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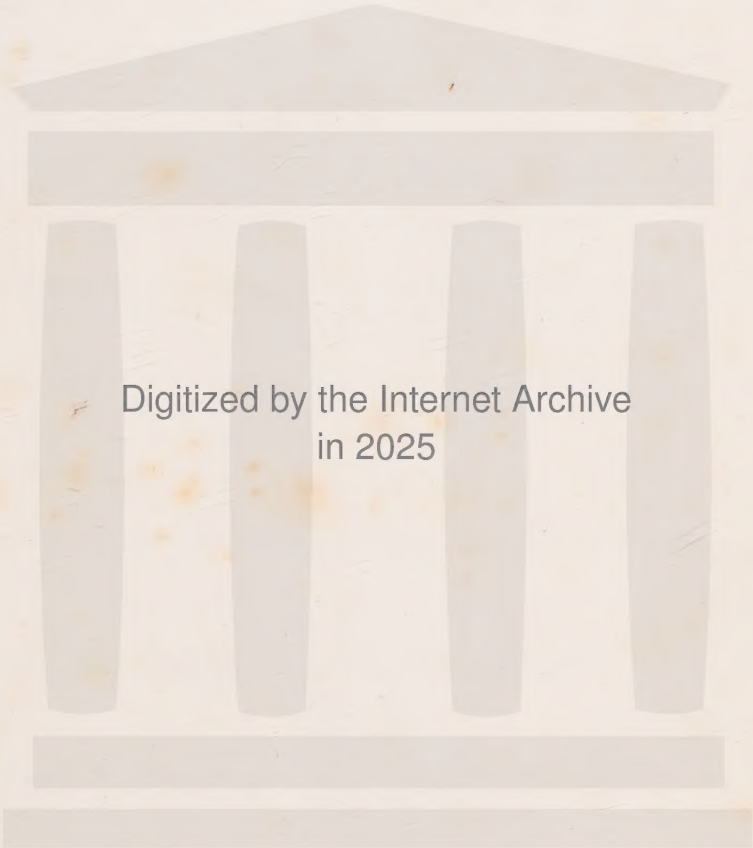
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A

CONCISE, PRACTICAL ABRIDGMENT

OF THE

Common and Statute Law,

AS AT PRESENT ADMINISTERED

IN

THE COMMON-LAW, PROBATE, DIVORCE, AND ADMIRALTY COURTS,

EXCLUDING ALL THAT IS OBSOLETE, OVERRULED, OR SUPERSEDED.

COMPRISING A

Series of Condensed Treatises on the different Branches of the Law,

WITH DETAILED DIRECTIONS, FORMS, AND PRECEDENTS.

AN ALPHABETICAL DICTIONARY OF TECHNICAL LAW TERMS AND MAXIMS, AND A COLLECTION OF WORDS THAT HAVE RECEIVED A SPECIAL JUDICIAL CONSTRUCTION.

THE WHOLE ILLUSTRATED BY REFERENCES TO THE PRINCIPAL CASES IN EQUITY, AND IN THE SCOTCH, AMERICAN, AND IRISH REPORTS, AND THE MOST EMINENT TEXT WRITERS.

SECOND EDITION, RE-MODELLED, AND NEARLY RE-WRITTEN.

BY CHARLES PETERSDORFF,

SERJEANT-AT-LAW;

ASSISTED BY

CHARLES W. WOOD, ESQ. AND WALKER MARSHALL, ESQ.

BARRISTERS-AT-LAW.

VOL. I.

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TO

THE RIGHT HONOURABLE

JOHN LORD CAMPBELL,

LORD HIGH CHANCELLOR OF GREAT BRITAIN,

&c. &c. &c.

My Lord,

I dedicate this attempt to facilitate the knowledge of the Common and Statute Law, as now administered, to your Lordship, not only as the originator and zealous promoter of the various improvements collected and developed in this and the succeeding volumes, but as a profound and accomplished Jurist, Law and Equity Judge, Statesman, Advocate, and Writer.

I have the honour to be,

With great respect,

Your Lordship's most obedient Servant,

C. PETERSDORFF.

PREFACE.

The design and scope of the present Work is to provide in an inexpensive, concise, and accessible form, an acknowledged and increasing requirement, in legal literature. There is no publication extant unfolding, in a consolidated but comprehensive shape, all that is practically useful, in the decided Cases—the Statutes and the Rules of Court—and eliminating everything obsolete, antiquated, or superfluous. Such a desideratum the present Work is intended to supply, by succinctly developing the whole of the important, practical, and even minute changes that have been introduced within the latter part of the present century. The last attempt at an Abridgment of the Law was that of the Edition in 1830. Since that time change after change of immense importance and endless variety has taken place. Twenty-eight years ago the elective branch of the Legislature was entirely reconstructed. Three years later, the whole system of Municipal Corporations was radically remodelled. Between the years 1832 and 1842 the law of Real Property was revised, simplified, and reformed. In 1834, and on the 10th of October, 1860, all Real Actions were abolished; thus abrogating by two short sections in a couple of Acts of Parliament, more than half the learning, erudition, and subtlety, which before constituted the governing test of legal acquirement and professional capacity. Within an equally recent period, Statutes have been passed, and Rules of Court promulgated, vitally altering the whole machinery of the Administration of Justice in our Civil, Criminal, Superior and Inferior Courts. Many novel and important tribunals have been called into existence. Numerous ancient jurisdictions have been transferred or extinguished. The Laws affecting Crime, Pleading, Evidence, Chattels Real, Personal Property, Shipping, Trade, Marriage, Divorce, Wills, Administration, Probates, and Finance, have all been fundamentally reformed, or materially varied. Scarcely any portion of our venerable legal fabric exists in undisturbed integrity. Every part of our ancient jurisprudence has succumbed, more or less, to the resistless exigencies of advancing time, and to inquiring and corrective intelligence. Many branches of professional knowledge, obtained even within the last eight years,[1] by great diligence and perseverance, are now rather a mental burthen than an appreciated acquisition. The recent suggestion of an eloquent official Law Reformer is scarcely a rhetorical exaggeration:—"That we hold up the best-considered Laws of one century in deriding contrast with the events and exigencies of the next." Hence it is no unjust depreciation to affirm that many existing and even recent Works, of great accuracy and discrimination when published, are now almost valueless; they not only fail unerringly

[1] See the Procedure Acts, 1852–54–60, and Rules of Court consequent thereon.

to guide, but they often seriously mislead. What is required by the Student and Practitioner is a clear, methodical, and practical development of the prevailing Law in all its branches — arranged in a readily accessible form, unmingled with any embarrassing allusions to what is extinct, antiquated, or exploded.

The object of the Publication is to realize, however imperfectly, an aim so widely and urgently required, but so difficult of attainment. The utmost care and discrimination have been exerted in selecting materials. All decisions that have been overruled or become inapplicable to the existing state of things, or obsolete, except for the purposes of illustration, contrast, or analogy, have been excluded. A distinctive prominence has been given to the LEADING CASES. Every repealed, expired, or obsolete Statute has been rejected, and each rescinded Rule of Court omitted. Untiring efforts have been made to collect from the approved English, Scotch, and American Law Writers, every species of available information, reproducing it under the most appropriate and suggestive titles or divisions, so condensed as to occupy the smallest possible space. Forms, Precedents, and Practical Directions and Suggestions, accompany the theoretic information.

The plan, character, and outline of the Work, may be further exemplified by a short statement of the distribution of its principal and subordinate parts.

1. *As to the Cases selected.*—These are taken exclusively, in relation to the *existing Law and its present administration*. No unnecessary reference is made to any of an obsolete or antiquated description, or rendered comparatively valueless by more precise and modern adjudications. Citations are made not only from the House of Lords and Privy Council Cases, Queen's Bench, Common Pleas, and Exchequer and Nisi Prius Reports; the Cases in the Probate, Divorce, and Admiralty Courts; but to the valuable contributions supplied by the *Law Times*, *Law Journal*, *Jurist*, *Legal Observer*, *Weekly Reporter*, and *Justice of the Peace*.

2. *As to the mode of Abridging the Cases.*— Every leading Case is abridged by stating the essential facts upon which the Judgment of the Courts is based. Extreme care is taken not only to embody the essence of each Report, but to give every point or useful suggestion contained in the original. In many instances the precise language of the Judges is retained, and indicated by inverted commas.

3. *As to the Statutes inserted.*— Every Section and Clause of Public Acts still unrepealed and of undoubted utility, is given entire and unabridged under its appropriate head, except where the sense or legal effect would not be altered, or varied, by omitting repetitions or obviously superfluous words. To each Section are subjoined copious References to the decisions given on its construction or regulating its application.

4. *As to the Rules of Court.*— Every Rule of Court now available *is literally transcribed;* and inserted, under its alphabetical title, according to the subject-matter.

5. *As to the Distribution of the Materials.*— The multitudinous subjects embraced in the plan are arranged in alphabetical and analytical order,— the former, as regards the primary title or division; the latter, as regards the subor-

dinate disposition of the materials. Every Decision, Statute, and Rule of Court, practical Direction and Suggestion, is placed under such title or word as is most likely readily to occur to the mind. To secure promptitude of access, not only have directing words been unsparingly multiplied, but every guiding word used in the various digests, abridgments, indexes, and text writers, has been adopted, with the hope of supplying one with which the inquirer may be familiar, or which may occur to him most readily. Indeed, no desire to avoid repetition, or the use of mere synonymes, has prevented the freest adoption of every variety of phrase likely to guide the seeker to the information for which he may be in search.

6. *As to the Synoptical Tables or Analytical Summaries.*—Great care has been bestowed in preparing the analysis of each title, to make it a readable epitome and condensed summary of the matters collected and stated in the text, and side and foot-notes. This elaborate analysing has been pursued, not only to facilitate reference and research, but to give to the reader at one view an instructive compendium of the whole law, which the title or division analysed more fully developes.

7. *As to the Body.*—This comprises, in larger type than the notes, the Abridgment of the Cases, the Statutes, and Rules of Court, collected and given as described in paragraphs 1, 2, 3, and 4.

8. *As to the Side and Foot-notes.*—The former give shortly the effect of the Statutes and Rules of Court set out in the text, and the exact point, or points, decided in the cases selected for abridgment; the latter, the cases not abridged, and contain the substance of the decisions required to illustrate or qualify the matter given in the body of the work. In the series of foot-notes references are given to the Elementary Writers, Equity Cases, Scotch, Irish, and American Reports. Frequent quotations are made from the latter on subjects not hitherto brought under the notice of the English Courts.

9. *As to the Forms and Precedents.*—All that will be attempted under this division will be to supply those fitted for ordinary practical occasions, giving references to where precedents of a special character can be consulted.

10. *As to the practical Directions.*—These are formed with a view of giving the fullest instructions as to the mode of conducting proceedings in the Civil and Criminal Courts, and supplying information connected with Conveyancing. The latter is furnished by a Gentleman of great experience in that branch of the profession.

11. *Maxims and Law Terms.*—Although the present book does not profess to be, and is not intended to be in any sense, a Law Dictionary or Encyclopædia, yet the utility of having prompt access to all the authorised legal maxims, with references to the principal cases in which they have been expressly recognised and acted upon, is of too great value and importance for them to be omitted. The technical words and sentences selected are confined to those applicable to modern procedure, with an occasional, but very sparing, insertion of more recondite aphorisms and terms of art.

12. *As to particular Words or Expressions.*—Under this division are comprised ordinary popular words or expressions, which have received legislative and judicial construction, differing from their usually accepted import.

In conclusion, what has been attempted—and, it is hoped, not altogether vainly—is the execution of the laborious and responsible task of collecting, selecting, comparing, and epitomising all that is practically useful in upwards of 500 volumes of Reports, and the essential parts of a still greater number of Statutes, with explanatory notes and illustrative references. The end studied to be achieved is one of great magnitude,—one of the highest practical usefulness—of almost insurmountable difficulty; still, a partial success—an inadequate realising of it—cannot fail to accelerate the onward course of accessible Legal information, to materially assist the Student, and facilitate the inquiries of the Practitioner, and all engaged in the administration of the laws of the country.

The publication in a Monthly form has been adopted as the most convenient mode, especially to the learner. The Student, by carefully perusing each Monthly Part, noting it up, with the assistance of one of the valuable periodicals that give Reports in all the Courts, and the Statutes and Rules, as soon as published, would find, by the time the work is completed, that he has accumulated, at no great effort, an invaluable mass of professional information. This mode of publication is more likely to stimulate perusal and encourage annotation, than if an entire volume were presented at once. The work will be completed in Five Volumes.

C. P.

Temple,
1*st June*, 1861.

A

CONCISE, PRACTICAL ABRIDGMENT

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A DIGNIORI fieri debet Denominatio et Resolutio. The title and exposition of a thing ought to be derived from, or given with reference to, the more worthy degree. Wingate's *Maxims*, 265. Hence if father and son are of one name, and be named without distinctive designation, the father *primâ facie* is intended. Id. pl. 4. Fleta, lib. 4, c. 10, s. 12. *Sed vide* 2 Hawk. c. 25, s. 106. But this may be negatived by extrinsic evidence identifying the person. *Doe v. Hiscock*, 5 M. & W. 367, 368. *Shore v. Wilson*, 9 Cl. & Fin. 556. *Doe v. Martin*, 4 B. & Ad. 771; Wigram, 58, and cases there cited. *See* Addition; Affidavit; Ambiguity.

A MENSA ET THORO. Lat. *From table and bed*, commonly translated *from bed and board.* A term formerly descriptive of one kind of divorce, but rendered obsolete by the 20 & 21 Vic. c. 85, s. 7, enacting that no decree shall hereafter be made for a divorce *a mensa et thoro*, but a judicial separation pronounced, which is to have the same force and the same consequences as a divorce *a mensa et thoro.* *See* Divorce; Husband and Wife; Judicial Separation.

A PIRATIS et Latronibus capta Dominium non mutant. Chattels taken or captured by pirates or robbers do not change their ownership. No right to the spoil vests in the piratical takers, nor can any right be derived through them to recaptors, in prejudice of the *original* owners. 2 Wooddes Lec. 258. *See* Market; Sale; Salvage; Vendor and Purchaser.

A PRENDRE. *See* Profits à prendre; also Common; Easements; Fish and Fisheries; Game; Hunting; Prescription; Water and Watercourses; Way; Wells.

A QUA—A QUO. *From which.* A term used with the correlative *ad quem* (to which) in expressing the computation of time, and also of distance in space. Thus, *dies à quo*, the day from which, and *dies ad quem*, the day to which, a period of time is computed. So *terminus à quo*, the point or limit from which, and *terminus ad quem*, the point or limit to which, a distance or passage in space is reckoned. 1 Burr. D. 3.

A RENDRE. L. Lat. *To render, to yield.* Profits à rendre comprise rents and services. *See* Distress; Landlord and Tenant; Rents.

A RETRO. L. Lat. *Behind, in arrear.*

A SUMMO REMEDIO, ad inferiorem Actionem non habetur regressus neque auxilium. A maxim in connexion with real actions, in which there were gradations in the remedies given, the rule being that a party who brought a writ of right, which was the highest writ in the law, could not afterwards resort or descend to an inferior remedy. 3 Bl. Com. 193, 194. Real and mixed actions are now abolished by 3 & 4 Wm. 4 (1834), c. 27, s. 36; 23 & 24 Vic. (1860), c. 126, s. 26.

A TEMPORE cujus contrarii Memoria non existit. *From time, of which there exists not memory to the contrary:* the words formerly used in setting forth a prescriptive right; a claim to an easement, a profit, or benefit taken or arising out of land. (1 Leon, 273; 2 Saund. 401 a.; *Att.-Gen. v. Gauntlett*, 3 Y. & J. 93.) But now, by 5th sect. 2 and 3 Wm. 4, c. 71, it is provided that in all pleadings, wherein the party claiming may by law allege his right generally, without averring the existence of such right from time immemorial, such general allegation shall still be deemed sufficient; and if the same shall be denied, all the matters in the Act mentioned and provided, which shall be applicable to the case, shall be admissible in evidence to sustain or rebut such allegation.—*See* 1 Saund. 345 (2); Common; Easement; Lights; Pews; Prescription; Profits à prendre; Watercourse; Way; Wells.

A VERBIS Legis non est recedendum. *From the words of the law there must be no departure.* 5 Co. 119; Wingate's *Max.* 25. A court is not at liberty to disregard the express letter of a statute in favour of a supposed intention. 1 Steph. Com. 71; Broom's *Max.* 268 (480); Dwarris on Statutes, 688. Strict adherence to the language used by the Legislature is now rigorously enforced in the construction and interpretation of its acts. Any other course is not to expound, but extra-judicially to make law. Hence the great object is to discover the true intention of the passers of the Act, and whenever that intention can be ascertained, it is obligatory upon the judges to give effect to it, whatever may be their opinion of its wisdom or policy. 2 Dwarr. 689, 690; 2 Scott, N. R. 419; 7 Jur. 911; 8 id. 795; 9 Ad. & E. 980; 10 M. & W. 389; id. 434; id. 521; id. 719; 11 Cl. & Fin. 86; 1 H. L. C. 1; 3 id. 638; 5 Jur. N. S. 1216. *See* Statutes.

A VINCULO MATRIMONII. L. Lat. *From the bond of marriage.* *See* Dissolution of Marriage; Divorce; Husband and Wife.

AB INITIO. *From the beginning—from the first act.* A party is said to be a trespasser *ab initio.* (*See* Arrest; Capias; Fieri facias; Process; Sheriff;) an estate to be good *ab initio;* an agreement or deed to be void *ab initio;* a marriage to be unlawful *ab initio*, and the like. Plowd. 6 a, 16 a; 1 Bl. Com. 440. The word *ab*, in this sense, is expressive not only of a point or period of time, but of continuity from that to a subsequent time without change. Hence it is another maxim—*Quod ab initio non valet tractu temporis non convalescet;* that which is originally void shall not acquire validity by lapse of time. *Aberdeen Railway v. Blakie*, 1 Macq. H. L. C. 461. *See* Acquiescence; Infant; Nuisance; Prescription.

AB INVITO. *See* In Invitum.

ABANDONMENT. *See* Contract; Costs; County Court, Excess of Claim in; Descent; Discontinuance; Distress; Execution; Husband and Wife; Insurance (Marine); Judgment by Default; Judgment, Irregular; Pleading; Poor; Rules and Motions; Settlement; Summons (Writ of); Summons and Judge's Order; and *post*, p. 3.

ABANDONMENT of Premises. *See* Ejectment; Surrender; Vacant Possession.

ABANDONMENT of Proceedings. *See* also Execution; Judgment.

I. A Party may abandon Proceedings generally.[1]
II. „ „ Rules.[2]
III. „ „ Judge's Orders.[3]
IV. „ „ Pleas.[4]
V. „ „ Powers conferred by Statute.[5]

ABATEMENT of Annuities. *See* Annuity.

ABATEMENT of Freehold. This was one of the modes of obtaining adverse possession under the old law; it imported the act of a stranger in entering upon lands after the death of the ancestor or person last seised, and before the entry of the heir, devisee, or persons next entitled, and keeping the latter out of possession. Co. Litt. 277 a.; 3 Steph. Comm. 482. The entry of a younger brother was not an abatement, but his possession was deemed to be that of the elder. *See* also Adverse Possession; Disseisin; Intrusion.

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[1] Irregular or premature, or otherwise unsustainable proceedings, may be abandoned by a party without payment of costs, when he gives notice to the other side of his intention to waive them sufficiently early to prevent the opposite party from unnecessarily incurring costs. Hence, notice not to appear to process, given before the expiration of the eight days allowed for the purpose, would enable the plaintiff to discontinue the suit free from the obligation of paying costs to his adversary.

An abandonment may also be implied, as where a writ is sued out against two defendants, and the plaintiff elects to declare only against one. In this instance, the defendant's right to costs against whom the plaintiff has abstained to proceed, depends upon whether he has or has not duly appeared before he had notice of the plaintiff's having confined his declaration to his co-defendant. But in such case the party abandoning must offer his adversary all that he could obtain by setting the abandoned proceedings aside. *See Clarke v. Crockford*, 3 D. P. C. 693; *Benge v. Swaine*, 23 L. J. C. P. 182. *See* Abatement of Suit. In Scotland, when the pursuer abandons the cause before the record is closed the costs are discretionary; if after closing the record, then he must pay costs, 6 Geo. 4, c. 120, s. 10, and he is entitled to bring a new action. Paters. *Comp.* 427.

[2] Although a party is at liberty to abandon a rule, he cannot do so to the prejudice of his adversary, and must pay his costs; but where a rule was made absolute for changing the *venue* from Middlesex to the country, on payment of the costs of the application, and of all costs reasonably and *bonâ fide* incurred and rendered useless by the rule, and after taxation of the costs the defendant's attornies gave notice to the plaintiff's attornies that they *abandoned* the rule:—*Held*, that the rule was conditional only, and that the defendant was not bound to abide by it, although the plaintiff had in the meantime incurred the costs of his witnesses, who were on their way to town before the rule was made absolute. *Maule, B.* dissenting. *Pugh v. Kerr*, 5 M. & W. 164. *See* also 8 D. P. C. 218; 5 T. R. 257.

[3] Notice of abandonment of an order should be promptly given. The plaintiff obtained an order to amend the *postea* at half-past nine o'clock on the 22d of November, but did not draw it up until the 23d, and it was not served until four o'clock on the 24th:—*Held*, that as no fresh step could have been taken by the defendant, the plaintiff had not abandoned the order. *Sandford v. Alcock*, 10 M. & W. 689. *See* 6 id. 134.

[4] It seems the Court will not compel the defendant to pay the costs of a demurrer to one of several pleas which he abandons after the demurrer, but where, after such abandonment, the issue and the record were made up with the plea, demurrer, and abandonment, a writ of error sued out on that ground was held not to be frivolous. *McIntyre v. Miller*, 13 M. & W. 725. *See* cases cited, 734 n, where in the judgment "not" should be inserted; and 2 Dowl. & L. 710. The effect of a plea prejudicial to the plaintiff cannot be neutralised by abandoning it at the trial. Hence, in an action of trespass for false imprisonment, the defendant pleaded, by way of justification, that the plaintiff had committed a felony. At the trial, his counsel *abandoned* the plea, and exonerated the plaintiff from the charge:—*Held*, that it was not a misdirection in the judge to tell the jury that the putting of such a plea on the record was a persisting in the charge contained in it, and was to be taken into account by them in estimating the damages. *Warwick v. Foulkes*, 12 M. & W. 507; *post*, Damages.

[5] *See Thicknesse v. The Lancaster Canal Company*, 4 M. & W. 472; *Lee v. Milner*, 2 id. 824; *post*, Railways; Hodge's *Railways*, 560, 738.

ABATEMENT of Nuisances.[1]

I. Public Nuisances may be abated —

(A) *By Board of Health.* *See* Health, Board of.

(B) *By Town-Council or other Public Bodies authorised by Statute.*

(C) *By Private Individuals.*

II. Private Nuisances may be abated by Party prejudiced.

I. Of Public Nuisances.

(B) *By Town Council or other Public Bodies authorised by Statute.*[2]

(C) *By Private Individuals.*[3]

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[1] This is the remedy which the law allows a party injured by a nuisance of destroying or removing it by his own act, so as he commits no breach of the public peace in doing it, nor occasions (in the case of a private nuisance) any damage, beyond which the removal of the inconvenience necessarily requires. 3 B. Com. 5, 168; 3 Steph. Com. 361; 2 Salk. 458; 1 Chit. *Gen. Pract.* 647–656; 2 Crabb's *Real Prop.* 1078–2475. It applies to easements as well as actual property and corporeal interests. *See* Animals; Common; Easements; Health, Board of; Highway; Injunction; Lights; Mill; Nuisance; Railway; Rivers; Trespass; Turnpike Roads; Watercourse; Way.

[2] The 11 & 12 Vic. c. 123, s. 1, provides that in England and Ireland public bodies therein mentioned, upon receipt of notice in writing from two householders of the existence of certain nuisances, may cause examination to be made; and if it appear that the nuisance, &c. exists, complaint is to be made before a justice, who shall summon the owner or occupier to appear before two justices, and who shall upon proof, &c., order him to remove the nuisance complained of; and if such order be not complied with, public body to enter the premises and remove the nuisance. *See* 12 & 13 Vic. c. 111, *Rex v. Cotton*, 8 L. J. M. C. 22.

By the 18 & 19 Vic. c. 121, s. 3, which repeals the previous Acts on the subject, in places where there is no local board of health, town council, body of trustees, commissioners, highway board, nuisances removal committee, or inspectors, under the Highway and Watching Act; the guardians and overseers of the poor, and the surveyors of highways, are to be the local authorities to execute the Act. Sect. 3, 20 & 21 Vic. c. 83, authorises justices to grant warrants to search suspected premises for obscene books, pictures, prints, and other articles, and destroy them. Powers for the abatement of public nuisances are also given by the Smoke-Prevention Act (16 & 17 Vic. 128); see 29 L. J. M. C. 22–29; by the Public Health and Local Management Act (21 & 22 Vic. c. 98), and by the Metropolitan Building Act (18 & 19 Vic. c. 122, ss. 69, 73), and Local Management Act, 18 & 19 Vic. c. 120, s. 134, and 10 & 11 Vic. c. 15, as to Gasworks. The amount paid for carrying into force an order of two justices to abate a nuisance, under 11 & 12 Vic. c. 123, may, under the provisions of s. 3, be recovered in the County Court from the owner of the premises where the nuisance existed, though title to land comes in question. *Reg. v. Harden*, 2 El. & Bl. 189; 17 Jur. 804; 22 L. J. Q. B. 299. Where a defendant suffers judgment by default on an indictment for a nuisance to a navigable river, the Court held that it could not in his absence give judgment that the nuisance be abated. *Reg. v. Chichester*, 2 C. C. 458; 15 Jur. 1131, Q. B.; the proper course being to sue out a writ of *capias*, and proceed to outlawry. A provision in the charter of a municipal corporation, authorising it to pass and enact bye-laws and ordinances to abate and remove nuisances, confers no power to pass an ordinance to *prevent* nuisances or to impose penalties. *City, &c. v. Collins*, 2 Hill, 94. The acts of a board of health in directing the abatement of nuisances cannot be shown by parol evidence, but only by written minutes of the proceedings, or written orders of the board. *Meeker v. Van Reusselaer*, 15 Wend. 387; cited 2 Hill, *Torts*, 94, 95.

[3] This may be done unless the abatement of it would involve a breach of the peace. A statute authorising commissioners to order the removal of nuisances does not abrogate the common-law remedy of abatement by the act of individuals, or abolish the proceeding by indictment, but is cumulative, and intended to provide a remedy in doubtful or questionable cases. 2 Hill on *Torts*, 96; *Wetworth v. Tracy*, 14 Went. 250 A. R. See Judgment, Willes, J., in *Broadbent v. Imperial Gas Comp.* 26 L. J. ch. 280. Nor is the right of abating, or indicting a party for a public nuisance, affected by a statute imposing a penalty, unless negative words are added, evincing an intent to exclude the common-law remedies. 2 Hill on *Torts*, 95 n. In a recent American case, *Brown v. Perkins*, cited 2 Hill on *Torts*, 96 n, the Court of Massachusetts suggested that it is not lawful for any person to abate a common

II. Private Nuisances may be abated by Act of Parties prejudiced.[1]

Earl of Lonsdale v. Nelson, 2 B. & C. 302.

A private nuisance may be abated, whether it arise from an act of commission or of omission.

The rule as to abating private nuisances is thus stated by *Best, J.*:— "Nuisances by an act of commission are committed in defiance of those whom such nuisances injure, and the injured party may abate them, without notice to the person who committed them; but there is no decided case which sanctions the abatement, by an individual, of nuisances from omission, except that of cutting the branches of trees which overhang a public road or the private property of the person who cuts them. The permitting these branches to extend so far beyond the soil of the owner of the trees is a most unequivocal act of negligence which distinguishes this case from most of the other cases that have occurred. The security of lives and property may sometimes require so speedy a remedy as not to allow time to call on the person on whose property the mischief has arisen to remedy it. In such cases an individual would be justified in abating a nuisance from omission without notice. *See* 2 Roll. Abr. 144; Nuisance (S), Vin. Abr. Nuisance (S). *Pendruddock's case*, 5 Rep. 101. *Baten's case*, 9 id. 55.

Jones v. Williams, 11 M. & W. 176; S. C. 12 L. J. Ex. 249.

But a party has no right to enter the land of another to abate a nuisance without previous notice to the owner to remove it, unless the latter be the

Plea. That the defendant before and at the time when, &c. was possessed of a dwelling-house near the *locus in quo*, and dwelt therein, and that the plaintiff before and at the time when, &c. injuriously and wrongfully permitted and suffered compost and refuse to be, remain, and lie in the *locus in quo*, so as to be a nuisance to the defendant's premises—justifying the trespass as being an entry to abate the nuisance. The Court held, that an entry on the land of another in order to remove a nuisance by a party injured, is justifiable without previous notice, when the owner of the land is himself the original wrongdoer by placing it

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nuisance merely because it is a common nuisance, though it may have been sometimes stated in terms so general as to give countenance to this supposition; that this right and power is never intrusted to individuals in general without process of law, by way of vindicating the public right, but solely for the relief of a party whose right is obstructed by such nuisance. The true theory of abatement of a nuisance is that an individual may abate a private nuisance injurious to him, when he could also bring an action, and also when a common nuisance obstructs his individual right. Hence, to justify a private individual in pulling down a wall or destroying a fence, on the ground of its being an obstruction in a public highway, it must be shown not only that the wall or fence encroached upon the public thoroughfare, but that the defendant was unable to enjoy his right of passing along the road without the removal of the obstruction. *Bateman v. Bluck*, 21 L. J. Q. B. 406; 18 Q. B. 876.

It is no defence to an action for an assault and battery that the plaintiff kept a disorderly house, and the receptacle of stolen goods, &c., and that the defendants threw down the house as a public nuisance, and in so doing necessarily unavoidably assaulted the plaintiff, and to some extent beat, bruised, and wounded him; 1 Hill, *Torts*, 148. So, in an action for hooting, yelling, &c. at a theatre, for the purpose of driving the plaintiff, an actor, from the stage, it is no defence that the plaintiff was, on certain specified grounds, an unfit person to appear before the public. *Gregory v. Brunswick*, 6 M. & G. 953.

The destruction of private property may be justified to prevent the spread of a fire. *See Handcock v. Baker*, 2 B. & P. 260: and cases, 1 Hill, *Torts*, 148 n.; see forms of pleas justifying abatement of nuisances, B. & L. Pre. 452, 493.

[1] An individual is justified in peaceably entering into the lands of his neighbour for the purpose of abating an *existing* nuisance; but not to prevent the commission of an apprehended one. *Norris v. Baker*, Roll. Rep. 393, Pl. 15. Before such entry is made, a notice should be given to the occupier of the land of the existence of the cause of complaint, and he should be required to abate it himself (*Perry v. Fitzhowe*, 8 Q. B. 776; *see Jones v. Williams*, abridged *supra*), and the plea justifying the entry should contain an averment that notice was given to the plaintiff to abate the nuisance, and that he neglected or refused to do so: whereupon the defendant entered upon the plaintiff's land, and abated it himself, using no more violence than was necessary for the purpose. *Davis v. Williams*, 16 Q. B. 556. But only so much of the thing as causes the nuisance should be removed. Thus, if a house be built too high, only so much of it as is too high should be pulled down. *Baten's case*, 9 Rep. 53; *Trahern's case*, Godb. 233. Where a party who is entitled to a limited right exercises

original wrongdoer, or its instantaneous removal essential to the safety of life.

there; so, possibly, where the nuisance arises from a default in the performance of some obligation incumbent on him. But where such nuisance is created by another, and the owner succeeds to the *locus in quo*, he is entitled to notice before an injured party can enter and remove it.

The case of an abatement of a nuisance dangerous to life may be an exception.

Du Bost v. Beresford, 2 Campb. 511.

A party libelled or caricatured may, it seems, justify the destruction of the obnoxious publication.

This was an action of trespass, for destroying a picture belonging to the plaintiff. It was a caricature representation of a gentleman and his wife, who was sister to the defendant, and publicly exhibited. It was contended for the defendant, that it was a public nuisance, which every one had a right to abate, by destroying the picture. *Lord Ellenborough.*—The only plea is, not guilty. It is unnecessary to consider whether the destruction of the picture might or might not be justified. The plaintiff is liable civilly and criminally for having exhibited it.

ABATEMENT of Criminal Proceedings. The death of the original prosecutor does not defeat the proceedings, even in the case of a libel, or assault, or other injury of a private nature. They are instituted not for the satisfaction of wrongs to the complainant, but for the furtherance of public justice. See *Rex v. Ellers*, 1 Wils. 222; 1 Chit. Crim. L. 2 n.

ABATEMENT of Error. *See* Error.

ABATEMENT of Suit[1] in County Court.

I. By Death of sole Plaintiff or sole Defendant, p. 6.

II. But not by Death of one of several Plaintiffs or Defendants, p. 7.

III. Nor by Bankruptcy or Insolvency, p. 7.

IV. Nor by Death of Assignees, or their Removal, p. 7.

V. Nor by Coverture after Judgment, p. 7.

VI. Nor when one of several Plaintiffs or Defendants dies after Judgment, p. 7.

I. By Death of sole Plaintiff or sole Defendant.[2]

it in excess, so as to produce a nuisance, and the nuisance cannot be abated without obstructing the enjoyment of the right altogether, the exercise of the right may be entirely stopped until means have been taken to reduce it within its proper limits. *Cawkwell v. Russell*, 26 L. J. Ex. 34; Add. *Torts*, 101. An action on the case is not affected or barred by a subsequent abatement of the nuisance by the plaintiff, and the plaintiff is entitled to recover damages for the injury he has sustained previous to the abatement. *Kendrick v. Bartland*, 2 Mod. 253; S. C. Freem. 230.

[1] Abatement in the common-law sense of the term, as derived from the French *abattre*, is an entire destruction of the suit. It imports cessation of all proceedings from want of proper parties legally capable of proceeding therein. Co. Lit. 134, 227 a; F. N. B. 115; 2 Arch. P. 299; 2 Tidd. 932. It will be seen by the statutes and rules of Court referred to in the text, *post*, p. 8, that suits at law are now temporarily suspended by the events which at common law occasioned their determination or absolute abatement. The numerous cases and statutes on the subject prior to 1852, are wholly inapplicable to the existing practice. In Scotland, the suit is continued by transference and substitution of proper parties. All changes in the constitution of a suit in equity as to parties is provided for by 15 & 16 Vic. c. 86, ss. 52, 53, which dispenses with a bill of revivor or supplemental bill, and substitutes an order of the Court. The 20 & 21 Vic. c. 71, s. 76, prevents the revocation of temporary grants of administration prejudicing actions or suits.

[2] There is no provision, either in the County Court Acts or in the County Court rules, as to the case of the death of a sole plaintiff or defendant; it is conceived that in such event the old law would be applicable, and that the suit would abate. But when the death of a sole plaintiff occurs after execution has issued in the County Court, whether against the goods or person of the defendant, the warrant may, nevertheless, be enforced by the personal representatives of the deceased; so that, in this case also, there will be no abatement by reason of the death. Broom's C. C. P. 296.

II. Not by Death of one of several Plaintiffs or Defendants.

By C. C. R. 151, "where one or more of several plaintiffs or defendants shall die before judgment, the suit shall not abate if the cause of action survive to or against the surviving parties respectively."

The death of one or more of several plaintiffs or defendants shall not abate the suit.

III. Nor by Bankruptcy or Insolvency of Plaintiff.

By 19 & 20 Vic. c. 108, s. 62, "the bankruptcy or insolvency of the plaintiff in any action in a County Court, which the assignees might maintain for the benefit of the creditors, shall not cause the action to abate, if the assignees shall elect to continue such action, and to give security for the costs thereof within such reasonable time as the judge shall order, but the hearing of the cause may be adjourned until such election is made; and in case the assignees do not elect to continue the action, and to give such security within the time limited by the order, defendant may avail himself of the bankruptcy or insolvency as a defence to the action."

Bankruptcy or insolvency of plaintiff is not to abate action in a County Court, if the assignees elect to continue, and will give security for costs.

IV. Nor by Death or Removal of Assignees.

By 7 & 8 Vic. c. 96, s. 13, "whenever any assignee shall die, resign, or be removed, or a new assignee shall be duly appointed, no action at law or suit in equity shall be thereby abated; but the Court in which any action or suit is depending may, upon the suggestion of such death, resignation, or removal and new appointment (if any), allow the name or names of the surviving or new assignee to be substituted in the place of the former, and such action or suit shall be prosecuted in the name or names of the said surviving or new assignee, in the same manner as if he had originally commenced the same."

Nor to abate by the death or removal of assignees.

V. Nor by Coverture after Judgment.

By C. C. R. 153, when a married woman is sued as a *feme sole*, and she obtains judgment on the ground of coverture, proceedings may be taken thereon in the name of the wife at the instance of the husband, without leave of the Court.

If married woman, defendant, obtain judgment, husband may proceed in name of wife.

VI. Nor when one of several Plaintiffs or Defendants dies after Judgment.

By C. C. R. 152, when one or more of several plaintiffs or defendants shall die after judgment, proceedings thereon may be taken by the survivors or survivor, or against the survivors or survivor, without leave of the Court.

If death take place after judgment, no leave of Court requisite to proceed.

ABATEMENT or Suspension of Action in Superior Courts.

I. Effect of the Death of Parties.

(A) *The Death of sole Plaintiff or Defendant is not to abate Action, provided Death be suggested on Record*, p. 8.

(B) *Nor the Death of one of several Plaintiffs or Defendants, provided the Death be suggested on Record*, p. 9.

(C) *The Death of either Party between Verdict and Judgment is not to be alleged for Error*, p. 9.

(D) *The Death of either Party after Interlocutory and before Final Judgment does not abate Action*, p. 10.

(E) *Forms of Suggestion of Death of Parties on Record*, p. 11.

(F) *Effect of Death of Parties in Error. See* Error.

II. Effect of Marriage and of Death of Husband or Wife on suit.

(A) *Marriage* pendente lite *does not abate Suit*, p. 11.

(B) *Nor Death of Husband or Wife*, p. 11.

III. Bankruptcy or Insolvency of a Party to a Suit does not abate it, if Assignees elect to continue it and give security for Costs, p. 11.

IV. By becoming an Alien-Enemy may. *See* Abatement, Pleas in; Alien.

V. Or by Outlawry of Plaintiff. *See* Abatement, Pleas in; Outlawry.

VI. Not by becoming Lunatic. *See* Lunatic, and 7 D. P. C. 22.

VII. Nor by Demise of the Crown, p. 12.

VIII. A special Case may be stated by an Arbitrator after Death of Parties, p. 12.

IX. Death of Attorney does not affect Proceedings, p. 12.

I. Effect of the Death of Parties.

(A) *Death of sole Plaintiff or sole Defendant does not abate Action; Death to be suggested on Record.*

Death of sole plaintiff or defendant does not abate action.

By C. L. P. 15 & 16 Vic. c. 76, s. 135, the death of a plaintiff or defendant shall not cause the action to abate, but it may be continued as hereinafter mentioned.[1]

On death of sole plaintiff representative may, by leave, suggest the death, and continue the action.[2]

By C. L. P. 15 & 16 Vic. c. 76, s. 137, "in case of the death of a sole plaintiff, or a sole surviving plaintiff, the legal representative[3] of such plaintiff may, by leave of the Court or a Judge, enter a suggestion of the death, and that he is such legal representative, and the action shall thereupon proceed; and if such suggestion be made before the trial, the truth of the suggestion shall be tried thereat, together with the title of deceased plaintiff, and such judgment shall follow upon the verdict in favour of or against the person making such suggestion, as if such person were originally the plaintiff."

If action survives, on death of sole defendant, plaintiff may suggest the death and the fact of there being an executor or administrator, and require such executor, &c. to appear to the action, and in default of his doing so, may sign judgment against him.

By C. L. P. 15 & 16 Vic. c. 76, s. 138, "in case of the death of a sole defendant, or sole surviving defendant, where the action survives, the plaintiff may make a suggestion, either in any of the pleadings, if the cause has not arrived at issue, or in a copy of the issue if it has so arrived, of the death, and that a person named therein is the executor or administrator of the deceased; and may thereupon serve such executor or administrator with a copy of the writ and suggestion, and with a notice signed by the plaintiff or his attorney, requiring such executor or administrator to appear within eight days after service of the notice, inclusive of the day of such service, and that in default of his so doing, the plaintiff may sign judgment against him as such executor or administrator; and the same proceedings may be had or taken in case of non-appearance after such notice as upon a writ against such executor or administrator in respect of the cause for which the action was brought; and in case no pleadings have taken place before the death, the suggestion shall form part of the declaration, and the declaration and suggestion may be served together, and the new defendant shall plead thereto at the same time; and in case the plaintiff shall have declared, but the defendant shall not have pleaded before the death, the new defendant shall plead at the same time to the declaration and suggestion;

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[1] At common law, the death of a sole plaintiff or defendant before verdict or judgment by default (2 Wils. 83), or at any time prior to the commission-day at the assizes, (1 Salk. 7 T. R. 31), or before the first actual sitting-day in term (3 B. & P. 549), abated the suit. 29 L. J. Ex. 472. But the *postea* will not be stayed in the hands of the associate upon affidavits showing the plaintiff's probable death. *Johnson v. Hamilton*, 1 M. & W. 149.

[2] And a writ of execution may be executed after a plaintiff's death, if issued in his lifetime. *Ellis v. Griffith*, 16 M. & W. 106; *Newnham v. Law*, 5 T. R. 577; 4 M. & S. 329.

[3] That is, all the legal representatives, even although some may have formally renounced before the Ordinary. *Hensloe's case*, 9 Rep. 37; *Webster v. Spencer*, 3 B. & A. 360; *Creswick v. Woodhead*, 4 Man. & G. 811; *Venables v. East India Company*, 18 L. J. Ex. 266. It may be questioned whether this would include the heir, where the cause of action descends to him. *See* Broom's *Parties to Actions*, 9, 38, 116, 117.

and in case the defendant shall have pleaded before the death, the new defendant shall be at liberty to plead to the suggestion only by way of denial, or such plea as may be appropriate to, and rendered necessary by, his character of executor or administrator, unless, by the leave of a Court or a Judge, he should be permitted to plead fresh matter in answer to the declaration; and in case the defendant shall have pleaded before the death, but the pleadings shall not have arrived at issue, the new defendant, besides pleading to the suggestion, shall continue the pleadings to issue in the same manner as the deceased might have done, and the pleadings upon the declaration and the pleadings upon the suggestion shall be tried together; and in case the plaintiff shall recover, he shall be entitled to the like judgment in respect of the debt or sum sought to be recovered and in respect of the costs prior to the suggestion, and in respect of the costs of the suggestion, and subsequent thereto, he shall be entitled to the like judgment as in an action originally commenced against the executor or administrator."[1]

If no pleadings have taken place before the death, suggestion to form part of declaration; and if defendant shall not have pleaded, the new defendant shall plead at the same time to the declaration and suggestion.

The 17 & 18 Vic. c. 125, s. 92, enacts, "that where an action would, but for the provisions of 'The Common Law Procedure Act, 1852,' have abated, by reason of the death of either party, and in which the proceedings may be revived and continued under that Act, the defendant, or person against whom the action may be so continued, may apply by summons to compel the plaintiff or person entitled to proceed with the action in the room of the plaintiff, to proceed according to the provisions of the said Act, within such time as the Judge shall order; and in default of such proceeding, the defendant, or other person against whom the action may be so continued as aforesaid, shall be entitled to enter a suggestion of such default, and of the representative character of the person by or against whom the action may be proceeded with, as the case may be, and to have judgment for the costs of the action, and suggestion against the plaintiff, or against the person entitled to proceed in his room, as the case may be; and in the latter case to be levied of the goods of the testator or intestate."

And a party entitled so to continue the action, may be compelled so to do or to abandon proceedings.

(B) *The Death of one of several Plaintiffs or Defendants does not abate the Action, provided the Death be suggested on record.*

By C. L. P. 15 & 16 Vic. c. 76, s. 136, "if there be two or more plaintiffs or defendants, and one or more of them should die, if the cause of such action shall survive to the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants, the action shall not be thereby abated; but such death being suggested upon the record,[2] the action shall proceed at the suit of the surviving plaintiff or plaintiffs against the surviving defendant or defendants."

On death of one of several plaintiffs or defendants, if action survives, death may be suggested, and action proceed by or against survivors.

(C) *The Death of either Party between Verdict and Judgment is not to be Error.*

By C. L. P. 15 & 16 Vic. c. 76, s. 139, "the death of either party between the verdict and the judgment shall not hereafter be alleged for error, so as such judgment be entered within two terms after such verdict."[3]

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[1] Defendant having died after issue joined, and notice of trial given, a suggestion of his death was duly made, and his administratrix appeared and pleaded to the suggestion. The plaintiff afterwards applied to a judge for leave to discontinue, on payment of the costs of the pleas to the suggestion; but the judge made the usual order on payment of full costs:—*Held*, that the judge was right: *Benge v. Swaine*, 23 L. J. C. P. 182. Whether, under sec. 138, *supra*, the debt and costs prior to the suggestion are to be levied *de bonis testatoris*, and the costs subsequent to the suggestion *de bonis propriis* of the new defendant, is questionable. *See* Lush's *Prac.* 104, n.

[2] The trial or subsequent proceedings will otherwise be void. *Barnwall v. Sutherland*, 19 L. J. C. P. 290. S. C. 1 L. M. & P. 159. *Larchin v. Buckle*, ib. 740.

[3] By the common law, if any one of the parties died before final judgment, the suit abated, Saund. 72 i.; but this inconvenience and cause of delay was partially mitigated by stat. 17 Car. 2, c. 8, s. 1, which enacts, that in all actions, personal, real, or mixed, the death of either party between verdict and judgment shall not be alleged for error, so as such judgment be entered within two terms after verdict. The s. 139, 15 & 16 Vic. c. 76, set out in the text, applies, it would seem, merely to personal actions (*see*

(D) *Death of either Party, after Interlocutory and before Final Judgment, does not abate Action.*

Death of plaintiff or defendant after interlocutory and before final judgment, will not abate action, if same might have been prosecuted by or against his executors; but a writ of revivor may be had by the plaintiff or his executors.

By C. L. P. 15 & 16 Vic. c. 76, s. 140, "if the plaintiff in any action happen to die after an interlocutory judgment, and before a final judgment obtained therein, the said action shall not abate by reason thereof, if such action[1] might be originally prosecuted or maintained by the executor or administrator of such plaintiff; and if the defendant die after such interlocutory judgment, and before final judgment therein obtained, the said action shall not abate, if such action might be originally prosecuted or maintained against the executor or administrator of such defendant; and the plaintiff, or if he be dead after such interlocutory judgment, his executors or administrators, shall and may have a writ of revivor in the form contained in the schedule (A) to this Act annexed, marked No. 9,[2] or to the like effect, against the defendant, if living after such interlocutory judgment, or if he be dead, then against his executors or administrators, to show cause why damages in such action should not be assessed and recovered by him or them; and if such defendant, his executors or administrators, shall appear at the return of such writ, and not show or allege any matter sufficient to arrest the final judgment, or shall make default, a writ of inquiry of damages shall be thereupon awarded, or the amount for which final judgment is to be signed shall be referred to one of the Masters, as hereinbefore provided; and upon the return of the writ, or delivery of the order with the amount endorsed thereon to the plaintiff, his executors or administrators, judgment final shall be given for the said plaintiff, his executors or administrators,

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C. L. P. 15 & 16 Vic. c. 76, s. 227); so that until 23 & 24 Vic. c. 124, s. 27, as regarded actions real and mixed, dower, and *quare impedit*, not abolished by 3 & 4 Wm. 4, c. 27, s. 34; and ejectment, *see* C. L. P. 15 & 16 Vic. c. 76, s. 190; *post*, Ejectment; the statute of Charles was in operation. It did not, however, extend to a nonsuit, *Dowbiggin v. Harrison*, 10 B. & C. 460, 5 M. & W. 431, unless the defendant had been delayed by the plaintiff seeking to set aside the nonsuit, and death intervened during the period of delay. *Ball v. Price*, 7 Bing. 237. The act made a verdict entered up under it equivalent to a judgment entered up during the lifetime of the deceased. *Saunders v. MacGowan*, 12 M. & W. 221; 3 D. & L. 405; 1 Lev. 277; *Taylor v. Harris*, 3 B. & P. 549; *Colbeck v. Peck*, 2 Lord Raym. 1280; and remedied the death of a party after the assizes or sittings had begun. *Jacobs v. Miniconi*, 7 T. R. 31; *Plomer v. Webb*, 2 Ld. Raym. 1415; *Cheetham v. Sturtevant*; 12 M. & W. 515; and it extended to a special case stated after the death of one of the parties by an arbitrator to whom it had been referred by order of Nisi Prius. *James v. Crane*, 15 M. & W. 379. It does not seem to have been necessary actually to enter the judgment on the roll within the two terms; but it was sufficient if it were signed within that time. *Webb v. Spursell*, Barnes, 261; *Duke of Norfolk's case*, 1 Salk. 401. If by unavoidable delay, occasioned by the act of the Court, the party entitled to sign judgment is prevented from doing so, the Court or Judge may at common law, and by R. 56, H. T. 1853, order the judgment to be entered *nunc pro tunc*. *Miles v. Baugh*, 3 D. & L. 105; 9 Q. B. 47; *Lawson v. Hodson*, 1 Y. & J. 363. But this will not be allowed where the delay is by the act of the parties, or by reason of a proceeding in the common course of law, as by a proceeding in error. *Lauman v. Ld. Audley*, 2 M. & W. 535; *Freeman v. French*, 21 L. J. C. P. 214; *Vaughan v. Wilson*, 5 Scott, 404; 4 Bing. 116.

[1] This section, therefore, will not relate to actions of tort not within the 3 & 4 Wm. 4, c. 42, s. 2, giving a right of action to executors, &c. for injury to the real estate of the testator, &c., and against executors, &c., for injuries to property committed by the testator, &c. *Ireland v. Champneys*, 4 Taunt. 884; *Wallop v. Irwin*, 1 Wils. 315.

[2] No. 9. *Form of Writ of Revivor*:—

VICTORIA, *by the grace of God*, &c. to E. F. of greeting.

WE command you that, within eight days after the service of this writ upon you, inclusive of the day of such service, you appear in our Court of to show cause why A. B. (or C. D. as executor of the last will and testament of the said A. B. deceased, *or as the case may be*), should not have execution against you (*if against a representative, here insert*, as executor of the last will and testament of deceased, *or as the case may be*) of a judgment, whereby the said A. B. (*or as the case may be*) on the day of in the said Court, recovered against you (*or as the case may be*), £ . And take notice, that in default of your so doing, the said A. B. (*or as the case may be*) may proceed to execution. Witness, &c.

If the death happen before the execution

prosecuting such writ of revivor, against such defendant, his executors or administrators respectively."

(E) *Forms of Suggestion of Death of Parties on Record.*[1]

II. Effect of Marriage and of Death of Husband or Wife on Suit.

(A) *Marriage* pendente lite *not to abate the Suit.*

By C. L. P. 15 & 16 Vic. c. 76, s. 141, "the marriage of a woman,[2] a plaintiff or defendant, shall not cause the action to abate, but the action may, notwithstanding, be proceeded with to judgment; and such judgment may be executed against the wife alone,[3] or by suggestion or writ of revivor pursuant to this act, judgment may be obtained against the husband and wife, and execution issue thereon; and in case of a judgment for the wife, execution may be issued thereupon by the authority of the husband, without any writ of revivor or suggestion; and if in any such action the wife shall sue or defend by attorney appointed by her when sole, such attorney shall have authority to continue the action or defence, unless such authority be countermanded by the husband, and the attorney changed according to the practice of the Court."

Marriage will not cause suit to abate; judgment may be executed against wife alone, or by suggestion against the husband and wife. Husband may issue execution.

By C. L. P. 15 & 16 Vic. c. 76, s. 167, "the marriage of a woman, plaintiff or defendant in error, shall not abate the proceedings in error; but the same may be continued in like manner as hereinbefore provided with reference to the continuance of an action after marriage."

Marriage will not affect proceedings in error.

(B) *Death of Husband or Wife not to abate the Suit.*

By 15 & 16 Vic. c. 76, s. 40, it is provided "that in actions by husband and wife, in case of the death of either plaintiff, such suit, so far only as relates to the causes of action, if any, which do not survive, shall abate."[4]

In actions by husband and wife, on death of one suit abates if cause not survive.

III. Bankruptcy or Insolvency of Plaintiff does not abate Suit if Assignees elect to continue it and give Security for Costs.

By C. L. P. 15 & 16 Vic. c. 76, s. 142, "the bankruptcy or insolvency of the plaintiff in any action which the assignees might maintain for the benefit of the creditors[5] shall not be pleaded in bar of such action, unless the assignees shall decline to continue and give security for the costs thereof, upon a judge's order to be obtained for that purpose, within such reasonable time as the

Bankruptcy or insolvency of the plaintiff does not abate suit if assignees elect to continue.

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of a writ of inquiry, the form should be to show cause why the damages should not be *assessed and recovered*. *Smith v. Harrison*, 1 Salk. 315. If after assessment, why the damages assessed should not be adjudged to, &c. *Goldsworthy v. Southcote*, 1 Wils. 243; 1 T. R. 388; Ch. Forms, 621, 622.

[1] *Suggestions on Death of one of several.*

And the plaintiff gives the Court to understand, that after the defendant pleaded to the declarations in this cause the said defendant C. D. died, and the said other defendant E. F. survived him.

Suggestions on Death of sole Plaintiff.

A. B. Executor of C. D. *v.* E. F. } And now, by leave of the Court, comes A. B., and gives the Court to understand, that since the plaintiff replied, that is to say on the day of , the said plaintiff died, and that he, the said A. B., is the legal representative of the aforesaid plaintiff. For Form under s. 92, 17 & 18 Vic. c. 125, *see* Ch. Forms, p. 843.

[2] Before this section, marriage *pendente lite* might have been pleaded in abatement or *puis darreign continuance*. *Walker v. Golling—Parke, B.*, 11 M. & W. 78, 79.

[3] The wife, however, is entitled to be discharged from a *ca. sa.* unless it can be shown that she has separate property, whether her husband had been taken as well or not. *Ivens v. Butler & Wife*, 26 L. J. Q. B. 145. *Edwards & Wife v. Martyn*, 17 Q. B. Rep. 693; 21 L. J. Q. B., N. S., 86. So that in general it will be more advisable to proceed against the husband under ss. 129, 130. C. L. P. 15 & 16 Vic. c. 76.

[4] This provision is rendered necessary by the earlier part of the above section, by which a husband may join in the same action a claim due to himself and wife with one due to himself alone.

[5] The assignees may sue on contracts made with the bankrupt, and for injuries affecting his property; but where *personal* injury to the bankrupt is the principal and essential cause of action, such cause of action remains in the bankrupt, and does not vest in the assignees. *Beckham v. Drake*, 8 M. & W. 846,

judge may order: but the proceedings may be stayed until such election is made; and in case the assignees neglect or refuse to continue the action, and give such security within the time limited by the order, the defendant may, within eight days after such neglect or refusal, plead the bankruptcy."[1]

VII. Demise of the Crown, Suits and Proceedings not to abate by.

Suits or proceedings are not to abate by death of the sovereign.

The stat. 1 Edw. 6, c. 7, enacts, "that no action, suit, bill, or plaint, depending between party and party, in any Court of Record, shall be discontinued by reason of the death of the King; but the process, pleas, demurrers, and continuances shall stand good in the same condition as if the King had lived." This statute does not extend to proceedings at the suit of the Crown. (See 7 Coke, 31; 3 Bulst. 314; Dyer, 65; Cro. Car. 10; id. 104.) By the act of 1 Anne, c. 8, it is provided, "that no writ, plea, process, or other proceeding, on any indictment or information, or for any debt to her Majesty or her successors, shall be discontinued and put without day by her or their death, but shall continue in force, and be proceeded upon. And no original writ, writ of *nisi prius*, commission, process or proceeding out of any Court of Equity, or upon any office or inquisition, nor any writ of *certiorari* or *habeas corpus* in any case criminal and civil, nor any writ of attachment or process for contempt, shall be abated or discontinued by the death of the Queen, or her successors." *See* 2 Lev. 207; 1 Stra. 43; Id. 782.

VIII. A special Case may be stated by Arbitrators after Death of Parties.

James v. Crane, 15 M. & W. 379 r.; 3 D. & L. 661.

Death of one of the parties does not interfere with right of arbitrators to state special case.

A cause was, by order of Nisi Prius, referred to a barrister who was to state a special case, and the case was stated and delivered after the death of the defendant; the Court refused to set it aside, for it was said, if it had been the case of a special verdict, and one of the parties had died before the verdict was prepared, that would have made no difference; that the referee was a person put in the place of a judge to settle the points for the opinion of the Court; and that, if the referee had not been substituted, the judge might have proceeded to settle the case after the death of the parties. *See post*, Arbitration.

IX. Death of Attorney does not affect Proceedings.

Ashley v. Brown, 3d June, 1850, Q. B. M. S.

Attorney dying pending suit does not prevent other side proceeding.

A defendant appeared and pleaded by attorney; issue was delivered to, and notice of trial served upon such attorney, after which he died. The cause was tried as an undefended one, and the defendant taken in execution for the debt and costs. Application having been made to set aside all proceedings since the death of the defendant's attorney, upon the ground of irregularity and of the defendant being ignorant of any steps having been taken since his attorney's death:—*Held*, by *Wightman, J.*, that as after notice of trial there did not remain anything to be done by the attornies in connexion with each other, except to tax the costs, the proceedings were regular. *See* Attorney.

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9 id. 79; 11 id. 315; 12 L. J. Ex. 486. *Rogers v. Spence*, 13 M. & W. 571; 15 L. J. Ex. 49.

[1] This provision does not apply to actions commenced AFTER the bankruptcy of the plaintiff, and therefore to a plea of the bankruptcy of the plaintiff in an action accruing before the bankruptcy and passing to the assignee, a replication that the assignees have not interfered cannot be supported. *Stanton v. Collier*, 3 E. & B. 274; 23 L. J. Q. B. 116. If the bankruptcy occur *after* plea and before trial, it may be pleaded *puis darreign continuance*, or after the last pleading (15 & 16 Vic. c. 76, s. 142). *See Cross v. Robertson*, 7 Man. & G. 640; *Govin v. Allon*, 7 Exch. Rep. 306. If the bankruptcy happen after interlocutory, but before *final* judgment, or after verdict but before execution, the assignees may proceed to execution in their own names. 2 Saund. 72 n. 4.

ABATEMENT of Legacies. *See* Legacy.

ABATEMENT, Pleas in, in Civil Proceedings.[1] *See* Abatement in Criminal Proceedings, *post*, 42.

I. To the Jurisdiction of the Court. *See* Jurisdiction, Pleas to; Ancient Demesne; Attorney; Cinque Ports; Conusance; Counties Palatine; Privilege.

II. To the Disability of the Person.

(A) *Of the Plaintiff.*

(*a*) *That Plaintiff is a fictitious Person*, p. 15.
(*b*) „ *an Alien-enemy*, p. 15.
(*c*) „ *an Attainted Person*, p. 16.
(*d*) „ *Dead*, p. 16.
(*e*) „ *a Bankrupt or Insolvent Debtor*, p. 16.
(*f*) „ *an Infant*, p. 16.
(*g*) „ *a Married Woman*, p. 16.
(1) *At time of cause of Action*, p. 17.
(2) *After commencement of Suit not pleadable*, p. 17.
(*h*) *Outlawed*, p. 17.

(B) *Of the Defendant*, p. 17.

(*a*) *That she is a Married Woman*, p. 18.
(*b*) *That he is an Infant*, p. 18.

III. To the Count or Declaration, p. 18.

IV. To the Writ.

(A) *To its form for Matters apparent therein*, p. 18.
(B) „ „ *not apparent*, p. 18.
(*a*) *As formerly Misnomer*, p. 18.
(*b*) „ *Non-joinder and Mis-joinder of Parties; Court or Judge may now amend Defects*, p. 19.

(C) *To the Action of the Writ.*

(*a*) *That it is prematurely brought, not now pleadable*, p. 23.
(*b*) *That the Remedy is misconceived, not now pleadable*, p. 23.

(D) *Another Action pending for same cause in Superior Court pleadable, not in an Inferior or Foreign Court*, p. 23.

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[1] *Definition.*—A plea in abatement neither admits nor denies the cause of action, but sets up some matter of fact, the legal effect of which is to preclude the plaintiff from recovering upon the writ and declaration as at present framed. Of this kind are pleas stating that the plaintiff or the defendant are under some personal disability of suing or being sued: as, pleas of the coverture of the plaintiff or of the defendant, that the plaintiff is an alien-enemy, that the plaintiff or the defendant cannot sue or be sued alone, as being joint parties with others to the cause of action. B. & L. Pleadings, 274.

They are discouraged by the Courts, as occasioning delay and creating technical difficulties. They do not negative the cause of action, or affect to raise the real question in dispute between the parties. *See* Steph. Pl. 48, 3d edit. Many matters of this description are *now* objected to, and corrected by summary application to a Judge or to the Court. As to the order to be observed in pleading such pleas, see p. 41. Most of the learning and authorities connected with dilatory pleas relate to the now in effect abolished proceedings by original writ. *See* 3 & 4 Wm. 4, c 27, and 23 & 24 Vic. c. 126, s. 26, substituting writs of summons in all actions, whether real, mixed, or personal.

(E) *Form of Plea of another Action pending*, p. 26.
(F) *Writ of Error pending, not pleadable*, p. 26.

V. General Qualities of.

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(I) *Not after Plea in Bar*, p. 29.
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VII. Particular Qualities of.

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(B) „ *be certain to every Intent*, p. 30.
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VIII. Formal Parts of.

(A) *Day of pleading*, p. 31.
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(A) *Always requisite*, p. 31.
(B) *By whom to be made*, p. 32.
(C) *At what time to be made*, p. 32.
(D) *Forms and Requisites of*, p. 32.
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XI. Effect of a Plea in Abatement, p. 34.

XII. Replications to Pleas in.
(A) *Form and Requisites in general*, p. 34.
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(A) *For Plaintiff.*
(*a*) *On Issue in Fact*, p. 39.
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(A) *Upon a* Nil capiat per Breve, *Plaintiff not entitled to*, p. 41.
(B) *On an Issue in Fact successful Party entitled to*, p. 41.
(C) *On an Issue at Law successful Party entitled to*, p. 41.
(D) *On Amendment after Notice on Plea of Non-joinder under C. L. P.* 15 & 16 Vic. c. 76, ss. 36, 38, p. 41.

II. To the Disability of the Person.

(A) *Of the Plaintiff.*
(*a*) *That Plaintiff is a fictitious Person.*[1]
(*b*) *That Plaintiff is an Alien-Enemy.*[2]

Ogden v. Peele, K. B.; 8 D. & R. 1.

An alien-enemy cannot sustain an action upon a contract made during the period of hostilities.

A. an American, and B. an English subject, were mutually trading before the year 1812, in which year war was declared, and continued until March 1814, prior to which latter period A. consigned goods to B. in England, who, on arrival, shipped them to France, and sold them, and received bills on account of the proceeds, which he procured to be discounted. A second cargo arrived

[1] This was formerly pleadable in abatement (Anon. E. T. K. B. 1 Wils. 302), but now such a course is unnecessary, as by the C. L. P. 15 & 16 Vic. c. 76, s. 7, every attorney who may issue a writ of summons can be compelled to give the profession, occupation, or quality and place of abode of his client, or proceedings will be stayed; and it is conceived that, even in actions to which the statute does not apply, a similar power would be exercised, if requisite, by the Court or Judge. *See* Abode.

[2] A person, by owing a permanent or temporary allegiance to a hostile power, becomes in time of war impressed with the character of an enemy, and as such is disqualified from suing. If the plaintiff be an alien-enemy at the time the contract sued on was made, and it was thereby illegal to contract with him, then, in general, alien-enemy may be pleaded in bar. But when the alienage only suspends the right to sue during the war, the objection must be taken by plea in abatement. *Flindt v. Waters*, 15 East, 260; 3 Camp. 152. An Englishman whilst in a foreign country, and adhering to the enemy, cannot sue. 3 Bos. & Pul. 164; Cob. *State T.* 588. But an alien-friend may maintain an action though he has never been in England. *Pisani v. Lawson*, 6 B. N. C. 90; and so may an alien-enemy, if he be living under the protection of the Crown. *Wells v. Williams*, 1 Salk. 46. *See* Alien. Or has a license from the Sovereign, 8 East, 273.

after that date, and was also sold by B. prior to the 15th of February, 1815; shortly after which he became bankrupt, and was appointed by his assignees their agent to wind up the affairs; in the course of which he received the proceeds of the second cargo, and transmitted accounts to A., in which he admitted A. to be his creditor for a balance in respect of the proceeds of the two cargoes.

The Court held that A. being an alien-enemy at the time of the first consignment, was only entitled to prove under B.'s commission in respect of the second consignment, as he could have maintained no action. *See* Smith's M. L. 16, 17.

ALCENIUS v. NYGREN, 24 L. J. Q. B. 19; 4 E. & B. 217.

Nor if he have become an alien-enemy after the commencement of the suit, though the contract was made during peace.

Declaration on common Money Counts.—Plea, that plaintiff was an alien, born in the empire of Russia, and an enemy of the Queen, born of an alien father and mother, and not a subject of the Queen by naturalization, denization, or otherwise, and that he was residing in this kingdom without the license, safe-conduct, or permission of the Queen.

Held, that the plea was good,[1] and that the plaintiff could not maintain the action on the contract entered into before the war during the continuance of hostilities.

DE WAHL v. BRAUNE, 25 L. J. Ex. 343; 1 H. & N. 178.

Nor can the wife of an alien enemy maintain an action in her own name on a contract made with herself either before or during coverture.

Declaration. For breach of agreement to purchase the interest of the plaintiff, Ann de Wahl, in a lease and school.

Plea. Coverture of plaintiff.

Replication. That the husband was and is an alien-enemy.

Held, that whether the contract was entered into before or after marriage, the husband ought to be joined, and it is no answer to say he is an alien-enemy, and therefore cannot sue. The effect of coverture is to vest the property in him, whether he be an alien-enemy or not.

It would be otherwise if the husband could be regarded *civiliter mortuus*, but he cannot be so regarded.

(*c*) *That Plaintiff is an Attainted Person.*

BISSE v. HARCOURT, 1 Show. 98; 1 Salk. 177; S. C. 3 Mod. 281; S. C. Carth. 137.

Attainder of plaintiff may be pleaded in abatement.

In *debitatus assumpsit*, the defendant, to show the plaintiff's incapacity to maintain the action, pleaded an attainder of high treason, which was adjudged good on demurrer. *See* Com. Dig. Abatement, E; and the Form, 1 Went. 75; 3 id. 115–117; Bro. V. M. 252; and 2 B. & A. 258.

See post, Attainder; and *Barnett v. London and North Western Railway*, 29 L. J. Ex. 334; 24 id. Q. B. 24.

(*d*) *That Plaintiff is Dead.*[2]
(*e*) „ *a Bankrupt or Insolvent Debtor.*[3]
(*f*) „ *an Infant.* *See* Infant.
(*g*) „ *a Married Woman.*

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[1] The plea in the text, therefore, may be adopted as a form. *See* also *Casseres v. Bell*, 8 T. R. 166; *Oppenheim v. Levy*, 2 Str. 1082; Steph. on *Pleading*, 4 ed. 381. *See* Precedent, B. & L. 280. Petersdorff's *Index*, 36.

[2] Death of plaintiff, we have seen, no longer abates the action, and cannot be pleaded. *Ante*, p. 8, Abatement of Suit; 15 & 16 Vic. c. 74, s. 135.

[3] *See ante*, p. 11, Abatement of Suit.

(1) *At Time of Cause of Action.*[1]

(2) *After Commencement of Suit not pleadable.*[2]

(*h*) *That Plaintiff is Outlawed.*[3] For law of Outlawry, *see* Outlawry.

FORD v. EDGECOMBE, C. P. 2 Lutw. 648.

The outlawry of plaintiff may be pleaded in abatement.

In an action of trover, the defendant pleaded in abatement outlawry of the plaintiff after judgment. The plea was admitted to be valid. *See* Co. Lit. 128 a; Gilb. C. P. 196–7; 1 Lutw. 3; 2 id. 683; 1 Com. Dig. Abatement, E. 2; 1 Bac. Ab. Abatement, B. 1. *See* Forms, Petersdorff's *Index*, 214; and *Aldridge v. Buller*, 2 M. & W. 412; *Solomon v. Graham*, 5 E. & B. 309; S. C. 24 L. J. Q. B. 332; *Smith v. Bromley*, 29 L. J. Q. B. 91.

DRAYCOTE v. CURZON, C. P. 1 Lutw. 17.

Or if a woman be demandant, or plaintiff, that she is waived; although the proceedings therein are irregular.

In dower the tenant pleaded that the demandant was waived, and concluded in abatement. On a demurrer to the replication it was contended, that although the outlawry might be erroneous, it could only be avoided by a writ of error, or an averment on the outlawry roll by the party proceeded against, and not by plea in a collateral action; in which opinion the Court concurred, and observed that the outlawry continued in force until reversed in a regular manner. *See* 1 Leon. 87; 44 E. 3, 27 a; Doct. Pl. 397; Bac. Ab. Outlawry, D. E.

POWIS v. WILLIAMS, C. P. 2 Lutw. 683.

Outlawry of the testator to an action brought by an executor is a good plea.

Declaration in *assumpsit* against the defendant for money had and received by the defendant to the use of the plaintiff's testator. Plea in abatement, that the testator was outlawed, with an averment of his identity.

Per Cur. The debt being forfeited to the king by the outlawry, the attorney-general might have sued for the recovery thereof. The disability of the deceased extends to his representatives.

ATKINS v. BAYLES, C. P. 2 Mod. 267.

Outlawry is a good plea to an action *qui tam.*

Information against the defendant as a justice of the peace for improperly refusing to grant his warrant. The defendant pleaded outlawry of the plaintiff, to which the latter demurred. First—It was urged in support of the demurrer, that the king being interested in the cause, the attorney-general might proceed, notwithstanding the alleged disability. This argument was disallowed by the Court.

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[1] The marriage of a female plaintiff at the time of entering into a contract or breach of its provisions (2 Inst. 673; *Wallis v. Harrison*, 5 M. & W. 142; *Bendix v. Wakeman*, 12 M. & W. 97; S. C. 1 D. & L. 450; *Guyard v. Sutton*, 36 B. 153; *De Wahl v. Braune*, 25 L. J. Ex. 343), or conversion of her goods, or for a wrong done to her before marriage, can only be pleaded in abatement (*Milner v. Milnes*, 3 T. R. 627; *Dalton v. Midland Railway*, 13 C. B. 474; *Morgan v. Cubitt*, 3 Exch. 612); and if she sue alone, and this course be not pursued, and the objection does not appear upon the record, she will be entitled to judgment and damages. *See post*, Husband, Wife.

Form of Plea. Commence as *post*, p. 31 n. "that the plaintiff at the commencement of this suit was and still is the wife of E. F., who is still living." Conclude as *post*, 31 n.

[2] Before the 16 & 17 Vic. c. 76, s. 141, the marriage of a woman plaintiff pending the suit might be pleaded in abatement, or *puis darreign continuance* (*Morgan v. Painter*, 6 T. R. 265; *Walker v. Golling*, 11 M. & W. 78). But by that section the marriage of a woman plaintiff shall not cause the action to abate, but it may notwithstanding be proceeded with to judgment; and in case of a judgment for the wife, execution may be issued thereupon by the authority of the husband without any writ of revivor or suggestion. As to the position of a married woman who has obtained a judicial separation, or an order for the protection of her property, under the Divorce and Matrimonial Causes Act, 20 & 21 Vic. c. 85, *see* ss. 21, 25, 26, and *Bathe v. Bank of England*, 27 L. J. C. 630; 4 K. & J. 564; *re Rainsdon*, 28 L. J. C. 334.

[3] Outlawry of one of several plaintiffs is a plea as to both. 2 H. 7, 8; Doct. Pl. 64; 2 Cro. Eliz. 616; 1 Com. Dig. Abatement, E. 2. But if one defendant be outlawed, the plaintiff may declare against the other alone. *Shovel v. Evans*, M. T. 1696; C. P. 1 Lutw. 16. *See post*, Outlawry.

(B) *To the Disability of the Person of the Defendant.*

(*a*) *That the Defendant is a Married Woman.*[1]

(*b*) *That he is an Infant.*[2]

III. To the Count, or Declaration.[3]

IV. To the Writ.

(A) *To its Form, for matters apparent therein.*[4]

(B) *For matters not apparent.*

(*a*) *Misnomer.*[5]

[1] If a married woman be sued alone upon a cause of action accruing *after* coverture, her marriage is matter for a plea in bar; but if for a cause of action which accrued wholly before marriage, or which had its inception before, but was completed afterwards, the coverture can only be pleaded in abatement. *Milner v. Milnes*, 3 T. R. 631; *Lovell v. Walker*, 9 M. & W. 299. Such a plea is not a plea of non-joinder within 3 & 4 Wm. 4, c. 42, s. 8, and therefore does not require an affidavit of the residence of the husband as a party who ought to be joined (*Jones v. Smith*, 3 M. & W. 526); but it is a dilatory plea, requiring an affidavit of verification, under 4 Anne, c. 16, s. 11. *See post*, p. 31.

Precedent of Plea. Date . "Defendant in person prays judgment of the writ and declaration herein, and that the same may be quashed, because she says, that at the commencement of this suit she was and still is the wife of C. D., who is still living." Conclude in Abatement, *see post*, p. 31 n.

As to effect of marriage *pendente lite*, we have seen, *ante*, p. 11, that by the 15 & 16 Vic. c. 76, s. 141, marriage of the plaintiff or defendant shall not cause the action to abate, but a suggestion shall be made of the fact. *See ante*, Abatement of Suit, p. 11; and *Morgan v. Painter*, 6 T. R. 265; *Walker v. Golling*, 11 M. & W. 78.

[2] This plea was called "*parol demurrer*," and which operated in suspension of the suit until such time as an infant heir, sued in that character, arrived at full age, was abolished by 1 Wm. 4, c. 47, s. 10. In all actions on contracts, defendant's infancy is pleadable in bar. *See* Infant.

[3] A plea in abatement *to the count* could only be pleaded in actions by original writ. After appearance and admission of the jurisdiction of the Court, and of the ability of the plaintiff to sue and of the defendant to be sued, came the count, or declaration. The defendant might then demand over of the writ, which being set forth on the roll, if there were any variance between it and the count, or between it and any specialty mentioned in the count, the defendant might plead such variance in abatement. 2 Wil. 394; Com. Dig. Abatement, G. 8. The stats. 2 Wm. 4, c. 39, and 23 & 24 Vic. c. 126, s. 27, by abolishing original writs in personal actions, extinguished this plea. And even before these enactments, in actions of every kind it had long been practically abrogated by several Rules of Court made in the reigns of Geo. II. and Geo. III., by which oyer of the original writ was no longer allowed; and if pleaded to, the plaintiff might have signed judgment. *Deshons v. Head*, 7 East, 383; 1 B. & P. 645, 646; 2 Salk. 658; 2 Wils. 85, 395; 1 Doug. 227; Barnes, 340; Steph. Pl. 57.

[4] Defects in the form apparent on the face of the writ were repugnancy, want of sufficient time between the teste and the return (1 Lutw. 25; 3 Inst. Cl. 49, 54, 66, &c.), or in actions by original writ, before its abolition, the omission or mistake of the defendant's addition, either of estate, degree, mystery, or place of abode. 1 Hen. 5, c. 5; 3 Inst. Cl. 92; Lil. Ent. 5; 2 Rich. C. P. 5, 8; 1 Strange, 556; 2 Ld. Raymond, 1541; 2 Inst. 668; but as oyer of the writ can no longer be had, an omission of the defendant's addition, which is not necessary to be stated in the declaration, can no longer be pleaded in abatement. 1 Saund. 318; see also n. g. Formal defects in writs are now the subject of application to a Judge at chambers or to the Court. *See Capias; Fieri facias;* Summons, Writ of, &c. &c.

[5] Pleas in abatement of misnomer were abolished by 3 & 4 W. 4, c. 42, s. 11, which enacts, "that no plea in abatement for a misnomer shall be allowed in any personal action, but that in all cases in which a misnomer would, but for this Act, have been by law pleadable in abatement in such actions, defendant shall be at liberty to cause the declaration to be amended, at the cost of the plaintiff, by inserting the right name, upon a judge's summons founded on an affidavit of the right name; and in case such summons shall be discharged, the costs of such application shall be paid by the party applying, if the judge shall think fit." This is the only proceeding the defendant can now take on a misnomer. *Lindsay v. Wells*, 3 Bing. N. C. 777; *Rust v. Kennedy*, 4 M. & W. 586.

The enactment applies to a misnomer of the plaintiff. *Kitchen v. Brooks*, 5 M. & W. 522; S. C. 8 Dowl. 232. But see *Lindsay v. Wells*, 3 B. N. C. 777. Before this statute, the plaintiff having declared by a wrong name was no ground of nonsuit at the trial, if the defendant knew that the action was brought by the party who actually sues. *Boughton v. Frere*, 3 Camp. 29. Nor can it be objected to after any admission of iden-

(*b*) *Non-joinder and Mis-joinder of Parties to Suit, and power of Court and Judges to amend.*[1]

A plea in abatement for non-joinder of a defendant, must state residence of party within jurisdiction.

By 3 & 4 Wm. 4, c. 42, s. 8, it is enacted, "that no plea in abatement for the non-joinder of any person as a co-defendant shall be allowed in any court of common law, unless it shall be stated in such plea that such person is resident within the jurisdiction of the court, and unless the place of residence of such person shall be stated in an affidavit verifying such plea."

Joinder of too many plaintiffs not fatal; actions may be brought in name of persons in whom right may be supposed to exist.

By 23 & 24 Vic. c. 126, s. 19, it is enacted, "that the joinder of too many plaintiffs shall not be fatal; but every action may be brought in the name of all the persons in whom the legal right may be supposed to exist, and judgment may be given in favour of the plaintiffs by whom the action is brought, or of one or more of them, or, in case of any question of mis-joinder being raised, then in favour of such one or more of them as shall be adjudged by the Court to be entitled to recover."[2] *See* Set-off.

WHITE v. GASCOYNE, 18 L. J. Ex. 110.

An affidavit of verification is required, stating residence of party not joined at *time of plea, pleaded.*[3]

The affidavit in verification stated that the persons therein named at the time of the commencement of this suit resided respectively as follows, &c.:—*Held*, that the statute 3 & 4 Wm. 4, *supra*, clearly requires that the residence, at the time of the plea being pleaded, should be stated in the affidavit. *See* also *Maybury v. Mudie*, 17 L. J. C. P. 95; 5 D. & L. 360; 5 C. B. 283. *See* note [3].

By 3 & 4 Wm. 4, c. 42, s. 9, it is enacted, "that to any plea in abatement,

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tity by the defendant. *Fisher v. Magnay*. 1 D. & L. 10. The application for the amendment should be made within the four days formerly allowed for pleading the misnomer. *Hinton v. Stevens*, 1 H. & N. 521; *Kitchen v. Brookes*, *supra*, p. 18, n [5].

By the 3 & 4 Wm. 4, c. 42, s. 12, in actions on bills of exchange or promissory notes, or other written instruments, any of the parties to which are designated by the *initial* letter or letters, or some contraction of the Christian or first name or names, it shall be sufficient in the process or declaration to designate such persons by the same initial letter or letters, or contraction of the Christian or first name or names, instead of stating the Christian or first name or names in full. *See post*, Bills of Exchange.

[1] The general rule is, that where the contract is joint, all the parties must be joined as defendants. *See* 1 Saund. 291, n. 4; Platt on Cov. 117. But the non joinder of a co-defendant is nevertheless only matter for a plea in *abatement*. 1 Saund. 154, n. 1, 291; 6 f. g. The non-joinder or mis-joinder of a co-plaintiff, on the other hand, in actions on contracts, was, before the 23 & 24 Vic. *supra*, ground of nonsuit under the general issue. *See Solly v. Neish*, 2 C. M. & R. 358; *Jones v. Smith*, 1 Exch. 831; though not so in detinue or case. *See Broadbent v. Ledward*. 11 Ad. & E. 209; *Phillips v. Claggett*, 10 M. & W. 102. Indeed, in actions in *tort* the non-joinder of a co-plaintiff was always matter for plea in abatement only. 1 Saund. 154. The mis-joinder of a co-defendant in an action *ex contractu* being a variance, is also a defence under the general issue. *Elliot v. Morgan*, 7 C. & P. 334.

[2] This is realising what was suggested by the Commissioners in their third Report, p. 6, that it often happens that it is a doubtful question in whom is vested the right to sue, and that in such cases great hardship and difficulty are imposed upon the suitor by the rule which requires an action to be brought in the name only of the person in whom the right is legally vested. The effect of that rule is, that a mistake as to the proper party to sue involves an expensive defeat by a judgment whereby the right is pronounced to exist, but to be vested in a person not a party to the action, but who may in fact be a trustee for, or otherwise in the same interest with the plaintiff, and who would have consented had the law allowed him to be joined as a party. The C. L. P. 15 & 16 Vic. c. 76, has now given great powers of amendment as to mis-joinder and non-joinder of plaintiffs and defendants. The law on this subject as it existed before the passing of that statute is thus stated in the Report of the Common-Law Commissioners, p. 9:—"In actions on contract the omission of a party as plaintiff who ought to be joined, or the joinder of a party who ought not to be joined, may be fatal to the action; so the joinder of a person as defendant who ought not to be joined is likewise fatal; whilst the omission of a party as defendant who ought to be joined can only be taken advantage of by a plea in abatement. In actions of *tort* a joinder of a party who ought not to be plaintiff is fatal, whilst the non-joinder of a party who ought to be a co-plaintiff can only be taken advantage of by a plea in abatement; and in such actions the joinder of persons who are not liable as defendants only entitles them to an acquittal, and the non-joinder of persons jointly liable is of no consequence." *See post*, 21.

[3] As regards the nature of the residence,

Plaintiff may reply the bankruptcy or insolvency of such person.

in any court of law, of the non-joinder of another person, the plaintiff may reply that such person has been discharged by bankruptcy and certificate, or under an act for relief of insolvent debtors."[1]

Provisions where, after such plea, plaintiff, without proceeding to trial upon an issue thereon, commences another action, joining the persons named in the plea.

By s. 10 it is enacted, "that in all cases in which, after such plea in abatement, the plaintiff shall, without having proceeded to trial upon an issue thereon, commence another action against the defendant or defendants in the action in which such plea in abatement shall have been pleaded, and the person or persons named in such plea in abatement as joint-contractors, if it shall appear by the pleadings in such subsequent action, or on the evidence at the trial thereof, that all the original defendants are liable, but that one or more of the persons named in such plea in abatement, or any subsequent plea in abatement, are not liable as a contracting party or parties, the plaintiffs shall, nevertheless, be entitled to judgment, or to a verdict and judgment, as the case may be, against the other defendant or defendants, who shall appear to be liable; and every defendant who is not so liable shall have judgment, and shall be entitled to his costs as against the plaintiff, who shall be allowed the same as costs in the cause against the defendant or defendants who shall have so pleaded in abatement the non-joinder of such person; provided that any such person who shall have so pleaded an abatement shall be at liberty, on the trial, to adduce evidence of the liability of the defendants named by him in such plea in abatement."

No plea in abatement for non-joinder of a co-defendant allowed in actions against carriers.

By the Common Carriers' Act, 11 Geo. 4, and 1 Wm. 4, c. 68, s. 5, it is enacted, "that any one or more of such mail-contractors, stage-coach proprietors, or common carriers, shall be liable to be sued by his, her, or their name or names only; and that no action or suit commenced to recover damages for loss or injury to any parcel, package, or person, shall abate for the want of joining any coproprietor or copartner in such mail, stage-coach, or other public conveyance by land for hire as aforesaid."[2]

And a plea of non-joinder of a co-defendant cannot be supported if the Statute of Limitations has run against the party.

By the 9 Geo. 4, c. 14, s. 2, "if any defendant or defendants in any action, on any simple contract, shall plead any matter in abatement, to the effect that any other person or persons ought to be jointly sued, and issue be joined on such plea, and it shall appear at the trial that the action could not, by reason of the said recited acts, or this act (the Statute of Limitations), or of either of them, be maintained against the other person or persons named in such plea, or any of them, the issue joined on such plea shall be found against the party pleading the same."

At any time before trial, non-joinder or

By C. L. P. 15 & 16 Vic. c. 74, s. 34, it shall and may be lawful for the Court or a Judge, at any time before the trial of any cause, to order that any person or persons not joined as plaintiff or plaintiffs in such cause, shall be

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it would seem that, if the party be merely in England for a temporary purpose, and is not actually residing in it, the defendant could not plead his non-joinder; and, on the other hand, he might so plead it if his absence abroad was merely a temporary one, and he was really residing here. The word "residence" means "domicile," or "home." *Lambe v. Smythe*, 15 M. & W. 433; 3 D. & L. 712. As the plea must accurately state all the contracting parties, so as to give a better writ, and if one be omitted the plea would fail (*Godson v. Good*, 6 Taunt. 587; *Crellin v. Brook*, 1 Car. & K. 571; 14 M. & W. 11), it follows that if any one of the contracting parties be not resident in England, or his residence here cannot be verified by affidavit, the plea cannot be successfully adopted. *Newton v. Stewart*, 4 D. & L. 89; 15 L. J. Q. B. 384; *Gell v. Lord Curzon*, 4 C. B. 249; 4 D. & L. 810; 16 L. J. C. P. 172.

[1] A plea in abatement of the coverture of the defendant is not a plea of non-joinder within the above sections of the 3 & 4 Wm. 4, c. 42, as these sections were meant to apply where defendant could reply the bankruptcy or insolvency of the party. *Jones v. Smith*, 3 M. & W. 526; 6 Dowl. 557.

[2] It seems, also, that a member of a banking copartnership, established under the 7 Geo. 4, c. 46, cannot plead in abatement the non-joinder of other members to a *sci. fa. qu. ex. non.* brought on a judgment obtained against the public officer of the company. *Fowler v. Rickerby*, 3 Sc. N. R. 138; 9 Dowl. 682; *Nunn v. Lomez*, 18 L. J. Ex. 247. *See* also *Esdaile v. Trustwell*, 2 Ex. 312.

so joined, or that any person or persons originally joined as plaintiff or plaintiffs shall be struck out from such cause, if it shall appear to such Court or Judge that injustice will not be done by such amendment, and that the person or persons to be added as aforesaid consent, either in person or by writing, under his, her, or their hands, to be so joined, or that the person or persons to be struck out as aforesaid were originally introduced without his, her, or their consent, or that such person or persons consent, in manner aforesaid, to be so struck out; and such amendment shall be made upon such terms as to the amendment of the pleadings (if any), postponement of the trial, and otherwise, as the Court or Judge by whom such amendment is made shall think proper; and when any such amendment shall have been made, the liability of any person or persons who shall have been added as co-plaintiff or co-plaintiffs shall, subject to any terms imposed as aforesaid, be the same as if such person or persons had been originally joined in such cause. See *ante*, p. 19; 23 & 24 Vic. c. 126, s. 19.

mis-joinder of plaintiff may be amended, on terms to be fixed by the Court or a Judge.

By C. L. P. 15 & 16 Vic. c. 74, s. 35, "in case it shall appear at the trial of any action that there has been a mis-joinder of plaintiffs, or that some person or persons, not joined as plaintiff or plaintiffs, ought to have been so joined, and the defendant shall not, at or before the time of pleading, have given notice in writing that he objects to such non-joinder, specifying therein the name or names of such person or persons, such mis-joinder or non-joinder may be amended, as a variance at the trial, by any court of record holding plea in civil actions, and by any Judge sitting at Nisi Prius, or other presiding officer, in like manner as to the mode of amendment, and proceedings consequent thereon, or as near thereto as the circumstances of the case will admit, as in the case of amendments of variances under an act, 3 & 4 Wm. 4, c. 42, entitled 'An Act for the further Amendment of the Law[1] and better Advancement of Justice,' by sec. 35, if it shall appear to such Court or Judge, or other presiding officer, that such mis-joinder or non-joinder was not for the purpose of obtaining an undue advantage, and that injustice will not be done by such amendment, and that the person or persons to be added as aforesaid consent, either in person or by writing, under his, her, or their hands, to be so joined, or that the person or persons to be struck out as aforesaid were originally introduced without his, her, or their consent, or that such person or persons consent, in manner aforesaid, to be so struck out; and such amendment shall be made upon such terms as the Court or Judge, or other presiding officer by whom such amendment is made, shall think proper; and when any such amendment shall have been made, the liability of any person or persons who shall have been added as co-plaintiff or co-plaintiffs shall, subject to any terms imposed as aforesaid, be the same as if such person or persons had been originally joined in such action."

Also at the trial, if it appear that there is a mis-joinder or non-joinder of plaintiffs, and the defendant has not, at the time of pleading, given notice in writing of his objection thereto, such mis-joinder or non-joinder may be amended.

By C. L. P. 15 & 16 Vic. c. 74, s. 36, in case such notice be given, or any plea in abatement of non-joinder of a person or persons as co-plaintiff or co-plaintiffs, in cases where such plea in abatement may be pleaded,[2] be pleaded by the defendant, the plaintiff shall be at liberty, without any order, to amend the writ and other proceedings before plea, by adding the name or names of the person or persons named in such notice or plea in abatement, and to proceed in the action without any further appearance, on payment of the costs of and occasioned by such amendment only, and in such case the defendant shall be at liberty to plead *de novo*.[3] *See* R. H. 1853, 26, as to filing consent of party, and affidavit of handwriting.

If such notice of objection be given by defendant, or he plead in abatement, the plaintiff may amend.

By C. L. P. 15 & 16 Vic. c. 74, s. 37, it shall and may be lawful for the

[1] It will be seen that amendments under this section are to be made in like manner as under the 3 & 4 Wm. 4, c. 42, s. 23. *See post*, Amendment; Variance.

[2] That is, in actions by executors and in actions *ex delicto* (12 Saund. 154), where the non-joinder of a co-plaintiff is matter for plea in abatement only; but see *ante*, p. 19.

[3] If the declaration be demurred to on the ground of the non-joinder of a co-plaintiff, the amendment must be made under the 34th section. A misjoinder pleaded to several counts, if bad as to any, is bad altogether. *Phillips v. Claggett*, 10 M. & W. 102.

In case of the joinder of too many defendants in an action on contract, an amendment may be made before, or even at the trial.

Court or a Judge, in the case of the joinder of too many defendants in any action on contract,[1] at any time before the trial of such cause, to order that the name or names of one or more of such defendants be struck out, if it shall appear to such Court or Judge that injustice will not be done by such amendment, and the amendment shall be made upon such terms as the Court or Judge by whom such amendment is made shall think proper; and in case it shall appear at the trial of any action on contract that there has been a mis-joinder of defendants, such mis-joinder may be amended, as a variance, at the trial, in like manner as the mis-joinder of plaintiffs has been hereinbefore (*ante*, p. 21) directed to be amended, and upon such terms as the Court or Judge, or other presiding officer by whom such amendment is made, shall think proper.[2]

WICKENS v. STEEL AND ANOTHER, 26 L. J. C. P. 241; 2 C. B. N. S. 488.

The last section, however, only relates to a case where a defendant has been joined by mistake, and not where it has been done for the purpose of trying his liability.

Action by an attorney for work and materials on the retainer of George and Alexander Steel. At the trial it appeared that defendant George was a man of substance, and that Alexander was not; and the whole contention of the plaintiff's counsel at the trial was, that they were both jointly liable.

The jury found that the contract was made with Alexander *alone;* upon which the learned judge directed the verdict to be entered for the defendants: but before it was recorded, plaintiff's counsel applied to amend the record by striking out the name of George. This was refused; but leave was given to the plaintiff to move to enter the verdict against George, if the amendment ought to have been made.

Held, that the question turned on the 37th section of 15 & 16 Vic. c. 74, 1852; that that section evidently refers to a case where a defendant has been joined erroneously, and does not apply to a case where a defendant has been joined, not through any mistake, but for the purpose of trying his liability.

Such amendment should be applied for before verdict.

Held, also, that an amendment under this section must be applied for before verdict. See *Robson v. Doyle*, 3 E. & B. 396; *Johnson v. Goslett*, 18 C. B. 725; 25 L. J. C. P. 274.

When non-joinder has been pleaded in abatement, the plaintiff may, without order, amend.

By C. L. P. 15 & 16 Vic. c. 76, s. 38, in any action *on contract* where the non-joinder of any person or persons as a co-defendant or co-defendants has been pleaded in abatement, the plaintiff shall be at liberty, without any order, to amend the writ of summons and the declaration, by adding the name or names of the person or persons named in such plea in abatement as joint-contractors, and to serve[3] the amended writ upon the person or persons so named in such plea in abatement, and to proceed against the original defendant or defendants, and the person or persons so named in such plea in abatement: Provided that the date of such amendment shall, as between the person or persons so named in such plea in abatement, and the plaintiff, be considered for all purposes as the commencement of the action.

Proceedings after such plea and amendment.

By C. L. P. 15 & 16 Vic. c. 74, s. 39, in all cases after such plea in abatement and amendment, if it shall appear upon the trial of the action that the person or persons so named in such plea in abatement was or were jointly liable with the original defendant or defendants, the original defendant or defendants shall be entitled as against the plaintiff to the costs of such plea in abatement and amendment; but if at such trial it shall appear that the original defendant,

[1] The mis-joinder of a defendant in actions on contracts is a variance, and is, therefore, a defence under the general issue. *Eliot v. Morgan*, 7 C. & P. 334. It will also be seen that the power of amendment given by this section is limited to actions on contract. In actions *ex delicto*, the plaintiff can always cure the mistake by entering a *nolle prosequi* before the trial. The section, also, does not allow of an amendment where there has been a non-joinder. *Goodchild v. Leadham*, 1 Ex. 706. The name of a co-defendant who has been improperly joined, but has suffered judgment by default, may be struck out. *Greaves v. Humphreys*, 24 L. J. Q. B. 190.

[2] If the Judge refuse to amend at the trial, the Court has no power to revise his decisions. *Holden v. Robinson*, 29 L. J. Q. B. 148.

[3] There will, therefore, be no necessity for entering a *cassetur breve*, as formerly.

or any of the original defendants, is or are liable, but that one or more of the persons named in such plea in abatement is or are not liable as a contracting party or parties, the plaintiff shall, nevertheless, be entitled to judgment against the other defendant or defendants who shall appear to be liable; and every defendant who is not so liable shall have judgment, and shall be entitled to his costs as against the plaintiff, who shall be allowed the same, together with the costs of the plea in abatement and amendment, as costs in the cause against the original defendant or defendants who shall have so pleaded in abatement the non-joinder of such person: Provided that any such defendant who shall have so pleaded in abatement shall be at liberty on the trial to adduce evidence of the liability of the defendants named by him in such plea in abatement.

(C) *To the Action of the Writ.*

(*a*) *That it is prematurely brought.*[1]

(*b*) „ *the remedy is misconceived.*[2]

(D) *Another Action pending for the same cause.*

Bowler v. Spathurst. 1 Lutw. 14. *See* Laughton v. Taylor, 6 M. & W. 695; Henry v. Goldney, 15 M. & W. 494; S. C. 15 L. J. Ex. 298; Boyce v. Webb, 15 Q. B. 84.

A defendant may plead in abatement that there is another action depending for the same cause.

To an action of *assumpsit* the defendant pleaded another pending for the same cause, and that a writ had been previously sued out, directed to the sheriff of W.; replication, confessing the prior writ, but alleging that no proceedings were taken thereon, and that another writ of the same date was sued out, directed to the sheriff of S., to which defendant had appeared. Demurrer thereto, and joinder in demurrer.

Per Cur. The replication is bad, because the action is laid in M.; and the plaintiff, by his replication, has confessed that the writ to which the defendant appeared, and on which the plaintiff has declared, was directed to the sheriff of S., which is totally inconsistent, so that the present declaration is supposed to be founded on a writ directed to the sheriff of W. and not to the sheriff of S.: and then, by the allegation that the appearance of the defendant was on a writ directed to the sheriff of S., he has of his own showing falsified his writ. Judgment, that the writ should abate. *See* 14 H. 7. 126; 5 id. 616; 5 Co. 62, n.; Hob. 137; Doct. Pl. 10; Lil. Ent. 25; 1 Com. Dig. Abatement, H.; 1 Bac. Ab. Abatement, M.; Precedents, Petersdorff's *Index*, 39; *Harley v. Greenwood*, 5 B. & Ald. 101; *Biggs v. Cox*, 4 B. & C. 920.

Bonner v. Hall, K. B. 1 Ld. Raym. 338; S. C. Carth. 433; S. C. Holt, 557; Comb. 479, S. C.

Though it has been held in Q. B. that a plea in abatement that an-

In *assumpsit* the defendant pleaded in abatement another action pending in the Common Pleas for the same cause; replication, that no action was pending for the same cause, and therefore *petit judicium de debito et damnis*; to which the defendant demurred, and joinder in demurrer.

[1] It was formerly held that a defendant might plead in abatement that the action was prematurely brought. *Papworth v. Stacey*, 1 Lutw. 10; *Pickering v. Simond*, Fort. 334. But this has subsequently been overruled, as it is a matter in bar, and not in abatement. *Owen v. Butler*, 1 Ld. Raym. 345. Nor can a defendant plead in abatement that the promise was made after the commencement of the action, and not before. *Facquire v. Kynaston*, 2 Ld. Raym. 1249.

[2] Anciently, a mistake, as to the legal remedy adopted, was pleadable in abatement. 1 Com. Dig. Abatement, G. 5, 3 Inst. Cl. 120; but as both this and the defence that *the action* has been brought too soon are severally grounds either of non-suit or demurrer (2 Saund. 210); or for a special application to the Court (2 Ch. R. 11); they are now never pleaded. The abolition of the arbitrary distribution of remedies into technical classes and forms of procedure has rendered useless a vast body of cases devoted to an inquiry into the applicability of the forms of proceedings or species of action to which the plaintiff may have resorted. *See post*, Action.

other action is pending in the Common Pleas for the same cause, is bad.

Per Cur. In this case the first fault is in the defendant, as the plea itself is ill; and as he cannot plead in this Court the pendency of prior suit in the Common Pleas, the defendant must answer over. *See* 5 Co. 62 a. *semb. contra;* 3 Mod. 281; 1 Salk. 177; Moore, 629; Co. Ent. 1682; Ra. Ent. 681; Sayer, 46.

Brinsby v. Gold, 12 Mod. 204. Seers v. Turner, 2 Lord Raym. 1102, S. P.

The pendency of a prior action in an inferior court cannot be pleaded to an action in a superior one.

Indebitatus assumpsit. The defendant pleaded another action depending in the Sheriff of London's Court for the same cause, and held to be no plea, because an action pending in an inferior court is no bar to an action in a superior court for the same cause. *See* Bro. Brief, Pl. 107, 560, 624; Dy. 92, 93; Fitzg. 313, 314; 1 Bac. Ab. Abatement, M.; Com. Dig. Abatement, H. 22; *White v. Willis*, 2 Wils. 87.

Laughton v. Taylor, 6 M. & W. 695; S. C. 8 Dowl. 776.

And the Borough Court of Liverpool is an inferior, and not a superior court.

Debt for goods sold and delivered.

Plea. That before the issuing the writ in this action the plaintiff impleaded the defendant in the Borough Court of Liverpool, for the non-payment of the same debt sought to be recovered in this action. That the debt accrued within the jurisdiction of the Borough Court, which had full power and jurisdiction over the same, and the said former suit was still pending.

Held, that the Borough Court being only an inferior court, the plea was bad. *See* 12 Mod. 204; 2 Ld. Raym. 1102; 2 Wils. 87, cited *supra.*

Cox v. Mitchell, 29 L. J. C. P. 33; 6 Jur. 225.

Nor can the pendency of a suit in a foreign court for the same cause be pleaded.

An American, a citizen of New York, a foreigner, against whom an action of contract was pending in his own country at the suit of the plaintiff, having come over to England, was sued here by the plaintiff for the same demand.

Held, that the pendency of the action in the foreign country was not sufficient ground for staying proceedings in the action here, nor could the pendency of such a suit be pleaded in abatement. *See post*, Foreign Court.

Rawlinson v. Oriett and another, K. B. Carth. 96; S. C. Comb. 144; S. C. Holt, 1; S. C. 1 Show. 75.

To an action against two, a plea by both that another action is pending against one is valid.[1]

Trespass against two defendants, who *both* pleaded in abatement that the plaintiff had brought another action against one of them for the same trespass. Demurrer to plea.

Per Cur. This is a good plea, and will abate the whole action; the objection that it will only afford a defence to one, and not to both, of the defendants, is ill founded. *See* Hob. 137, 250; Winch. Ent. 892, 893; 1 Mod. 239; Lutw. 42; Cro. Eliz. 202; 1 Brownl. 161.

Baines v. Blackburn, Sayer *Rep.* 216.

The pendency of a former suit in a penal action may be pleaded in bar.[2]

Debt for exercising a trade contrary to the 5 Eliz. c. 4.

Plea in abatement. That a prior action was pending for the same matter. *Held*, bad.

For the pendency of a prior action for the same matter may be pleaded in bar to a second, but not in abatement.

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[1] But not the pendency of an action for the same demand against a person jointly liable with the defendant. *Henry v. Goldney*, 15 M. & W. 494; S. P. *Newton v. Blunt*, 3 C. B. 675. If more than one other pending action be averred in the plea it will be bad for duplicity. *Esdaile v. Lund*, 12 M. & W. 607.

[2] But the plea must show that the right of action was attached to the other suit before the commencement of the plaintiff's action. *Combe v. Pitt*, 3 Burr. 1423; S. C. 1 Bla. 437, 523.

WALLIS v. SAVIL, NAYLOR, AND STACY, C. P. 1 Lutw. 19.

But *semb.* in trespass against three it cannot be pleaded that there was another action pending against two of them for the same cause. *Vide infra.*

The plaintiff declared against the defendants in an action of trespass, to which they pleaded as to part not guilty, and as to the residue that the plaintiff had in a preceding term impleaded Savil and Stacey, and several others therein named, omitting Naylor's name altogether. Judgment was given for the plaintiff. *See* 1 Com. Dig. Abatement, H. 24; Bac. Ab. Abatement, M.

HAIGHT v. LANGHAM, C. P. 3 Lev. 303.

In debt against husband and wife, the wife being heir of B, plea of another action pending against the husband as executor of B, was held bad.

In debt on bond against husband and wife, it appeared that the wife was heir of B. Plea in abatement *auter action pendent* against the husband and others as executors of B.; to which the plaintiff demurred.

Per Cur. Where an action is brought against one person as heir, and against another as executor, and the plaintiff recovers two judgments, and after he has levied the debt upon one of them he endeavours to levy it again on the other, he shall be aided by *audita querela*, because he could not have pleaded it in abatement. Judgment, *respondeas ouster*. *See* 3 H. 6. 14; Cro. Eliz. 207; 14 Vin. Ab. 264; 11 Viner. Ab. 249.

KNIGHT'S CASE, 2 Lord Raym. 1014; 1 Salk. 329; 3 id. 238; Holt, 255.

A suit exists until regularly discontinued.

Defendant pleaded a misnomer in abatement. The plaintiff, without discontinuing, declared against him *de novo* by his right name, and he then pleaded *auter action pendent.*

Per Cur. It is too late now to discontinue, for a discontinuance only relates to the time of its being entered upon the record, so that if the plaintiff should now enter it and reply *nul tiel record*, it would be against him, because it was a record at the time of plea pleaded. *See* Doct. Pl. 67, 68.

JAMES v. MATTHEWS, C. P. 1 Com. Rep. 157.

Nor can the effect of a plea in abatement be avoided by another writ.

In an action of trespass the defendant demanded oyer of the original, and in the original there appeared a fault in the addition of the defendant, which he availed himself of by plea in abatement. The plaintiff replied, and showed another original, and concluded with a traverse *absque hoc*, that the action was founded on the other original, upon which the defendant demurred. Judgment for the defendant.

HUTCHINSON v. THOMAS, K. B. 2 Lev. 141; 3 Keb. 426, 491;
S. C. JACKSON v. GISLING, 2 Stra. 1169, S. P.

The plea should show the precise day or time when the prior suit was commenced.

An information for usury was entitled as of Michaelmas Term. The defendant pleaded that another person had in the same term exhibited an information against him for the same usury, and obtained judgment. Demurrer to plea, because both the informations as pleaded refer to the first day of the term, instead of its being shown on what days in the term the first and second informations were severally exhibited. Judgment for plaintiff.

KNIGHT'S CASE, 1 Salk. 329; S. C. 2 Ld. Raym. 1014; Holt, 255.

The plaintiff can avoid the effect of the plea by discontinuing the first action before bringing the second.

Case by plaintiff in wrong name. Plea in abatement for misnomer. Plaintiff brought new action in right name. Plea to new action, *auter action pendent*. *Et per Holt, C. J.*—The plaintiff should first have discontinued the first action; it will be too late to do it now, as the discontinuance will relate only to the time of its being entered on record, so that upon *nul tiel record* it will be against him, for it was pending at the time of the plea pleaded. *See* Doct. Plac. 11.

(E) *Form of Plea of another Action pending.*[1]

(F) *Writ of Error pending.*[2]

V. General Qualities of.

(A) *Difference between Pleas in Abatement and Pleas in Bar.*[3]

(B) *What ought or may be pleaded in Abatement.*

Coan v. Bowles, K. B. Carth. 124; 4 Mod. 8; 1 Show. 15, 165; 1 Salk. 205, S. C. not the same point. Gravenor v. Stephens, K. B. 10 Mod. 166.

That which ought to be pleaded in abatement can never be assigned for error.

Per Cur. A man shall never assign that for error which he might plead in abatement, for neglecting to take the objection in proper time is his own fault; hence, if a *feme covert* bring an action in her own name by attorney, and the defendant plead in bar, he shall never afterwards be allowed to assign the coverture for error. 17 Edw. 3, 70 b; 48 Edw. 3, 10 b; 1 Com. Dig. Abatement, K. 2.

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[1] Commence as in p. 31 n. That before this suit the plaintiff issued a writ of summons out of the Court of Queen's Bench at Westminster against the defendant, in an action for the same causes of action as in the declaration herein mentioned, as by the record and proceedings thereof remaining in the said Court appears, and the parties in this and the said former suit are the same parties, and the said former suit is still depending in the said Court. Conclude as *post*, p. 31, n [5].

[2] Although at one time it was held that a writ of error might be pleaded in abatement to an action of debt brought on the original judgment (*see* Courtney's case, 7 Mod 140; *Prinne v. Edwards*, 3 Salk. 145; 1 Ld. Raym. 47; Comb. 199), yet it is now settled that such a plea cannot be sustained. Carth. 136; 1 Show. 98; 1 Lutw. 600. But the Court will stay the proceedings in the second action till those in error are determined. *Riddle v. Grantham Canal Navigation*, 16 M. & W. 882. *Snook v. Mattock*, 5 Ad. & E. 248. Unless the conduct of the plaintiff in error be vexatious, or intended merely for delay. *Christie v. Richardson*, 3 T. R. 78. *Hanbury v. Guest*, 14 East, 401; Cowp. 72. And in general terms will be imposed according to the justice of the case. *Bicknell v. Longstaffe*, 6 T. R. 455. *Smith v. Shepherd*, 5 T. R. 9. *Abraham v. Pugh*, 5 B. & Ald. 903. *Doe d. Wight*, 10 Ad. & E. 763. *Sayer v. Herbert*, 6 P. N. R. 946. *See* 27 L. J. Ex. 426.

[3] Matters which show that the *present* action cannot be sustained must be pleaded in *abatement;* those which show that no action can be supported *at all*, in bar. *Evans v. Stephens*, 4 T. R. 224. Hence, that one of several plaintiffs is jointly liable with defendant, is in *bar*. *Mainwaring v. Chatteris*, 2 B. & P. 120; 2 Ch. R. 539: and that defendant is jointly liable with another person, in *abatement*. *Nowland v. Geddes*, 1 East, 634. In the former, the plea shows that the action is not sustainable at all; in the latter, it may be on joining the omitted party.

The effect, therefore, of pleas of this description, when successfully pleaded, is, that the particular action is defeated, but the right of suit itself is not extinguished, and the plaintiff may resort to a new action when the disability or objection pointed out is removed.

A plea in abatement is not an *issuable* plea. 1 Burr. 59; Barnes, 263.

The following is the order in which these pleas must be pleaded:—

I. Plea to the Jurisdiction (Co. Lit. 303 a), excepts to Court's right to entertain the action, 1 Q. B. 667; 16 C. B. 328; 5 C. B. N. S. 699.

II. Plea in Abatement.

1. To the Person of the Plaintiff.
2. „ „ Defendant.
3. „ Count.
4. „ Writ for matter appearing on the face of it.
5. „ Writ for matter *dehors*.
6. „ Action of the Writ.

III. Plea in Bar (Co. Lit. 303 a; Com. Dig. Abatement, c. *Longueville v. Thistleworth*, Ld. Raym. 970).

In this order the defendant might plead all these kinds of pleas successively. Thus, he might first plead to the jurisdiction, and upon judgment of *respondeat ouster* thereon he might resort to a plea to the disability of the person, and so to the end of the series. But he cannot vary the order, and by pleading one he is taken to waive all prior pleas in the series. Steph. Pl. 4 ed. 462, 463.

In Scotland, preliminary and dilatory pleas are pleaded along with, and at the same time, as pleas peremptory. Pater. *Comp.* 1073.

West v. Sutton, K. B. 2 Lord Raym. 853; 1 Salk. 2; Holt, 3, S. C.

Matter of disability which might have been pleaded to the action, not pleadable to a *scire facias* on a judgment.

The plaintiff had sued out a *scire facias* upon a judgment in assize, obtained against the defendant for the office of Marshal in the King's Bench. The defendant pleaded in abatement that the plaintiff was an alien enemy, &c.

Per Cur. The plea is ill, because this matter ought to have been pleaded to the original action; for the plaintiff having been admitted to be able to recover judgment, he cannot be disabled from having execution upon it by matter precedent to the judgment. A *respondeas ouster* awarded. *See* Co. Litt. 303; 1 Sid. 182; Comb. 186, 311; Ca. Temp. Hard. 237; Cowp. 728; 2 Stra. 1043.

Cantwell v. Earl of Stirling, C. P. 8 Bing. 174; S. C. 1 M. & Scott, 297.

A statement which can be rejected as surplusage, cannot be made the subject of a plea in abatement.

To an action on a bill of exchange, the defendant pleaded in abatement that he was sued as a peer, and also "as having privilege of Parliament." On demurrer to the plea, the Court said, the defendant complains of a misstatement in what is mere matter of addition; but, to sustain this objection, it should appear that the addition in question is material; for it is laid down in Com. Dig. Abatement, F. 22, "If the defendant be named A. B. of P., he may say that he is A. B. of D., and not of P. So if he be named A. B., smith, he may say he is A. B., carpenter, and not smith. But if the addition be immaterial, a mistake cannot be pleaded in abatement: as in an action against A. B., citizen, of Y., one of the company of M., it is no plea that he was not of the company. These are cases of mere idle description, the name of itself being sufficient to distinguish the defendant. In like manner, and for the same reason, we may throw out of the declaration here the words, 'having privilege of Parliament.'"[1]

(C) *What cannot be pleaded in Abatement.*

Bowler v. Spathurst, C. P. 1 Lutw. 14.

That which is bad on the face of the plaintiff's own pleadings need not be pleaded in abatement.

Declaration in *assumpsit* for work and labour. Plea, *auter action pendent*, on a writ directed to the sheriff of Wilts, with an averment that both suits are for the same cause. Replication, admitting the first writ, but alleging that no proceedings were had upon it, and that another writ of the same date was sued out, directed to the sheriff of Southampton. Demurrer and joinder on demurrer.

Per Cur. The replication cannot be supported, for the *venue* is laid in Middlesex, and the plaintiff by his replication confesses that the writ to which the defendant has appeared, and on which the plaintiff has declared, was directed to the sheriff of Southampton, which cannot be correct, for the action is laid in Middlesex. By the allegation that the appearance of the defendant was on a writ directed to the sheriff of Southampton, the plaintiff has of his own showing falsified his writ. Judgment was given that the writ should abate. *See* 11 Ass. Pl. 9; 4 Edw. 4, 32; 3 Co. 16; 1 Rol. 176; Hob. 281; Cro. Car. 272.

Anon. K. B. 3 Salk. 1. Owen v. Butler, K. B. 1 Ld. Raym. 345; Comb. 483, S. C. Barber v. Palmer, K. B. 1 Ld. Raym. 693; 1 Salk. 178; 12 Mod. 539, S. C. Hackett v. Tilly, 2 Lord Raym. 1207.

Matter in bar cannot in

An administrator brought an action of debt on a bond; the defendant

[1] Any irregularity in the proceedings formerly available by plea, could only be so by plea in abatement. *Harding v. Salkill*, 1 Salk. 296; *Nowlan v. Geddes*, 1 East, 634; *Warmsley v. Macey*, 5 B. Moore, 168.

general be pleaded in abatement.

pleaded in abatement that administration was granted to another. Demurrer and joinder.

Per Cur. Defendant must answer over, for matter in bar cannot be pleaded in abatement. See *Facquire v. Kynaston*, Ld. Raym. 1249. Also see *Major v. Birde*, 1 Mod. 214; S. C. Freeman, 208; 1 Mod. 250.

HARECOURT v. HASTINGS, K. B. 3 Salk. 19.

No advantage can be taken by plea in abatement of a demurrable defect.

In an action of *assumpsit* the defendant pleaded in abatement that the declaration was uncertain, and in other respects defective.

Sed per Cur. It shall not be allowed for the defendant to take advantage of any errors apparent in the declaration under a plea in abatement: he ought to demur. Judgment, that he answer over.

DOCKMINIQUE v. DAVENANT, 1 Salk. 220; 6 Mod. 198.

And if it be so pleaded, final judgment will be given.

Per Cur. If a defendant demur in abatement, the Court will, notwithstanding, give a final judgment, because there cannot be a demurrer in abatement; for if the matter be extrinsic, the defendant must plead it; if intrinsic, the Court will take notice of it themselves. *See* 1 Show. 91.

(D) *A Plea in Abatement by one abates the Action as to all.*[1]

VI. WITHIN WHAT TIME MUST BE PLEADED.

(A) *Must be pleaded within four days.*[2]

RYLAND v. WORMALD, Ex. 2 M. & W. 393; S. C. 5 D. P. C. 581.

Sunday, if the last day, is not calculated in the computation.

The declaration was delivered on the 8th March. On the 13th (12th being Sunday) defendant pleaded in abatement. On that day the plaintiff signed judgment, contending that such pleas were not within the R. H. 2 Wm. 4, r. 8; but the Court held that the time for pleading was extended by the rule, and that it did not apply merely to pleas in bar. See *Jennings v. Webb*, 1 T. R. 277. *Long v. Miller*, 2 Stra. 1197. *Infra*, p. 29, n. 9.

SOWTER v. DUNSTON, K. B. 1 M. & R. 508.

Under special circumstances, the time has been extended.

In this case two actions had been brought; in one, the plaintiff withdrew the record, and in the other the plaintiff was nonsuited. A third being now brought, the defendant, after plea, made an affidavit, disclosing the above facts, and stating that the first and third actions were for one and the same demand, and that if defendant was liable at all to the demand of the said plaintiff, it was jointly with Dunston, Richards, Moore, Verbeke, and divers other persons.

Per Cur. Such a defence is by plea in abatement, and the defendant might have special leave to plead the non-joinder after the four days, if any oppression had been shown, by affidavit to the Court.

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[1] *Staples v. Haydon*, 2 Ld. Raym. 922.

[2] As the C. L. P. Act, 15 & 16 Vic. s. 63, giving a defendant eight days to plead, only relates to pleas in bar, and not to pleas in abatement, the latter must be pleaded as heretofore, within four days, exclusive of the delivery or filing of the declaration. And if the defendant plead, either wholly or in part, in abatement, after the time above mentioned, without the leave of the Court or a Judge, the plaintiff may treat the plea as a nullity, and sign judgment at the expiration of the time allowed for pleading in bar. *Brandon v. Payne*, 1 T. R. 689; R. E. 5 a; *Martindale v. Harding*, 1 Ch. 716; *Nolleken v. Severn*, 1 Dowl. 320. The plea must be pleaded within the four days, though no notice to that effect has been indorsed on or delivered with the declaration. Anon. Ca. Pr. C. P. 23. *Biddleston v. Atcherley*, id. 63. The plaintiff by keeping the plea does not waive the irregularity of its having been delivered too late, or by its retention recognise its validity. *Garratt v. Hooper*, 1 D. P. C. 28, *qu.? Graham v. Ingleby*, 1 Exch. 651. *See post*, p. 29, n. 9.

(B) *Not before Appearance.*[1]

(C) „ *Declaration.*[2]

(D) *After Bail put in.*[3]

(E) „ *Imparlance.*[4]

(F) „ *Oyer.*[5]

(G) „ *a View.*[6]

(H) „ *last Continuance.* *See* Puis darreign continuance.

(I) *Not after, or with a Plea in Bar.*[7]

(J) *Time for computed, exclusively of the first Day, and inclusively of the last.*[8]

VII. Particular Qualities of.

(A) *Must give Plaintiff a better Procedure.*

Smith v. Mason, 2 Stra. 816; S. C. Lord Raym. Mason v. Russell, 2 Lord Raym. 1178. Horsepool v. Harrison, 1 Str. 556.

A plea in abatement must invariably give the plaintiff a better writ or declaration.[9]

The defendant was sued by the addition of gentleman, and pleaded in abatement that he was a merchant, and not a gentleman. On demurrer to the plea a *respondeat ouster* was awarded, for the plaintiff has his election to sue him either by his name of degree or mystery, and the plea in abatement should invariably give the plaintiff a better writ, and ought therefore to describe the addition by which he is to be sued. *See* 4 Edw. 3, 137; 10 Edw. 3, 497; 5 Edw. 3, 144, 184; Yelv. 112; 1 Stra. 192; Cowp. 172; 4 T. R. 227; 8 T. R. 515; 2 B. & P. 125; 5 Taunt. 653; 1 East, 634; 6 East, 600; Bac. Abr. Misnomer, F.; 1 Saund. 274, n. 3; 285, n. 4.

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[1] The defendant must enter an appearance before he can be allowed to plead. *Saunders v. Owen*, 2 D. & R. 252; *Wakefield v. Marden*, 2 Ch. 8.

[2] Such plea cannot be delivered before plaintiff has declared. *Doug. v. Green*, 2 Ch. 7; *Bowyer v. Kemp*, 1 Dowl. 281, 1 C. & J. 287. Nor if the declaration has been filed before it has been delivered out of the office. *Bond v. Smart*, 1 Ch. 735; *Douglas v. Green*, 2 Ch. 7; *White v. Dent*, 1 B. & P. 341.

[3] Before the 1 & 2 Vic. c. 110, he must have put in bail, but now he may plead without any reference to bailable (collateral) proceedings. 2 Arch. *Pr.* 870.

[4] Imparlances are now abolished. 2 Wm. 4, c. 39, s. 11; R. 31; T. T. 1853.

[5] Oyer is abolished by C. L. P. Act, 15 & 16 Vic. c. 76, s. 55.

[6] After a view the defendant cannot plead in abatement anything that does not arise upon the view. *Dwyhurst v. Batt*, 3 Lev. 219.

[7] A plea in abatement cannot be adopted after a plea in bar to the merits, nor can it be pleaded with the latter except under very exceptional circumstances, and the granting the indulgence essential to the attainment of justice. Lush. *Prac.* 327.

[8] The four days are to be reckoned exclusively of the first day and inclusively of the last, unless the last day shall happen to fall on a Sunday, Christmas Day, Good Friday, or a day appointed for a public fast or thanksgiving, in which case the time shall be reckoned exclusively of that day also. R. 174, H. T. 1853. The statute and R. H. T. 1853, r. 9, as to pleading between the 10th of August and the 24th of October, are applicable to pleas in abatement as well as in bar. *See* also *Sowter v. Dunston, ante*, p. 28; *Milner v. Milnes*, 3 T. R. 627. The time is very rarely extended beyond the prescribed limit, though where an action is brought by a *feme covert* alone, for a debt or other cause of action which accrued to her *dum sola;* here, as it has been held that the husband may avoid paying costs by bringing error (if the verdict go against the wife), the courts would probably give the defendant time to plead the coverture of the plaintiff in abatement, unless the husband undertook to pay the costs in such an event, and not to bring error in his own name. *Milner v. Milnes*, 3 T. R. 627.

[9] That is, it must state all such matters as may be necessary to enable the plaintiff to amend his proceedings, or frame them more correctly in future; it is designed to suggest errors in procedure, not to defeat legal rights. *Godson v. Goode*, 6 Taunt. 587; and see 14 M. & W. 11.

OWEN v. BUTLER, 1 Ld. Raym. 345; Comb. 483, S. C.

And should show that plaintiff may have another action.

In debt on bond oyer was craved; and from the condition it appeared that the defendant stipulated to pay three sums of money on three several days. The defendant pleaded in abatement that he had paid the two first instalments, and that the last payment was not yet due.

Per Cur. It should always appear from a plea in abatement that plaintiff may have another action. Judgment, that defendant answer over. *See* 1 Wils. 80; 1 Mod. 214.

(B) *Must be certain to every Intent.*[1]

(C) *May be to the whole or part of the Declaration.*

AYLWOOD v. WOOLLEY, 10 Mod. 286.

A plea in abatement should answer the whole declaration.[2]

An action was brought in the Common Pleas on three several promises, the first for 55*l.*, the second for 65*l.*, and the third for 65*l.* The defendant pleaded as to part *non assumpsit*, and as to part in abatement: thus, viz. as to 50*l.* of the first promise, 60*l.* of the second, and 60*l.* of the third, and prayed that the writ might be quashed, because there were three actions depending in the Court of Exchequer for the same sums. Judgment of *respondeat ouster* was given in the Common Pleas.

The Court of King's Bench, upon error brought, were of opinion that the judgment ought to be affirmed, as a plea in abatement must go to the whole and not to part of the declaration, and the three suits pending in the Exchequer might have been pleaded in bar of the whole. *See* 11 Co. 456; 1 Saund. 285 n; 2 id. 210; Ca. Temp. Hard. 273.

HILL v. WHITE & ANOTHER, 8 Dowl. 13; 8 Scott, 245; 6 B. N. C. 26.

A defendant may plead

Tindal, C. J. "This is an action of assumpsit for work and labour as an attorney, which is brought against two defendants; and they plead in abate-

[1] A plea in abatement must be certain to every intent and the matter be stated with precise exactness. *Cheetham v. Sleigh*, 3 Lev. 67; Co. Lit. 303; Willes, 42, 3 T. R. 186; Com. Dig.; 2 Saund. 209, b. n. *Marshall v. Barnet*, 1 Lutw. 15 n.; 1 Show. 394; 5 T. R. 487. The strictest adherence to form is required. 3 T. R. 185; 5 id. 485. The primary rules to be observed in framing these pleas are, that they must embody some sufficient matter of law, or matter of record, or matter of fact; they must be single, precise, and certain, exempt from repugnancy, confer on the plaintiff a better writ, and conclude in a manner technically correct: for if a plea which contains matter in abatement only, inartificially conclude *in bar*, final judgment will be given; for, by concluding as in bar, the defendant admits the writ to be valid; but upon pleas in bar a contrary rule obtains, as the Court will give such judgment as appears to them to be proper, upon consideration of the whole of the record. *See* 10 East, 87; 1 B. & A. 172; 1 Salk. 297; 3 T. R. 185. But *quære*, whether as special demurrers are now abolished (C. L. P. Act, 1852, s. 51), the same degree of exactness is required?

[2] As a writ is divisible, and may be abated in part and remain good as to the residue, it must not be inferred from the above rule that a plea in abatement must invariably be pleaded to the whole declaration; for the defendant may plead in abatement to a part of the declaration, and plead another plea in abatement as in bar to the residue; or one of several defendants may plead in abatement, and the others in bar. The meaning of the rule is, that the whole matter of complaint alleged in the declaration must be answered by the plea or pleas pleaded, or the omission will amount to a discontinuance of the whole. *See* Co. Litt. 303 a; Steph. on Pl. 302 n. 6 ed.; Com. Dig. Plead. R. 9; 1 Saund. 264 n. The principle has been thus illustrated: If the plaintiff in his action, brought either upon a general writ, such as debt, detinue, account, or the like; or on a certain and particular one, as *assumpsit*, trespass, case, &c., demand two or more things, and it appears from his own showing that he cannot have an action or better writ for one of them, the writ shall not abate in the whole, but stand for so much as is good; but if it appears upon his own showing that he has a cause of action for all the things demanded, but the writ is not proper for one of them, and that he might have another in another form, for that then the whole writ shall abate, 2 Saund. 210 a. n.; 1 Chit. Pl. 444. 3d edit.; 5 T. R. 553; 6 Bing. N. C. 26. When both kinds of pleas are pleaded to separate parts of the declaration, they must be pleaded within the four days.

ment to the whole writ, and allege that the contracts mentioned in the declaration were made by the defendants jointly with others, and not by the defendants alone; on which issue is joined, and the parties go down to trial. The question is, whether when it is proved, that some contracts were made between the defendants and others jointly, but that others were made, not jointly with those other persons, but with the defendants alone, the plaintiff has a right to recover upon them? And it appears to me that the defendants have failed in their plea, and that the plaintiff is entitled to recover. There is no doubt on the old authorities that where there are several counts the defendants may plead in abatement as to some of them; and now there is no reason why, when the count is divisible, the same rule may not be adopted."[1]

in abatement to part of the amount, and in bar to the residue.

(D) *Must not be in Bar and in Abatement to the same matter.*[2]

(E) „ *double.*[3]

VIII. Formal Parts of.

(A) *Day of Pleading.*[4]

(B) *Commencement of Plea, Prayer of Judgment, and Conclusion of Plea.*[5]

(C) *Signature of Counsel.*[6]

IX. The Statute 4 Anne, c. 16, s. 11, requires an Affidavit.

(A) *Always requisite.*

By 4 Anne, c. 16, s. 11, "no dilatory plea shall be received in any court of record, unless the party offering such plea do, by *affidavit*, prove the truth thereof, or show some probable matter to the Court to induce them to believe that the fact of such dilatory plea is true." *See* also *Davidson v. Chilman*, 1 Scott, 117; 3 Dowl. 129; 1 B. N. C. 297. *Styles v. Mead*, 2 Str. 738. *Cuningham v. Johnson*, Say. 19; Pr. R. 5.

By stat. 4 Anne, c. 16, s. 11, all pleas in abatement must be verified by affidavit.

Rex v. Grainger, 3 Burr. 1617.

On a motion to set aside defendant's plea to an indictment, and that judgment might be entered against him by default, as the prosecutor had, in consequence of the plea in abatement, lost the benefit of trial at the sittings after

And this extends to criminal as well as civil proceedings.

[1] *See* also *Herries v. Jamieson*, 5 T. R. 553; *Powell v. Fullerton*, 2 B. & P. 420.

[2] A defendant cannot plead in bar and in abatement at the same time to the same matter. *Holt v. Mabberley*, Ca. Temp. Hard. 135; 1 Com. Dig. Abatement, i. 5.

[3] A plea in abatement was bad for duplicity. 1 Show. 80; S. C. Holt, 543. As the C. L. P. 15 & 16 Vic. c. 76, s. 51, abolished special demurrers, this objection, as well as the preceding one, can, it would seem, only afford ground for application to set the plea aside as tending to embarrass.

[4] Title of the term is no longer necessary, as by C. L. P. Act, 1852, s. 54, all pleadings must be entitled of the proper Court, and of the day of the month and year when pleaded.

[5] The provisions of the C. L. P. Act, 15 & 16 Vic. c. 76, s. 66, 67, as to the commencement and conclusion of pleas, do not apply to pleas in abatement, and the prayer of judgment hitherto used is still necessary. No doubt the prayer of judgment was necessary before the act. *Davies v. Thomson*, 14 M. & W. 161; 3 D. & L. 49; *Whitling v. Desange*, 3 C. B. 910; 4 D. & L. 678. *See* Chitty's *Forms*, 8 ed. p. 437, n. b. *Sed qui non?* special demurrers being abolished.

A plea beginning and ending in abatement is in abatement, though its subject-matter be in bar. *Godson v. Good*, 6 Taunt. 587; 2 Marsh. 299. But a plea ending in bar is in bar, though its subject-matter is in abatement. *Nowlan v. Geddes*, 1 East, 634.

Precedent. In the The
F. *v.* } day of A.D. The de-
B. } fendant, by G. H. his attorney [or in person], prays judgment of the writ and declaration herein, and that the same may be quashed, because he says [here state the substance of the plea and conclude] and this the defendant is ready to verify; wherefore he prays judgment of the said writ and declaration, and that the same may be quashed, &c.; or if to disability of the party, "if the plaintiff ought to be answered to his said declaration." Co. Litt. 124 a.

[6] The signature of counsel is no longer required. C. L. P. Act, 16 & 17 Vic. c. 76, s. 85.

term, the objection taken was, that "the plea was a dilatory one, and not verified by affidavit;" nor had any probable matter been shown to the Court to induce them to believe that the fact stated in it was true.

Per Cur. It is usual to annex affidavits to pleas of this description in the Crown Office, and we do not see why they should not be annexed. *Rule absolute for setting aside the plea.*

(B) *By whom to be made.*[1]

(C) *At what time to be made.*[2]

(D) *Forms and Requisites.*

Rex v. Jones, 2 Stra. 1161.

The affidavit must be properly entitled in the cause.

A plea in abatement to an information in the nature of a *quo warranto* was set aside, because the affidavit of verification was not entitled.

Prince v. Nicholson, C. P. 1 Marsh. 70; S. C. 5 Taunt. 333.

An affidavit, however annexed to a plea, refers to the plea, and therefore need not be entitled in the cause.[3]

This was an action against an executor for goods sold and delivered to the testator. The defendant in Trinity Term had pleaded *non assumpsit*, and at the trial had tendered a plea *puis darreign continuance*, stating that a judgment had been recovered against him as executor in a plea of debt for money borrowed by the testator in his lifetime. It was objected that the plea could not be received, as the affidavit to verify it was not entitled in the cause.

Per Cur. There was no occasion to entitle the affidavit at all, although it has been directed generally that every affidavit shall be entitled of the cause, in order that it may be identified in cases where it becomes necessary to bring an action or indict for perjury; yet that can make no difference in the present case, because the affidavit is annexed to the plea, and refers therefore to the title of the plea as if it were incorporated with it. *See* also *Richards v. Pettree*, 3 Price, 197.

(E) *Consequences of there being no Affidavit, or of its being defective.*

Lovell v. Walker, 9 M. & W. 299; 1 Dowl. N. S. 5, 952.

If the plea be delivered without an affidavit, plaintiff may treat it as a nullity.

Debt by payee against acceptor and for goods sold, work and labour, and on account stated. Defendant pleaded to first two counts in coverture for abatement, and to the third as never indebted. The plea in abatement not being accompanied by an affidavit of verification, the plaintiff signed judgment as for want of a plea:—*Held*, that the judgment was regular.

Onslow v. Booth, Sayer, 19; S. C. 1 Str. 705; S. C. Fort. 341.

So if the affidavit be defective.

In this case a plea of privilege was set aside, although it was sworn gene-

[1] It may be made by the defendant, or by a third person. Pr. Reg. 5, 6; *Lumley v. Foster*, Barnes, 343; 1 Ch. 58; 2 Saund. 211 f.

[2] It must not be sworn before the declaration is delivered. *Bower v. Kemp*, 1 Dowl. 281; 1 C. & J. 287; S. C. 1 Tyr. 260; *Johnson v. Popplewell*, 2 C. & J. 544; 2 Tyr. 715. But where it was sworn in Liverpool the day the declaration was filed in London the Court held it sufficient. *Lang v. Comber*, 4 East, 348; *Basket v. Barnard*, 4 M. & S. 332; *Poole v. Pembry*, 1 Dowl. 693.

[3] It is, however, usual and safest so to entitle it. Arch. *Pr.* 10 ed. p. 87. And it must be entitled in the Court; and if there be any mistake, such as entitling in the wrong Court, or mistaking, or transposing the parties' names, it would seem that the plea would be set aside, and the defendant compelled to plead issuably on the usual terms. *Dobben v. Wilson*, 3 N. & M. 260.

The following is the form. It must be delivered with the plea:—

In the between A. B. plaintiff, and C. D. defendant.

I, C. D., of, &c., the defendant in this cause [or, "I, X. Y., the attorney of the above-named defendant,"], make oath, and say [or, "that I am advised and verily believe,"], that the plea hereunto annexed is true in substance and fact.

rally that the plea was bad, because it was not sworn that the particular facts alleged therein were true. *See* also 2 Ld. Raym. 1409; 1 Stra. 639; 1 T. R. 277, 689; 5 T. R. 210; 7 T. R. 298; 4 East, 348. *Johnson v. Popplewell*, 2 C. & J. 547. *Davidson v. Chilman*, 1 B. N. C. 297. *Davidson v. Watkins*, 3 Dowl. 297; 4 East, 348.

MAYBURY v. MUDIE, 5 C. B. 283; 5 D. & L. 360.

Debt for work and labour, and on an account stated. Defendant pleaded in abatement non-joinder of several co-contractors, describing two of them as follows:—"One, J. E. B., who is still living, and who, at the time of the commencement of this suit, was, and still is, resident within the jurisdiction of this Court, to wit, at *Bath*, in the county of *Somerset*;" and "one, R. D., who is still living, and who, at the time of the commencement of this suit, was, and still is, resident within the jurisdiction of this Court, to wit, at 89 Leadenhall Street, in the City of London."

Or it may be set aside on motion if untrue.

The affidavit verifying the plea stated, that deponent verily believed that "the said J. E. B. mentioned in the said plea resides at *Bath*, in the county of *Somerset;* and that the said R. D. mentioned in the said plea resides at No. 89 Leadenhall Street, in the City of London." A rule *nisi* was granted to set aside the plea and affidavit, on the ground that the above places of residence were not correctly given:—*Held*, that upon a careful revision of the cases, the affidavit must state the true place of abode of the parties when non-joinder is objected to; and that whether it does so or not, is a matter that may be controverted and determined by the Court on motion.

FLETCHER v. LECHMERE, 2 D. N. S. 848; S. C. 5 M. & G. 265.

Defendant had pleaded in abatement his privilege, as an attorney of the Court of Queen's Bench, which was verified by affidavit. The plea was entitled, "Lechmere ats. Fletcher, administratrix," &c.; the affidavit stated the cause to be "between Sophia Fletcher, administratrix, &c. plaintiff, and William Lechmere, defendant." It was submitted this was bad, without specifying the name of the person of whose estate the plaintiff was administratrix, and a rule *nisi* was granted to set aside the plea and affidavit:—*Held*, that as the plaintiff might have very different powers entrusted to her, according as she might claim by one right or another, that the affidavit must be held to be badly entitled. *See* also *Poole v. Pembery*, 1 Dowl. 695. *Wheatly v. Golney*, 9 Dowl. 1019. *Lambe v. Smythe*, 15 M. & W. 433; S. C. 3 D. & L. 712. *Newton v. Stewart*, 4 Dowl. & L. 89; 15 L. J. Q. B. 384; 1 Str. 638; Say. 19; 3 Burr. 1617; 2 Moore, 213; 2 B. & C. 618.

Or if it be in any other respect insufficient, or wrongly entitled.

PHELPS v. LEWIS, Excheq. Forr. 144.

To a *scire facias* against heir and ter-tenants of the recoveree, the defendant pleaded that there were other ter-tenants who were not returned, and prayed judgment "if he ought to be compelled to answer the said writ of *scire facias;*" but no affidavit in verification of the plea was annexed, and the plaintiff signed judgment as for want of a plea. A rule *nisi* to set aside the judgment was obtained. The Court (after argument, in the course of which it was suggested that, even if the plea required an affidavit, permission might be given to the defendant to enable him to make one, notwithstanding judgment had been signed) said, that when the plaintiff is delayed by the plea, it must be verified in a more solemn manner than in other cases. The defendant cannot be permitted to do that in this stage of the cause, as the plaintiff is now entitled to his judgment; and when the defendant applies to set aside a regular judgment, he must lay sufficient grounds.

And the Court will not afterwards permit the defendant to make another affidavit, or correct an imperfect one.

X. Amendment of Pleas in, not allowed.[1]

XI. Effect of a Plea in Abatement.[2]

Rich v. Pilkington, Carth. 171.

The defendant cannot on demurrer to a plea in abatement take exception to the declaration.

Action on the case for a false return; plea in abatement; demurrer to plea and joinder, the plea having been held bad; counsel for defendant proposed to except to the declaration.

Sed per Cur. After the defendant has pleaded in abatement, instead of demurring to the declaration, he cannot be allowed to avail himself of any defect in the latter. *See* 1 Salk. 212; 2 Lutw. 1592; Willes, 478.

Dundalk Western Railway Comp. v. Tapster, 1 Q. B. 667; 1 Gale & D. 657.

But he may do so if the plea demurred to be in substance a plea in bar.

Debt for calls in a company formed under statute 1 Vict. c. 96. *Plea*, that this Court ought not to have cognizance of the action, because a remedy was given in the statute for the directors to sue for calls in any of the Queen's Courts of Record in *Dublin*. Verification and prayer of judgment if the Court ought to have further cognizance.

Held, that the right and the remedy were both created by the Legislature, and that the company were bound to pursue the remedy provided by it. The plea is in substance, though not in form, a plea in bar; and the objection to the declaration may, therefore, be taken advantage of upon this record.

Osborne v. Haddock, Barnes, 257.

After plea in abatement, plaintiff, without leave of the Court, may enter a *nil capiat per breve*, and bring a new action.[3]

After the defendant had pleaded in abatement, the plaintiff, without leave of the Court, entered a *nil capiat per breve*, and then brought a new action. The Court held the proceedings to be regular, but said that a different rule applied to pleas in bar. *See* Bac. Abr. Abatement, M.; 3 Anst. 934; 1 B. & P. 40; 7 T. R. 698.

Knight's Case, 1 Salk. 329; S. C. 2 Ld. Raym. 1014; Holt, 255.

But the plaintiff cannot, after a plea of the pendency of a prior suit, evade its effect by discontinuing the first action.

Case against Besaliel Knight by a wrong name. The defendant pleaded in abatement: the plaintiff, without proceeding further, brought a new action against the defendant by his right name, to which he pleaded another action pending. *Et per Holt, C. J.*— The plaintiff should have discontinued the prior action; it will be too late to do it now, for the discontinuance will relate only to the time of its being entered on record, so that upon a *nul tiel record* it will be against him, for it was pending at the time of the plea pleaded.

XII. Replications to Pleas in.

(A) *Form*[4] *and Requisites of in general.*

Bisse v. Harcourt, 3 Mod. 281; S. C. 1 Salk. 177; 1 Show. 98; S. C. cited Lord Raym. 339, 1053.

A replication confessing and avoiding the

The plaintiff brought an action against the defendant for money had and received. The defendant pleaded an attainder of high treason in abatement,

[1] Pleas in abatement are not allowed to be amended, as they are dilatory, and do not go to the merits of the action. *Dockary v. Lawrence*, Ca. Pr. C. P. 29; 2 Ch. R. 5.

[2] Is to enforce technical accuracy in procedure.

[3] Or, in case of a non-joinder, he may amend the writ, and proceed as *ante*, p. 20.

[4] In the B. *v.* F. } The day A.D. The plaintiff says that the said writ and declaration ought not to be quashed, because he says [here state the denial in the terms of the plea traversed, or the new matter in confession and avoidance, and conclude]; and this the plaintiff prays may be inquired of by the country [or, if the answer be by way of confession and avoidance, "and this the plaintiff is ready to verify; wherefore he prays judgment, if the said writ and declaration ought to be quashed."] Replications and subsequent pleadings to dilatory pleas must be by demurrer, traverse, or confession and avoidance, and require, it seems, no special commencement or conclusion.

and consequently ought not to be compelled to answer the declaration. The plaintiff replied, that after he was attainted, and before this action brought, he was pardoned, and concluded thus, *unde petit judicium et damna sua.*

The defendant demurs, and stated for cause that the replication was improperly concluded, as the words *damna sua* ought not to have been inserted.

And of that opinion was the Court, and a rule was made that he might be at liberty to discontinue the action without costs.

Facts in the plea should not conclude with a demand of damages.

Bonner v. Hall, K. B. 1 Ld. Raym. 338; S. C. Comb. 479; differently reported in Carth. 433; Holt, 557; S. P. Medina v. Stoughton, 1 Ld. Raym. 590; S. C. 2 Salk. 210. Crosse v. Bilson, 2 Ld. Raym. 1016.

Assumpsit, plea in abatement that another action was pending in the C. P. for the same cause. The plaintiff replied, negativing that fact, and concluded *petit judicium de debito et damnis.* Demurrer and joinder.

Per Holt, C. J. When a plaintiff takes issue upon a plea in abatement, he ought to pray judgment for damages; for if it be found against the defendant, final judgment will be given. But when the plaintiff confesses and avoids the plea he cannot pray damages, but must maintain his writ.

Though when a plaintiff takes issue on a plea in abatement, he ought to pray judgment of his damages.

Bisse v. Harcourt, 1 Salk. 177; 3 Mod. 281; 1 Show. 98; Carth. 126. Bonner v. Hall, 1 Ld. Raym. 338.

The defendant pleaded an attainder of high treason. Plaintiff replied a pardon *et petit judicium et damna sua;* to which defendant demurred, and the Court determined that the improper conclusion of the replication created a discontinuance, and that an ill prayer of judgment renders the plea a nullity. *See* Say. 46.

If the replication prays a judgment which the Court cannot give, it will create a discontinuance.

Sabine v. Johnstone, C. P. 1 B. & P. 60.

To a plea of misnomer in abatement of the writ the replication prayed that the said declaration ought not to be quashed, as the defendant was and is known by the one name as well as by the other; concluding to the country. Special demurrer for not showing any reason why the said writ should not be quashed. Joinder in demurrer.

Per Cur. Both the plea and replication are good. The replication is an answer by matter of fact, and not by matter of law. If that fact had been tried and found for the defendant, the judgment would have followed the prayer of the plea. The prayer of judgment at the beginning of the replication is surplusage. Judgment for plaintiff.

But *quære* the effect of these decisions, if special demurrers are abolished as to pleas in abatement. *See ante*, p. 31.

A replication to a plea in abatement of the *writ*, beginning, "that the said declaration ought not to be quashed," is sufficient.

(B) *To Plea of Alien-Enemy.*

Richfield v. Udal, C. P. Carter, 48.

The plaintiff brought an action of debt as executor of A. C. The defendant pleaded that the plaintiff was an alien, of the United Provinces in enmity against the king. The plaintiff replied that he ought not to be barred of having an answer; for that before the purchase of the writ he was made a denizen by letters patent, concluding with a verification. To this replication the defendant demurred; and on argument, the validity of the replication was admitted. *See* 9 E. 4, 76; 3 H. 6, 55 a; 1 Com. Dig. Abatement, E. 4.

The plaintiff may reply that he was made denizen by letters patent.

Nichols v. Pawlet, K. B. Carth. 302; S. C. 4 Mod. 285, S. P. Freeman v. King, Sid. 357.

The defendant pleaded in abatement that the plaintiff was an alien-enemy,

Or that he was born with-

in the ligeance of the king, stating the place of his birth.

born in a certain place in France. The plaintiff replied that he is *indigena* and *born* in a place described in the replication, and *non alienigena modo*, &c. and concluded to the country.

On demurrer the replication was holden ill, for the plaintiff did not rely upon the first part of it, that he was born in England, and concluded with an averment, so that issue might be taken by the other side, viz. that he was not born in England, and that the allegation might be triable with a proper *venue;* but here he had put alien or not alien in issue, which cannot be tried for want of a *venue.* Judgment, that the bill shall abate. *See* Co. Lit. 129 b; 6 Co. 47; 7 Co. 26; Carter, 50; 1 Leon. 78, 79; Precedents, Ra. Ent. 252, 605; Ast. 11; Herne, 361.

Wells v. Williams, C. P. 1 Salk. 46; 1 Lutw. 34; 1 Ld. Raym. 282. S. C.

Or that he is residing in this country by the license, and under the protection of the king.

If an alien-enemy comes to this country *sub salvo conductu*, he may maintain an action as an alien-*enemy* in time of peace, *per licentiam domini regis*, and resides here *sub protectione*, and a war arises between the two states, he may nevertheless maintain an action, for the capacity to sue is but a consequential right of protection. Calvin's case, 7 Rep. 16; Forts. 221; Co. Litt. 1296. Petersdorff's *Index*, 18.[1]

(C) *To Plea of Coverture.*

Pearson v. Hulse, 2 Lutw. 1638.

To a plea of the coverture of the plaintiff, the plaintiff may traverse the coverture.

In *assumpsit* by a *feme covert*, defendant pleaded that after the writ issued the plaintiff married H. Replication, that after suing out the writ she did not marry H. Demurrer and joinder.

In support of the demurrer, it was contended that it ought to have been alleged in the replication that she was *sole*, and then have traversed the marriage with H., so that issue could have been taken on the affirmative in the defendant's rejoinder.

Sed per Cur. It is the same in effect whether the issue be joined on the rejoinder or on the replication, for it is an affirmative and a negative to the plea and replication.

And an allegation that she did not take husband after the writ cannot be objected to.

It was submitted, that by the replication the time of the marriage had been made parcel of the issue, for it being alleged that after the purchase of the writ she did not take husband, the allegation was improper; for if she married even before the purchase of the writ, the suit ought to be abated.

Sed non allocatur: for the defendant by implication confessed that she was not married before the writ. Judgment for defendant. *See* Ast. Ent. 9, 10; Brownl. 203; 1 Com. Dig. Abatement, E. 6.

De Wahl v. Braune, 1 Ex. R. 178; S. C. 25 L. J. Ex. 343.

But to a plea that the plaintiff is a married woman, it is not a good replication that the husband is an alien-enemy.

Declaration by Ann De Wahl for breach of an agreement with her. Plea in abatement, that the plaintiff before the commencement of the suit was, and still is, married to one De Wahl, then and yet her husband, who is still living. Replication, that De Wahl was, and is, an alien-enemy, and that the cause of action accrued to the plaintiff within the realm of England; to wit, &c., while the plaintiff was a subject of our Lady the Queen, and residing in this country as a single woman, separate and apart from the said De Wahl:—*Held*, that whether the contract was entered into before or after marriage the husband ought to be joined, and it is no answer to say that he is an alien-enemy, and cannot sue. See *Stretton v. Busnach*, 1 B. N. C. 139. *Barden v. Keverberg*, 2

[1] These replications might have concluded either with a verification or to the country (*West v. Sultan*, 2 Ld. Raym. 853; 1 Salk. 2; Holt, 3. *Texel v. Hooper*, Comb. 394; Forts. 222): but it is conceived that now no conclusion is requisite. *See ante*, p. 31, and Steph. on Pl. 321, 6th ed.

M. & W. 61. *Williamson v. Dawes*, 9 Bing. 292; 1 Salk. 116; 1 Ld. Raym. 147. *Marshall v. Rutton*, 8 T. R. 545; 11 East, 301.

XIII. Demurrer to Plea.

Carter v. Davies, 1 Salk. 218; S. C. 1 Show. 147; Carth. 187; S. C. Bonner v. Hall, K. B. 1 Ld. Raym. 338. Lug v. Goodwin, K. B. 1 Ld. Raym. 393. Anon. 1 Wils. 302. Maynard v. Hopkins, Say. 46. Bowen v. Shapcott, K. B. 1 East, 542.

A demurrer concluding in bar to a plea in abatement occasions a discontinuance.

To an action of *assumpsit*, the defendant having pleaded the general issue to the first count, and in abatement to the others, the plaintiff demurred to the plea in abatement, concluding the demurrer in bar.

Per Cur. The plaintiff having demurred in bar where the plea is only in abatement, the suit is discontinued. But as issue had been taken on the other counts, the Court deferred proceeding on the demurrer, observing that the discontinuance would have been aided by verdict.

Anon. 1 Wils. 302.

The demurrer should pray that the defendant might answer over.

The defendant pleads in abatement that there is no such person as the plaintiff *in rerum natura;* the plaintiff replies that there is, viz. at Westminster. Defendant demurs. Plaintiff joins in demurrer, and prays judgment and his damages, which being in chief is incorrect; for it ought to be that he may answer over.

Per Cur. Let the proceedings be suspended, with leave to the plaintiff to move to amend on payment of costs. As to the proper prayer, *see* 2 Saund. 210 g, and precedents there referred to; and 1 Bac. Ab. Abatement, P.; 1 Com. Dig. Abatement, I. 15. Plaintiff cannot amend the demurrer except by consent. *Maynard v. Hopkins*, Sayer, 4; but it can be withdrawn. 2 Ch. R. 5.

Hastrop v. Hastings, 1 Salk. 212. Rich v. Pilkington, Carth. 171. Bellasyse v. Hester, Lutw. 672; Lutw. 1667. Ballythorpe v. Turner, Willes, 478.

On demurrer to a plea in abatement defendant cannot take advantage of a defect in the declaration.

In an action of *assumpsit*, the defendant pleaded in abatement, *et petit judicium de billa prædict' cassetur*, for uncertainty in the declaration. Upon demurrer, the defendant's counsel insisted upon several defects in the declaration. *Et per Cur.* The defendant cannot take advantage of mistakes in the declaration upon a plea in abatement; but if he would avail himself of them, he must demur to the declaration. A *respondeat ouster* was awarded. *See* 1 Bac. Ab. Abatement, P.; 1 Com. Dig. Abatement, I. 14; 1 Chit. Pl. 457, 3d ed.

Powis v. Williams, C. P. 2 Lutw. 683.

Except where the matter pleaded in abatement is pleadable in bar.

In an action of *assumpsit* by the plaintiff as executor, for money had and received, the defendant pleaded in abatement the outlawry of the testator. Demurrer and joinder. In the course of the argument, exception was taken to the declaration on account of some technical defect, and judgment was given for the defendant. The reporter introduces a *quære*, whether there is not a distinction between the present case and the decision in Bellasyse *v.* Hester (cited above)? because the outlawry was pleadable in bar. *See* 1 Com. Dig. Abatement, I. 14, in which this difference is recognised; and *ante*, p. 34.

Battersby v. Marsh, K. B. 6 Mod. 80.

Demurring to the plea is a confession of its truth.

The plaintiff in his bill styled himself a gentleman. Plea in abatement, that he was no gentleman; to which the plaintiff demurred.

Per Cur. The plea is good, being confessed by the demurrer.

WALDEN v. HOLMAN, 2 Ld. Raym. 1015; S. C. 6 Mod. 114; 1 Salk. 6; Holt, 492, 563.

Objection may be taken to defects in matter of form on general demurrer.[1]

The plaintiff declared against the defendant by the name of John, who pleaded in abatement that he was baptized by the name of Benjamin; *absque hoc idem Johannes* was ever known by the name of John; and the plaintiff demurred generally.

Per Holt, C. J. Matters of form may be taken advantage of on a general demurrer when the plea is only in abatement, for the stat. of Elizabeth (the language of the statute of 4 Anne, c. 16, is precisely similar) only means that matters of form in pleas which go to the merits of the action shall be aided on a general demurrer. Judgment, *respondeas ouster*. *See* 1 Salk. 194; 1 Ld. Raym. 337; 1 Tidd, 662, 7th ed. *Lloyd v. Williams*, 2 M. & S. 484.

XIV. TRIAL OF PLEAS IN.[2]

FOWLER v. COSTER, M. & M. 241. WADE v. BIRMINGHAM, 2 Ch. R. 5.

The defendant in an action on a bill of exchange, on a plea of non-joinder, has been permitted to begin;

This was an action on a bill of exchange, where the non-joinder of a joint-contractor was pleaded in abatement. *Lord Tenterden, C. J.*, permitted the defendant to begin, and said, "that the most convenient rule was, that, wherever it appears on the record, or by the statement of counsel, that there is really no dispute about the sum to be recovered, that the damages are either nominal, or mere matter of computation; then, if the affirmative is on the defendant, he is entitled to begin."

MORRIS v. LOTAN, 1 M. & Rob. 233.

but, unless the amount be admitted, the plaintiff is entitled.

Indebitatus assumpsit for goods sold. *Plea*, non-joinder of others as defendants. *Lord Denman, C. J.*, ruled that the plaintiff should begin; but that the defendants might do so by admitting the amount claimed.

WADE v. BIRMINGHAM, 1 M. & R. 111, n.

The trial of a plea in abatement will not be postponed at the request of the defendant.

After issue joined on a plea in abatement, a rule was obtained to show cause why the trial should not be postponed till the sittings after Easter Term, on an affidavit, stating that, in order to establish the defence, it would be necessary to bring witnesses from Ireland, and obtain much evidence from public records, parish registers, and other documents there, without which he was advised, &c. that he could not safely proceed to the trial of his cause; especially as this deponent was advised, &c. that he could not safely proceed to trial without the testimony of Sir William Betham, Knt., Ulster King-at-Arms.

Per Cur. Although there might be cases in which it would be reasonable to postpone the trial of a plea in abatement, yet that, in general, where a party

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[1] This affords a strong argument why the old forms should be adhered to in pleas of abatement. *See ante*, pp. 31, 36.

[2] As the plea raises a collateral issue, neither admitting nor denying the sum claimed or sought to be recovered as damages, the plaintiff should be prepared to prove the amount of loss or injury sustained, otherwise, though the issue be found for him, he will only be entitled to a nominal verdict (*Welcher v. Le Pelletier*, 1 Camp. 481), instead of substantial damages. Hence, when defendant pleaded her coverture to an action for goods sold, her counsel was permitted to begin, only on condition of admitting the delivery of goods to the amount claimed. *Lenen v. Higgins*, 3 Stark. N. P. 178. On the other hand, it has been sometimes held that the question of damage is a distinct inquiry, that never arises until the issue on the plea is determined; and that it ought not, therefore, to regulate the right to begin. *Jackson v. Hesketh*, 2 Stark. N. P. 518. Mr. Starkie (*Evidence*, vol. ii. p. 1) considers the order of proof to be discretionary with the Court; such discretion to be governed by a consideration of convenience in each case.

When the plaintiff is allowed to begin, he may, it seems, confine himself to proof of the damages, and reserve his case in reply to the plea. *Stansfield v. Levy*, 3 Stark. N. P. C. 8. *See* Best, *On Right to Begin, &c.*

If the jury omit to assess the damages, a *venire de novo* must be awarded: *post*, 39 n.

puts on the record a plea unconnected with the merits, he ought to be prepared with evidence to support it; and that the indulgence now prayed for would be contrary to the spirit of the Act of Parliament on dilatory pleading.

XV. Trial of by the Record, and granting a New Trial.[1]

Kerbey v. Siggers, 2 Dowl. P. C. 659.

The defendant pleaded in abatement *auter action pendent*, concluding with *prout patet per recordum*, and, on being ruled, produced the record of the writ of summons issued in the Court of Common Pleas. It was objected that it had not been served first. The Court held, that, if the fact were so, application should have been made to take the writ off the file.

Pendency of prior suit for the same cause, proved by production of the record.

Kerbey v. Siggers, 2 Dowl. P. C. 659.

The plaintiff issued two writs, one out of this Court, and the other out of the Exchequer. The first was never served; on the second the plaintiff declared. The defendant pleaded to the second action, another action pending for the same cause in this Court. The plaintiff replied *nul tiel record*, and served the defendant with a notice to produce. The defendant made up a roll from the *præcipe* of this Court. The Court directed it to be cancelled, with costs.

but the roll must be regularly made up.

Eichorn v. Le Maitre, C. P. 2 Wils. 367; S. C. cited *Bowen v. Shapcott*, K. B. 1 East, 543.

To a declaration in *assumpsit* the defendant pleaded misnomer in his Christian name in abatement, and upon issue joined, the jury found a verdict for the plaintiff, but neglected to assess the damages; a motion was afterwards made for a writ of inquiry; but against application it was said for the defendant, and agreed to by the Court, that the omission of the jury in not finding damages in this case could not be supplied by a writ of inquiry, but a *venire facias de novo* must be awarded; for where a man may have an attaint, there no damages shall be assessed by the Court, if they be not found by the jury. In *assumpsit*, damages are the whole object of the writ and suit, though issue be joined upon a fact in abatement; yet as to the defendant it is conclusive to all intents and purposes, and involves the damages upon finding the fact against him; and if outrageous damages had been given, an attaint would have lain.

When an issue in fact is joined upon the replication, the jury should assess the damages.

XVI. Judgment.

(A) *For Plaintiff.*

(*a*) *On Issue in Fact.*

Anon. 1 Vent. 22. Amcots v. Amcots, E. T. Ld. Raym. 118; S. C. 1 Lev. 163. Medina v. Stoughton, K. B. 1 Ld. Raym. 593; S. C. 1 Salk. 210. Crosse v. Bilson, 2 Ld. Raym. 1022. Barker v. Forrest, 1 Stra. 532.

Per Cur. If the defendant plead matter of fact in abatement, and issue is joined thereon, and tried and found against him, the plaintiff is entitled to final judgment. See *Thompson v. Collier*, Yelv. 112; 2 Wils. 367; 2 B. & P. 384; *Bowen v. Shapcott*, 1 East, 542. *See* also *France v. White*, 1 M. & G. 731.

Whenever an issue in fact is found for the plaintiff, the judgment is final.[2]

[1] In *Shew v. Hislop* (4 D. & R. 241) it is said, there was no instance of a new trial being granted on a plea in abatement; but in *Ewer v. Ambrose* (3 B. & C. 746; S. C. 5 D. & R. 629) that indulgence was conceded.

[2] Care should therefore be taken that on a verdict for the plaintiff the jury at the trial assess the damages, as an omission in this respect cannot be supplied by a writ of inquiry. *Eichorn v. Le Maitre*, 2 Wils. 367. *Foxwist v. Tremaine*, 2 Saund. 11, n. 3.

(*b*) *On Issue in Law.*

BOWEN v. SHAPCOTT, 1 East, 543.

Where the plaintiff demurs to a plea in abatement, or the defendant demurs to the replication, the judgment for the plaintiff is that the defendant answer once.[1]

Assumpsit. Plea of misnomer in abatement. Replication, that plaintiff was known as well by one name as the other. Demurrer and joinder.

By the Court. The rule is laid down in *Eichorn v. Le Maitre*, 2 Wils. 367, that where one plead a fact which he knows to be false, and a verdict be against him, the judgment is final. But upon a demurrer to a plea in abatement, there shall be a *respondeat ouster;* because every man shall not be presumed to know the matter of law, which he leaves to the judgment of the Court. That rule governs the present case, which is that of a demurrer to a replication to a plea in abatement. *Patt v. Nosworthy*, 1 Vent. 137. *Collop v. Brandon*, Jones, 122. *Thompson v. Collyer*, Yelv. 112. *Eichorn v. Le Maitre*, 2 Wils. 367. *Medina v. Stoughton*, 1 Ld. Raym. 594; Arch. *Pr.* 10 ed. 872.

AMCOTT v. AMCOTT, K. B. 1 Sid. 252.

Unless the plea be *puis darreign continuance.*

Semb. Upon a demurrer to a plea in abatement pleaded after the *last continuance*, if it be adjudged against the tenant or defendant, the judgment is final.

PHILLIPS v. CLAGGETT, 10 M. & W. 102; 2 Dowl. N. S. 258.

When a plea of non-joinder of parties was pleaded to several counts, and was bad as to some of them:—*Held*, that there must be one general judgment of *respondeat ouster* as to the whole.

The declaration contained ten counts: five in trover, for certain sugar; and five that the plaintiffs employed the defendant for reward, as agent or factor, to receive certain sugar belonging to the plaintiffs, and that the defendant misconducted himself in the receipt thereof, whereby they were lost to the plaintiffs.

Plea in abatement to the whole declaration, that the goods therein mentioned were not the property of the plaintiffs only, but the joint property of the plaintiffs and two other persons. Demurrer and joinder.

Per Ld. Abinger, C. B. "If the defendant had pleaded separately to the first five counts, that other parties besides the plaintiffs had an interest in the goods, that plea might have been good; but this plea in abatement is no answer at all to the other counts of the declaration, and which are framed upon contracts which the defendant admits himself to have made with the plaintiffs alone. It is urged, however, that we may take the plea distributively, and quash the writ as to the first five counts, and award a judgment of *respondeat ouster* as to the residue. Pleas in abatement are never favoured by the Court; and I think that such a plea, if bad as to part, is bad as to the whole. There must be one general judgment of *respondeat ouster.*"

(*c*) *On Replication of* Nul tiel Record.

CREMER v. WICKET, 1 Ld. Raym. 550; S. C. 12 Mod. 350.

On a failure by defendant to produce the record on an issue of *nul tiel record*, the judgment is that he answer over.

In trespass for assault and battery the defendant pleaded in abatement another action pending for the same cause. To which *nul tiel record* was replied, and *habetur tale record* rejoined, and the plaintiff signed final judgment as for want of a plea.

Per Cur. Final judgment ought not to have been signed, but only *quod respondeat ulterius*, for failure of record is not peremptory.

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[1] If, however, the plea is really one in bar, final judgment may be given. *Crosse v. Bilson*, 6 Mod. 102; 1 Salk. 3; 2 Ld. Raym. 1016; Lilly, 351. But if it be actually in abatement, though not so concluding, the Court may award a *respondeat ouster.* *Medina v. Stoughton*, 1 Salk. 211; 1 Ld. Raym. 593. In Scotland, where a dilatory plea is sufficient, an interlocutor is pronounced; when bad, it is repelled, or it may be discussed with the plea on the merits. Paterson, 1073 n.

(B) *For Defendant.*

The judgment for the defendant on a plea in abatement, whether it be on an issue in fact or in law, is, that the writ be quashed (Gilb. C. P. 52); or if a temporary disability or privilege be pleaded, that the plaint remain without day, until, &c. Clift. 3; 1 Lutw. 19; 2 Saund. 210.

(C) *Proceedings subsequent to a Judgment of* Respondeat Ouster.[1]

XVIII. Costs.

(A) *Upon a* Nil Capiat per Breve *Plaintiff not entitled to.*

Greenhill v. Sheppherd, 12 Mod. 145, S. P. Allen v. Maxey. Barnes, 120, S. C.

Per Cur. If the defendant plead in abatement, and the plaintiff confess it, the plaintiff thereby saves costs. *See* Hullock, 126; 1 Tidd, 666, 7th ed.; 2 Archbold *Prac.* 10 ed. 872; Marshall *on Costs*, 36; so also in *Scire facias* as in an action, *Pocklington v. Peck*, 1 Strange, 638; Barnes, 431.

The defendant is not entitled to costs where the plaintiff enters a *nil capiat per breve.*

(B) *On an Issue in Fact successful Party entitled to.*

Aplin v. Constable, Ca. Prac. C. P. 35.

A rule *nisi* was obtained calling upon the plaintiff to show cause why the costs of a nonsuit at the assize on an issue in abatement should not be taxed. And the Court were clearly of opinion, that upon a nonsuit on such an issue the defendant ought to have his costs; for if it had been found for the plaintiff the judgment would have been peremptory, and he would then have been entitled to his costs. See *Welchen v. Le Pelletier*, 1 Chit. *Rep.* 636, n.; *Nash v. Calder*, *cor.*; Parke, B. at Chambers; Arch. *Pr.* 10 ed. 873. *Cazneau v. Morrice*, 25 L. J. Q. B. 126.

If verdict for plaintiff, he is entitled to costs; if plaintiff be nonsuited, defendant is entitled.

(C) *On an Issue at Law successful Party entitled to.*

By 3 & 4 Wm. 4, c. 42, s. 34, it is enacted, "that where judgment shall be given either for or against a plaintiff or demandant, or for or against a tenant, upon any demurrer joined in any action whatever, the party in whose favour such judgment shall also have judgment to recover his costs in that behalf."

On a demurrer the successful party is entitled to his costs.[2]

(D) *On Amendment after a Plea of Non-joinder of Plaintiff under C. L. P. Act*, 15 & 16 Vic. c. 76, ss. 36, 38.

By 15 & 16 Vic. c. 76, s. 36. In case such notice (*i. e.* of the non-joinder of plaintiffs), or any plea in abatement of non-joinder of a person or persons as co-plaintiff or co-plaintiffs in cases where such plea in abatement may be pleaded by the defendant, the plaintiff shall be at liberty, without any order, to amend the writ and other proceedings before plea, by adding the name or names of the person or persons named in such notice, or plea in abatement, and to proceed in

Upon notice or plea of non-joinder of a plaintiff, the plaintiff may amend on payment of the

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[1] The order invariably to be observed, we have seen, in pleading, is this:—

1. To the jurisdiction.
2. In abatement.
    1. To the person.
        1. Of the plaintiff.
        2. Of the defendant.
    2. To the Court.
    3. To the writ.
        1. To the form of the writ.
        2. To the action of the writ.
3. In bar of the action.

Therefore, after a judgment of *respondeat ouster*, you cannot plead a plea in the same or any preceding degree or class with that which you have already pleaded; but you may plead one in any of the subsequent classes. Com. Dig. Abatement; 2 Saund. 5 ed. 40, 41. It is not now necessary to enter the plea in abatement, with judgment of *respondeat ouster* on the issue, or on the *nisi prius* record, *Pepper v. Whallay*, 5 N. & M. 437; 1 H. & W. 480: though this was formerly otherwise. *Doberteen v. Chancellor*, Carth. 447; 1 Ld. Raym. 329. *Combe v. Pitt*, 3 Burr. 1682; 1 Black. 523.

[2] At one time otherwise. 1 Salk. 194; 1 Raym. 336.

costs of, and occasioned by the amendment.

the action without any further appearance, *on payment* of the costs of, and occasioned by, such amendment only.

In Cazneau v. Morrice, 25 L. J. Q. B. 126.

The defendant M. pleaded in abatement the non-joinder of B. and G., and after they were made parties he paid money into court. The plaintiff went on, and the money paid in was found to be sufficient to cover the debt. It was held that the defendant was entitled to the costs of his plea in abatement and amendment, and to the general costs of the cause, and of the trial, as succeeding on an issue, which entitled him to the judgment he had obtained.

Provisions as to costs after trial of plea in abatement of non-joinder.[1]

And by C. L. P. Act, 16 & 17 Vic. c. 76, s. 39, "in all cases after such plea in abatement, if it shall appear upon the trial of the action that the person or persons so named in such plea in abatement was or were jointly liable with the original defendant or defendants, the original defendant or defendants shall be entitled as against the plaintiff to the costs of such plea in abatement and amendment; but if at such trial it shall appear that the original defendant, or any of the original defendants, is or are liable, but that one or more of the persons named in such plea in abatement is or are not liable as a contracting party or parties, the plaintiff, nevertheless, shall be entitled to judgment against the other defendant or defendants who shall appear to be liable; and every defendant who is not liable shall have judgment, and shall be entitled to his costs as against the plaintiff, who shall be allowed the same, together with the costs of the plea in abatement and amendment, as costs in the cause, against the original defendant or defendants who shall have so pleaded in abatement the non-joinder of such person."

On joinder of too many plaintiffs, the defendant shall be entitled to his costs occasioned by the mis-joinder.

By 23 & 24 Vic. c. 126, s. 19, the joinder of too many plaintiffs shall not be fatal, but every action may be brought in the name of all persons in whom the legal right may be supposed to exist, provided that the defendant, though unsuccessful, shall be entitled to his costs occasioned by joining any person or persons in whose favour judgment is not given, unless otherwise ordered by the Court or a Judge.

ABATEMENT, Pleas in Criminal Proceedings.[2] By stat. 7 Geo. 4,

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[1] By C. L. P. Act, 1852, s. 38, the plaintiff may amend after plea of non-joinder of a co-defendant, without any order.

[2] A plea in abatement, in criminal as in civil cases, must be pleaded before any plea in bar (2 Hale, 175; Fost. 167), and be put in upon the arraignment of the accused. 2 Hale, 175.

These pleas require the greatest accuracy and precision in framing them: they should be certain to every intent, and should point out the objection intended to be relied on, so that it may be readily controverted or avoided in another prosecution. *O'Connell v. Reg.* 11 Clark & Fin. 155; 9 Jur. 25. In a prosecution for felony the defendant may plead over to the offence, together with a plea in abatement; and if he omit to do so the Court will order it to be done, and insert it at the bottom of the parchment (*Dean's case*, 1 Leach, 478; 2 Leach, 712 n. a.; 2 Hale, 238); but the omission is no ground of demurrer, as the defendant may plead over to the felony after the plea in abatement has been determined against him, and this is *in favorem vitæ*. Id. Carth. 55. In misdemeanors the defendant is not allowed to plead over together, with or after plea in abatement. See *Rex v. Gibson*, 8 East, 107. The plea may be pleaded by attorney as well as in person. *Rex v. Westby*, 10 East, 85, n.; 2 Hawk, c. 34, s. 3, S. C.

It has been decided that the plea may be put in *ore tenus* (2 Leach, 535; 1 Leach, 476); the present practice, however, does not accord with this,—the usual and safest course is to put it in in writing, engrossed on parchment or paper. See *R. v. Gregory*, 15 L. J. M. C. 38.

The 4 Anne, c. 16, s. 11, requiring an affidavit of verification, applies to criminal proceedings. *Rex v. Grainger*, 3 Burr. 1617. It must be added to a plea in a prosecution in the Crown Office. *R. v. Jones*, 2 Show. 1161. *See* also *Kinloch's case*, Fost. 16; 1 Wils. 157.

The judgment for the Queen is final upon a plea in abatement in misdemeanor, but in treason or felony that the defendant answer over. The judgment for the defendant was formerly that the indictment be quashed, but now the indictment may be amended, and the defendant called to plead thereto. *R. v. Gibson*, 8 East, 107, 110; 1 Leach, 478; 2 Hale, 239. The judgment on a demurrer is, that the defendant answer over (6 East, 602; S. C. 2 Smith, 591; 2 Wils. 368). The

c. 64, s. 19,[1] it is enacted, "that no indictment or information shall be abated by reason of any dilatory plea of misnomer, or of want of addition, or of wrong addition of the party offering such plea, if the Court shall be satisfied, by affidavit or otherwise, of the truth of such plea; but in such case the Court shall forthwith cause the indictment or information to be amended according to the truth, and shall call upon such party to plead thereto, and shall proceed as if no such dilatory plea had been pleaded." If defendant plead in abatement, the Court may amend and proceed.

Rex v. Cooke, 2 B. & C. 618; S. C. 4 D. & R. 114.

The defendant pleaded in abatement to an indictment that he is a peer, and ought to be styled by his title. On motion to quash the plea it was contended that the objection to the plea, that the patent and pedigree were not set out, may be cause for demurrer, but was no ground for quashing the plea; for defendant would thereby be deprived of the opportunity of discussing the validity of his plea upon a writ of error. Defendant may plead to an indictment that he is a peer.[2]

And of that opinion were the Court. *See* 2 Hawk. P. C. 271.

ABATEMENT of Rent. In an action of ejectment for non-payment of rent, the defendant's case was, that the plaintiff had made a parol agreement to accept an abated rent, and that accordingly a whole year's rent was not due at the time when the ejectment was brought:—*Held*, that there was no bar to the landlord's proceeding for the entire rent reserved by the lease, notwithstanding the parol agreement. *Levinge & others v. O'Brien*, 4 Ir. Jur. 252. (C. B.) *See post*, Annuity; Covenant; Landlord and Tenant; Rent.

ABBREVIATE. In Sc. L. an abstract, a memorandum of a decree of adjudication, signed by the extractor, and received in evidence without further proof.

ABBREVIATIONS.[3] These contractions are characteristic of the court-hand in which the records of the Court and the reports of proceedings were

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operation, however, of the 7 Geo. 4, c. 64, s. 19 *supra*, is to make these objections of no practical importance.

[1] The above statute does not repeal the Statute of Additions (1 H. 5, c. 5), but the 14 & 15 Vic. c. 100, s. 24, provides that no indictment shall be holden insufficient for want of, or imperfection in, the addition of any defendant. See *R. v. Shakespeare*, 10 East, 83; *R. v. Warren*, 1 Sid. 247, 2 Ins. 670; Ca. Temp. Hard. 303. By pleading over, he waived all objection to the indictment on that ground. 2 Hawk. c. 23, s. 125; *R. v. Checkets*, 6 M. & S. 91.

Where the defendant was indicted with an *alias dictus*, and pleaded in abatement that he was not known by such name—*Held*, that the plea must be demurred to, or issue taken thereon, and it could not be quashed on motion. *Rex v. Clark*, 1 D. & R. 431, S. P.; *Rex v. Cooke*, 4 D. & R. 592; 2 B. & C. 871. *Quære*, s. 25, 14 & 15 Vic. c. 100?

[2] It is apprehended that the 7 Geo. 4, c. 64, s. 19, does not affect the right of a peer when indicted as a commoner to plead in abatement of an indictment for felony; for his title is not only part of his name, but gives him a different mode of trial, viz. by his peers. Arch. C. C. p. 85. *R. v. Gregory*, 15 L. J. M. C. 38.

[3] By 3 & 4 Wm. 4, c. 42, s. 12, it is enacted, "that in all actions upon bills of exchange or promissory notes, or other written instruments, the parties to which are designated by the initial letter or letters, or some contraction of the Christian or first name or names, it shall be sufficient in every affidavit to hold to bail, and in the process or declaration to designate such persons by the same initial letter or letters, or contraction of the Christian or first name or names, instead of stating the Christian or first name or names in full." See *Esdaile v. McLean*, 15 M. & W. 277. But it must appear on the count that they are so described in the instrument itself (*Levy v. Webb*, 9 Q. B. Rep. 427, 442; *Gatty v. Field*, ib.; *Esdaile v. McLean*, 15 M. & W. 277), or the declaration is specially demurrable (*Miller v. Henry*, 3 Exch. Rep. 14; *Turner v. Fitt*, 3 C. B. Rep. 701), unless the full Christian name could not be discovered. *Lomax v. Landells*, 6 C. B. Rep. 583. A single letter, where it is a vowel, may on special demurrer be assumed to be a Christian name, but not if a consonant. 18 L. J. C. P. 88; 7 C. B. 980.

Even before the 3 & 4 Wm. 4, c. 42, it had been provided by R. Hil. 2 Will. 4, r. 32, that a description of the defendant in the process or affidavit by his initials, or a wrong name, or without a Christian name, should not entitle him to a discharge, provided due diligence had been used to obtain a knowledge of his true name.

anciently written. See *Year-Books*, *Bracton*, *Doomsday Book*, &c. They were accompanied by arbitrary marks, turns, and dashes, upon or over words, to denote omission of letters, &c. Their use is now prohibited in legal proceedings by 4 Geo. 2, c. 26; but all abbreviations usual in the English language may be adopted in an attorney's bill of costs. *See post*, Attorney.

The following is a list of the abbreviations in common use, as B. R. for *Banco Regis;* Q. B. for *Queen's Bench;* N. P. for *Nisi Prius;* S. C. for *same case;* S. P. for *same point;* def. for *defendens;* bre. for *breve;* vic. for *vicecomes;* ven. for *venit;* dic. for *dicit;* re. fa. lo. for *recordari facias loquelam;* sus. per col. for *suspensus per collum;* cur. adv. vult for *curia advisari vult;* fi. fa. for *fieri facias;* sci. fa. for *scire facias;* lib. for *liber*. *See* also Attorney; Capias, Writ of; Initials; Summons, Writ of; and Styles, R. 182, c. 2, 227, 290; 4 Geo. 2, c. 26; 6 Geo. 2, c. 14, s. 5; and *post*, Forgery.

ABDICATION. Abdication, from *Abdicatio* (*see* Termes de la Ley), is the act of renouncing and giving up an office by the voluntary act of the party who holds it. It differs from the word resignation. The former signifies a total and unconditional renunciation; the latter implies rather a relinquishment in favour of another. Abdication may be implied or presumed from actions inconsistent with, and in subversion of, the essential nature and object of the office held. *See* 1 Bl. Com. 210, 213; iv. id. 78, where mention is made of the resolution of the legislature in 1688, "that King James the Second, &c., having withdrawn himself out of this kingdom, had *abdicated* the government, and that the throne is thereby vacant." In a conference between the two Houses of Parliament previous to the resolution, it was disputed whether the word "abdicated" or "deserted" should be used in describing the conduct of the king in quitting the country. It was finally resolved that the word "abdicate" should be used, as including in it the idea of maladministration. See *Penny Enc.* i. 16; Rees' *Enc.;* Crabb's *Synonymes.*

ABDUCERE. *To lead away, to carry away. Abduxit*, applied in old writs to the taking away of live *animals*, as distinguished from *asportavit*, applied to inanimate chattels.

ABDUCTION.[1] From *Abducere*, to lead away. *See* Infanticide; Kidnapping.

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[1] Is the offence of taking away a man's wife, child, or ward, by fraud and persuasion, or open violence (1 Russ. on Cr. 701; 3 Bl. Com. 139); or the unlawful taking or detention of any female for the purpose of marriage, concubinage, or prostitution. 4 Steph. Com. 129. It is no longer necessary, as was the case under the early statutes, that an actual marriage or defilement should take place. Under the existing acts, the taking or detaining for the purpose of lucre, coupled with an intent to marry or defile, constitutes the offence. The law of Scotland is the same: the punishment there is arbitrary. Paters. E. & S. L. A parent or guardian may maintain an action for the abduction of his child. *See* Seduction. The following American decisions may be useful. In *Kirkpatrick v. Lockhart*, cited 2 Hill, *Torts*, 603, the plaintiff had a verdict for damages in trespass *vi et armis*, for the abduction of his daughter, under twenty-one. On motion in arrest of judgment the action was held to lie, although it was not laid in the declaration, that the plaintiff had lost the services of his child; nor was there evidence of a forcible taking. But a father who lives apart from his wife, and suffers his son, a minor, to remain in her custody and care, and supported and employed by her, or who allows a son to go from him and obtain independent employment, cannot maintain an action against a third person, alleging that the defendant enticed and carried away the son from the plaintiff's own care and custody. *Woodell v. Coggeshall*, id. Nor can a father support an action against one who procures the marriage of his daughter, if the daughter in good faith, and without force or imposition, enter into the marriage contract, between twelve and fourteen years of age. *Goodwin v. Thompson*, id. See *post*, Apprentice; Master and Servant; Parent and Child; and *R. v. Tinkler*, 1 F. & F. 513; *R. v. Baillie*, 8 Cox, C. C. 238; *Reg. v. Primelt*, 1 F. & F. p. 50.

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(1) *How punishable*, p. 47.

(2) *Consent of Girl immaterial*, p. 47.

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(C) *Commitment, Indictment, and Evidence*, p. 49.

(D) *Stealing a Child under Ten.*

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(*b*) *Or knowingly harbouring Stolen Child*, p. 49.

(*c*) *How punishable*, p. 49.

(*d*) *Not applicable where Person has a claim of Right*, p. 49.

(A) *At Common Law.*

Rex v. Lord Grey, 3 St. Tr. 519; S. C. 1 East, P. C. c. 11, s. 10, p. 460.

An indictment at common law will lie for conspiring to take away a woman from her parents, and then seducing her.

This was an information at common law against Lord Grey and several others, for conspiring and intending the ruin of the Lady Henrietta Berkeley, then a virgin unmarried, within the age of eighteen years, one of the daughters of the Earl of Berkeley (she being under the custody, &c. of her father), and soliciting her to desert her father, and to commit whoredom and adultery with Lord Grey, who was the husband of another daughter of the Earl of Berkeley, sister of the Lady Henrietta, and to live and cohabit with him; and further, the defendants were charged, that, in prosecution of such conspiracy, they took away the said Lady Henrietta at night from her father's house and custody, and against his will, and caused her to live and cohabit in divers secret places with Lord Grey, to the ruin of the lady, and to the evil example, &c. The defendants were found guilty, though there was no proof of any force; but on the contrary it appeared that the lady, who was herself examined as a witness, was desirous of leaving her father's house, and concurred in all the means taken for her departure and subsequent concealment. It was not shown that any artifice was made use of to induce her to leave her father; but the case was put upon the ground that there was a solicitation and enticement of her to unlawful lust by Lord Grey, who was the principal person concerned, the others being his servants, or persons acting by his command, and under his control. See *Rex v. Twistleton*, 2 Keb. 432; 1 East, P. C. c. 11, s. 9, p. 458; and a precedent, 3 Chit. *Crim.* 713. *See* Conspiracy.

(B) *By Statute.*[1]

[1] The earlier acts on this subject were the 3 Hen. 7, c. 2; 39 Eliz. c. 9, s. 1; 4 & 5 Ph. & M. c. 8.

(a) Of a Woman on account of her Fortune, with intent to marry or defile.

Abduction of a woman on account of her fortune, with intent to marry or defile her, is made felony, and offender liable to transportation or imprisonment.

By 9 Geo. 4, c. 31, s. 19, it is enacted, "That where any woman shall have any interest, whether legal or equitable, present or future, absolute, conditional, or contingent, in any real or personal estate, or shall be an heiress, presumptive or next of kin to any one having such interest, if any person shall, from motives of lucre, take away or detain such woman against her will, with intent to marry or defile her, or to cause her to be married or defiled by any other person, every such offender, and every person counselling, aiding, or abetting such offender, shall be guilty of felony, and, being convicted thereof, shall be liable to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding four years.

REX v. BROWN, 3 Keb. 193; S. C. 1 Vent. 243, 244.

The subsequent consent of the woman to her defilement will not take the case out of the statute 3 Hen. 7, c. 2;[1] nor is it necessary that she should be actually married or defiled.

The prisoner was indicted on the stat. 3 H. 7, c. 2, for forcibly taking away and marrying the daughter of S. T., a city orphan in the custody of the Chamberlain.

The facts established in evidence were, that the prosecutrix was possessed of 5000*l.*; that she was menaced by the defendant, who was disguised in a mask, and carried away in a coach to Westminster; and the next day, by her own consent, but caused by the precedent menaces, she allowed herself to be married, but was not actually defiled, the defendant being interrupted in his designs; and, by direction of the Court, the defendant was found guilty, and afterwards received sentence of death, and executed. *See* 1 Hale, 660; 1 Hawk. P. C. c. 41, s. 8; *Fulwood's case*, Cro. Car. 485, 493; *Swanson's case*, 5 *State Trials*, 450, *infra*; C. C. C. 530. For precedents, *see* Petersdorff's *Index*, Crim. Div. p. 1.

THE QUEEN v. SWANSON AND OTHERS, 7 Mod. 101–2; S. C. Holt, 319; 5 St. Tr. 453.

The prisoner, by marrying a female after the abduction, and while under restraint, is guilty of an offence within the statute, although he may not have assisted in the original abduction.[1]

The defendants were indicted upon the stat. 3 Hen. 7, c. 2. The facts disclosed in evidence were, that the female was resident with her aunt, and that on the day stated in the indictment they were waylaid, and arrested in a fictitious suit, and conveyed from Westminster, where they lodged, to the Garter Tavern, Drury Lane, and that the defendants there separated the aunt and niece from each other, and carried the latter to Holborn, where Swanson, the principal defendant, became her bail, and there married her while in custody. Baynton, one of the defendants, told her that if she did not marry Swanson she must go to Newgate.

The Court, in directing the jury, told them, that though the female might have had a regard for Swanson, yet, as she was not privy to the contrivance of coming out to him, and knew nothing of the scheme adopted by the defendants, and being married whilst she continued under that restraint and violence, though perhaps she consented to the marriage, the act itself was a crime within the statute; for here was a forcible taking away; and her subsequent consent, while under the restraint, could not be looked upon but as the effect of a continuing coercion; and that though Swanson had known nothing of the first force, yet he knowing her to be under restraint, and marrying while he knew her to be under it, made him an approver of the first act of violence, and hence a participator in the general guilt.

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[1] The 3 Hen. 7, c. 2, was repealed by the above act, 9 Geo. 4, c. 31. But the cases in the text are still useful. If the woman be taken away and married with her own consent, yet if this be effected by means of fraud, it would seem to be a case within the statute; for she cannot, whilst under the influence of fraud, be considered a free agent. *R. v. Wakefield*, Lancaster Assizes, 1827. Deac. C. L. 4; 1 Burn. J. 9; by Chitty, 6. Nor is force necessary if the girl be taken against the will of her parents. 22 L. T. 115.

R. v. Barratt, 9 Car. & P. 387.

Abduction. The prisoner was indicted under 9 Geo. 4, c. 31, s. 19, for having "feloniously, and from motives of lucre," taken away Maria Ellis against her will.

The jury ought not to convict the prisoner, unless they are satisfied that the motive was lucre; but evidence of expressions used by the prisoner respecting the property of the woman are important.

Parke, B., to the jury. "If all the other requisites of the statute constituting the offence are satisfied, and the evidence of the motive being the base and sordid one of lucre is unsatisfactory, it will be your duty to acquit the prisoner; you will, therefore, say whether the prosecutrix, being a lady entitled to property, the prisoner either took her away or detained her against her will, with the intent of marrying her, but for the base purpose of getting possession of her property; and if you come to the conclusion that that was so, it will be your duty to find him guilty. With respect to the motives of the prisoner, evidence has been given of expressions used by the prisoner respecting the property of Miss Ellis. These expressions are important for you to consider, in order to your forming a judgment whether the prisoner was actuated by motives of lucre or not."

(*b*) *Of a Girl under Sixteen.*[1]

Abduction of girl under sixteen from persons having lawful charge of her, is a misdemeanour punishable by fine or imprisonment, or by both.

By 9 Geo. 4, c. 31, s. 20, it is enacted, "That if any person shall unlawfully take, or cause to be taken, any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, every such offender shall be guilty of a misdemeanor, and being convicted thereof shall be liable to suffer such punishment, by fine or imprisonment, or by both, as the Court shall award."

R. v. Manktelow, 1 Deac. C. C. 159; 17 Jur. 357; 22 L. J. M. C. 115.
(Crown case reserved by *Coleridge, J.*)

The prisoner was tried and convicted on the 9 Geo. 4, c. 31, s. 20.

The consent of the girl is immaterial, and where a girl in pursuance of an arrangement left her home alone, and was met by the prisoner, and they went away together to a distant place, not intending to return:—*Held*, that there was a taking of the girl within the meaning of this section.

It appeared that the prisoner lodged with J. F. at *R.* He stated to J. F. and his family his intention of going to America. On the 7th of February he took leave of them, and went with J. F. to Maidstone by the Sutton road, there to take train to London. It was arranged that J. F. should return by the Staplehurst road. Before his departure the prisoner had previously persuaded A. F., the daughter of J. F., a girl under sixteen, to go with him to America. On the morning he left he had secretly told her to put up her things in a bundle, and walk to a point in the Sutton road, where he would meet her. She did so, and the prisoner having parted with her father, met her. He placed her clothes amongst his own, and the two travelled to London. In the morning he was taken into custody.

Jervis, C. J. The conviction is right. It is unimportant under the section on which this indictment is framed whether the girl consented or not to go away with the man. When the prisoner met the girl at the appointed place, there was then a taking of her. Then we come to the second point, whether she was taken out of the possession of her father. According to the opinion of *Maule, J.*, in *The Queen v. Kipps*, it is not necessary that there should be an actual possession by the father. So long as she continues a member of her father's family, and is under his control, she is in his possession. The facts of this case show that there was a continuing possession in the father. The girl, by the prisoner's persuasion, left her father's house for the particular purpose of meeting the prisoner. If she had not met him she would have returned home. The possession of the father, therefore, was only conditionally renounced. By the act of taking, the prisoner severed the connexion between the girl and her father, and so took her out of his possession. This is in

[1] *See* 4 & 5 Ph. & M. c. 8.

accordance with the decision of *Maule, J.*, in *The Queen v. Kipps*, 4 C. C. C. 167. See *Reg. v. Robins*, *infra*.

REG. v. BAILLIE, 8 Cox, Crim. Ca. 238.

So a girl induced to leave her father's house and go to a chapel to be married is within the statute.[1]

A girl under sixteen years of age, who was living in her father's house, was induced by the defendant to go to a chapel and be married to him. She was only away from home an hour or two, and after her return continued to live with her father as before, he being ignorant of what had taken place. The marriage was never consummated: — *Held*, that there was sufficient evidence of her having been taken out of her father's possession to satisfy the statute. See *R. v. Kipps*, 4 Cox, C. C. 167; *R. v. Robins*, 1 C. & K. 456; but *see* also note [2].

CALTHROP v. AXTEL, 3 Mod. 168.

If the guardian once consents to the marriage he cannot after retract. *Qu.?*[3]

In this case it was said that there must be a continual refusal of the guardian to accede to the marriage; for if he once agree, though he afterwards express his dissent, yet it is an assent within the statute. (*See* 1 Hawk. P. C. 173; 1 Vern. 394; 2 Vern. 380.) In 1 East, P. C. c. 11, s. 6, p. 457, it is observed, that this was not the principal point before the Court, and required further confirmation.

REGINA v. ROBINS, 1 C. & K. 456.

It is no defence that the defendant did not know her to be under sixteen.

Per Cur. With respect to the defendant not knowing that she was under sixteen, the case is within the statute if the girl were in fact not sixteen years of age, and a person taking her away does so at his peril. By her appearance and her forwardness (for she it was who made the proposal to elope) the defendant might have taken her for more than sixteen; but that is no ground of defence, however it may be matter of mitigation.

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[1] And to constitute an offence under the statute, it is sufficient if, by moral force, willingness on the part of the girl to go away with the prisoner is created; but if her going away with the prisoner is entirely voluntary, no offence is committed. *Reg. v. Handley*, 1 F. & F. 648. And in the absence of evidence of any improper motive, the jury should be directed, that if they thought the defendant merely wished to have the child to live with him, and honestly believed that he had a right to its custody, although he had no such right, they ought to acquit him. *Reg. v. Tinkler*, 1 F. & F. 513: *Cockburn, C. J.* Nor can an indictment under 9 Geo. 4, c. 31, s. 90, be sustained, if the parents have encouraged the daughter in a lax course of life. *Reg. v. Primelt*, 1 F. & F. 50: *Cockburn, C. J.*

[2] And if the defendant induce the parents, by false and fraudulent representations, to allow him to take the girl away, this is a "taking" under the statute. *R. v. Hopkins*, C. & M. 254. But where A., a girl in service, under sixteen, returning from an errand, was asked by B. if she would go to London, as B.'s mother wanted a servant, and would give her 5*l.* wages, A. and B. went away together to Bilston, where both were found, and B. apprehended: — *Held*, that this was not such a taking, or causing to be taken, of A. as was sufficient to constitute the offence of abduction under the 20th section of the 9 Geo. 4, c. 31. *Reg. v. Meadows*, 1 C. & K. 399: *Parke, B.* But in a subsequent case, where it appeared that the girl actually proposed to the man to elope with him, and he, in pursuance of it, went to her father's house at night, placed a ladder against a window, and held it whilst she descended, and both of them then eloped: — *Atcherley, Serj.* held this to be a case within this section: and *Tindal, C. J.*, to whom he afterwards mentioned it, was of the same opinion *R. v. Robins*, 1 Car. & K. 456, 460. It is immaterial that the offender did not know that the girl was under sixteen, or that from her appearance he might have thought her of greater age (*vide supra*). The act is positively prohibited, and therefore the absence of a corrupt motive is no answer to the charge; nor is it any legal defence that the defendant made use of no other means than the common blandishments of a lover. *R. v. Twiselton*, 1 Lev. 257; 1 Sid. 387; 2 Keb. 1; Hawk, c. 44, s. 10. *See* also 5 & 6 Vic. c. 28 (Irish).

[3] It must, however, be shown that the taking was against the will of the person having the lawful care or charge of the girl. 1 Hawk. c. 11, s. 14. *R. v. Sweeting*, 1 East, P. C. 457. The case of a natural daughter with her putative father is within the statute. *R. v. Cornfield*, 2 Str. 1162. Upon the death of the father the mother retains her authority, though she marry again, unless the father has disposed of the custody of his child to another. 12 Car. 2, c. 24, s. 7. The assent of the second husband is not material. *Ratcliffe's case*, 3 Co. 38. The father's right to the custody until sixteen was fully recognised in *Reg. v. Barford*, 9 W. R. 99, M. T. 1860, Q. B. *See R. v. Greenhill*, 4 A. & E. 624.

By 14 & 15 Vic. c. 55, s. 2, it is enacted, "that all the provisions of the 7 Geo. 4, c. 64, as amended by this act, authorising and empowering courts to order payment of costs and expenses, and compensation for trouble and loss of time, in cases of the several misdemeanours enumerated in the 7 Geo. 4, c. 64, s. 23, and concerning orders for payment of such costs, expenses, and compensation, and the payment thereof, and all the provisions of any other act for, concerning, or applicable to the payment of such costs, expenses, and compensation, in cases of the said misdemeanours, shall extend and be applicable, in the case of any of the misdemeanours hereinafter mentioned; viz. (amongst others) unlawfully taking, or causing to be taken, any unmarried girl, being under the age of sixteen years, out of the possession, and against the will, of her father or mother, or of any other person having the lawful care or charge of her."

Provisions as to costs of prosecutions as directed by the 7 Geo. 4, c. 64, s. 23, extended to the 9 Geo. 4, c. 31, s. 20, by the 14 & 15 Vic. c. 55, s. 2.

(C) *Commitment, Indictment,*[1] *and Evidence.*[2]

(D) *Stealing Children under Ten.*

By 9 Geo. 4, c. 31, s. 21, it is enacted, "that if any person shall maliciously, either by force or fraud, lead or take away, or decoy or entice away, or detain any child under the age of ten years, with intent to deprive the parent or parents, or any other person having the lawful care or charge of such child, of the possession of such child, or with intent to steal any article upon or about the person of such child, to whomsoever such article may belong; or if any person shall, with any such intent as aforesaid, receive or harbour any child, knowing the same to have been, by force or fraud, led, taken, decoyed, enticed away, or detained as hereinbefore mentioned; every such offender, and every person counselling, aiding, or abetting such offender, shall be guilty of felony, and being convicted thereof shall be liable to be transported beyond the seas for the term of seven years, or to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding two years, and, if a male, to be once, twice, or thrice publicly or privately whipped (if the Court shall so think fit), in addition to such imprisonment: Provided always, that no person who shall have claimed to be the father of an illegitimate child, or to have any right to the possession of such child, shall be liable to be prosecuted by virtue hereof, on account of his getting possession of such child, or taking such child out of the possession of the mother or any other person having the lawful charge thereof."

Taking away or detaining child under ten, with intent to deprive the person having the lawful care of the possession, or to steal anything about its person, is a felony, and punishable by transportation or imprisonment. Not to apply to persons having claim of right in.

ABETTORS. *See* Aiders and Abettors.

[1] *Precedent of Indictment.*—From this form a commitment may be easily framed:—M. to wit. The jurors, &c. present, &c. on, &c. at, &c., feloniously, and from motives of lucre, did take away and detain against her will, she the said A. N., then and there having a certain present and absolute interest [any interest, whether legal or equitable, present or future, absolute, conditional, or contingent] in certain real estate ["real or personal estate"], with intent her the said A. N. to marry [to marry or defile, or to cause her to be married or defiled, by any other person], against the form of the statute.

In 1637, a girl, under sixteen years of age, being an orphan, with property, was taken with force at Islington, in Middlesex, and carried in a coach to the Strand Bridge, and from thence by water to the Bishop of Winchester's house, in Surrey, where the next day, on pretence of showing her the house, she was brought into the chapel there, and being put in fear, was married to one F. The Court held, that the force continued on her in Surrey, and therefore there was a forcible caption there, within 3 Hen. 7, c. 2, so as to be indictable under that statute before a jury of that county as well as Middlesex. *R. v. Fulwood*, Cro. Car. 488. See *R. v. Gordon*, 1 Russ 707; Arch. P. & E. 470.

[2] The material averments in the indictment must be proved, and what will constitute the offence to be established in evidence is stated in the preceding pages. The woman, though married, may be a witness against the offender, for though his wife *de facto*, she is not *de jure*. 1 Hale, 661, 4 Com. 209. *Brown's case*, Vent. 243; 3 Kep. 193. *R. v. Wakefield, Lancaster Assizes*, 1827; 2 Russ. 605, S. P. *R. v. Fulwood*, Cro. Car. 418. And for the same reason she is a witness for him on the prosecution of this offence, though she has cohabited with him from the day of the marriage. *R. v. Perry*, 1 Hawk. c. 41, s. 13; 1 Russ. 710; 1 East, P. C. 454. *Brown's case*, 1 Hale, 301.

ABEYANCE.[1]

(A) *Of the Freehold*, p. 50.
(B) *Of a Remainder*, p. 50.
(C) *Of a Title of Dignity*, p. 52.

(A) *Of the Freehold.*

REX v. KEMP, 4 Mod. 280.

The law does not admit estates to be in abeyance, except in cases of necessity.[2]

Freehold lands are not allowed to be in abeyance except in particular cases, as permitting it would conduce to make fractions of estates, and prevent livery of seisin. *See* Davis, 34; Rol. Rep. 502; Hob. 153, 171, 338; Plow. 556; Co. Lit. 348; 1 Co. Rep. 131; 2 Wils. 165; 1 Com. Dig. Abeyance; 1 Vin. Ab. Abeyance; 2 Bl. Com. 107; 1 Saund. 260; 2 Saund. 382; Fearne's *Rem.* 41; *post*, Lease.

(B) *Of a Remainder.*

PLUNKET v. HOMES, T. Raym. 28; S. C. 1 Lev. 11; 1 Sid. 47.

When there is a devise for life, with remainder in contingency, the fee descends to the heir till the contingency happen, and is not in abeyance.

A. devised lands to B. his heir, for life; and if B. should die without issue living at his death, that then the same should remain to C. in fee; but if B. should have issue living at his death, then the fee should remain to the right heirs of B.: it was resolved that B. took an estate for life, with remainder in fee in contingency; and it was said by *Wyndham* and *Twysden*, *J. J.*, and agreed by the other judges, that the fee descended to B. as heir, till the contingency happened, though not so as to confound his estate for life, and was not in abeyance; that in relation to C., B. took only an estate for life; but in the mean time, by operation of law, he had the fee in such sort as that there should be an *hiatus* to let in the contingency when it happened. See *Archer's case*, 1 Rep. 66.

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[1] From *hayer*, or *abbeyer*, Fr., *to expect, to wait for.* In Sc. L. *in pendente.* Where there is no person in existence in whom an inheritance can vest, it is deemed in *abeyance;* that is, in expectation: the law considering it as always potentially existing and ready to vest whenever a proper owner appears. 2 Bl. Com. 107. Mr. Serjt. Stephen, in his *Commentaries*, 223, objects to expectation as the proper import of abeyance, and prefers Littleton's (ss. 646–680) exposition of the term, "to be as the remembrance, intendment, and consideration of the law;" referring to the case of the parson of a church, where the fee is in perpetual abeyance. Mr. Fearne treats the whole notion of abeyance as an absurd, unintelligible fiction.—*Fearne on Remainders*, 452. And the inclination in modern law seems to be, to substitute in its place the doctrine, that where there is no person in existence in whom an inheritance can vest, it remains in the grantor, or his heirs, or (in case of a devise) in the heirs of the testator, until the contemplated contingency happen. (2 Chitt. Bl. Com. 107, notes.) The term is also sometimes applied to personal property; thus, in the case of maritime capture during war it is said: "That until the capture becomes invested with the character of prize by a sentence of condemnation, the right of property is *in abeyance*, or in a state of legal sequestration." (1 Kent. *Com.* 102.) It has also been used in relation to the franchises of a corporation. When a corporation is to be brought into existence by some future acts of the corporators, the franchises remain in abeyance until such acts are done; and when the corporation is brought into life, the franchise instantaneously attaches to it. (1 Burr. 10.) But in general, property in goods and chattels cannot be so suspended (Plow. 564); for when the owner dies, it must be in the executors, administrators, or residuary or other legatee. (Brown, C. C. 132.) As to the freehold of the church being in abeyance during the vacancy of an incumbent, *see* Co. Litt. 647; 1 Burn. Ecc. L.; 2 Bl. Com. 107; 1 Prest. *Convey.* 107; 1 Vin. Ab. 106.

[2] It was a maxim of the feudal law that the freehold should never be in abeyance if it could be avoided. This rule was established for two reasons: 1st. That the superior lord might always know on whom he was to call for military services; 2d. That every stranger who claimed a right to any particular lands might know against whom he ought to bring his *præcipe*, or real action. Hence, a freehold estate cannot be created to commence *in futuro*, for the freehold would be an abeyance from the execution of the conveyance until the moment when the estate so created was to commence. The law, as before stated, does not favour the abeyance of the fee-simple, for by it many operations of law are suspended.

PUREFOY v. ROGERS, 2 Saund. 380; S. C. 1 Lev. 39; 3 Keb. 11.

S. devised lands to his wife for life; and if it should please God to bless her with a son, and she should call that son by the testator's Christian and surname, he gave the inheritance of the lands to him after his mother's life; and if he died before he came to twenty-one, then the testator gave the inheritance of his lands to his, the testator's, heirs for ever. Before any son was born, the heir of the testator conveyed the estate to the wife and her second husband by fine. It was urged that the contingent remainder to the son was not destroyed; for that at the time of the fine the heir of the testator had no reversion or estate in him, for that an estate for life was devised to the wife, and the remainder in fee was devised to her son upon a contingency: so that till it could be known whether such contingency would happen or not, the reversion must be in abeyance and not in the heir, and then his conveyance gave no estate to the husband and wife, but they were only tenants for life of the wife as before. But *Hale, C. J.*, interrupted the counsel, and said, it was clear that the reversion was in the heir of the testator by descent, and not abeyance, and accordingly it was adjudged that the contingent remainder was destroyed.[1] See *Fortescue v. Abbott*, Pollex, 479; S. C. T. Jones, 79. *Wood v. Ingersole*, Cro. Jac. 260. *Kent v. Harpool*, 1 Vent. 306; Ca. Temp. Hard. 16.

So where there is a devise in remainder in fee in contingency;

CLARKE v. SMITH, C. P. 1 Lutw. 316.

Per Cur. In all cases of executory devises the estate descends till the contingency happens. See *Pay's case*, Cro. Eliz. 878. *Gore v. Gore*, 2 P. Wms. 28. *Hayward v. Stillingfleet*, 1 Atk. 422; Fearn, *Cont. Rem.* 395, 7th ed.

Or where there is an executory devise;

DAVIS v. SPEED, Carth. 262; S. C. 4 Mod. 153; 5 id. 143; 2 Salk, 675; Show. Par. Ca. 104; Skin. 351.

Per Holt, C. J. Where a feoffment is made to the use of A. in tail,

Or a feoffment to uses.[2]

[1] This opinion of Lord Hale is agreeable to what we have seen (*ante*, p. 50) had been before determined, where the testator devised land "to his eldest son, Thomas, for life; and if he died without issue living at the time of his death, to Leonard, another son, and his heirs; but if Thomas had issue living at his death, then the fee should remain to the right heirs of Thomas for ever: it was adjudged that Thomas took only an estate for life, with a contingent remainder to Leonard in fee; and it was said by two Judges, and not dissented from by the others, that the fee descended to Thomas, as heir, until the contingency happened, and was not in abeyance; that in relation to Leonard, Thomas took only an estate for life; but in the meantime, by operation of law, he had the fee in such a way that it should not merge the estate for life, but there should be an *hiatus* to let in the contingency when it happened; and it was compared to *Archer's case*, 1 Rep. 66 b, where, though Robert took an estate only for life by the will, yet, by operation of law, he had the fee also. *Supra*, p. 50. Lord Hale's opinion has been also recognised in subsequent cases. *See* 1 P. Wms. 506. *Carter v. Barnardiston. Loddington v. Kime*, 1 Salk. 224; S. C. 1 Ld. Raym. 203; 3 Lev. 431; 2 Bro. Ca. Parl. 51. *Hopkins v. Hopkins*, 1 Atk. 590. *Chapman v. Blisset*, Ca. Temp. Talb. 151; Watkins, *Desc.* 202; Fearn, *Con. Rem.* 355, 7th ed. In the case, however, of *Vich v. Edwards*, 3 P. Wms. 372, which was a devise to A. and B. and the survivors of them, and the heirs of such survivor, in trust to sell, *Lord C. J. Talbot* held, that the fee was in abeyance, it being uncertain which would be the survivor: that the trustees joining in a fine, might make a good title to a purchaser by way of estoppel, and that the heirs joining would have no other effect than that of supplying the want of proving the will. *Vich v. Edwards*, 3 P. Wms. 372. *See* observations upon this case in Fearne's *Con. Rem.* 356; 2 Cruise, Dig. 448.

[2] It may be safely stated, as a general proposition, that the fee simple, during the suspense of a contingent remainder, remains in the grantor, and is not in abeyance, as well in common-law conveyances as in conveyances by way of use and dispositions by will. Fearn, 362, in support of this position, cites the following case:—A. makes a lease for life, on condition that if the lessee has issue in his life the land shall remain to W. in fee. A. recovers against the lessee in a writ of waste, and has execution. Lessee has issue and dies. No action of formedon accrues to W. because the fee remained in A. until the lessee had issue, and then the recovery in waste defeated the first limitation. Brooks on Stat. Lim. 84. And the

remainder to the use of the right heirs of T. S. who is then living, the fee simple is not in abeyance, nor in the feoffees, but results to the feoffer, and remains in him till the contingency, viz. the death of T. S. happens. *See* Fearn, *Cont. Rem.* 353 ; Prest. Est. 103.

(C) *Of a Title of Dignity.*

Sir Richard Verney's Case, Skin. 432 ; S. C. Coll. 322.

Where a dignity falls into abeyance between co-heirs; whenever there is a determination of the co-heirship by the death of all the co-heirs except one, such heir becomes entitled to the dignity as a matter of right.[1]

Sir Richard Verney, Knight, claimed the barony of Broke, as lineal heir to Sir Robert Willoughby, who was summoned to parliament 7 Hen. 7, the writ being directed to Robert Willoughby de Broke, Chevalier ; to whom succeeded Sir Robert Willoughby, who was summoned to parliament by the same title, and sat accordingly in the reign of Hen. 8 ; from him the barony descended to Lady Elizabeth Greville (she having survived her two sisters, who died without issue); from whom it descended to her grandchild and heir, Sir Foulk Greville, Knight (who was created Lord Broke, to him and his heirs male) ; but who dying without issue, the barony descended to Margaret, Lady Verney, the petitioner's grandmother. The attorney-general argued against this claim : 1st. That a summons by writ did not create an estate in fee ; for that anciently several had been so summoned, and yet their sons had never been summoned after them ; nay, sometimes the very person first summoned had afterwards been omitted to be summoned. But he did not design to urge that any further ; but chiefly insisted, that even in the time of King Henry 7, when Sir Robert Willoughby was first summoned, it was not considered as an estate in fee ; urging Latimer's case ; and of later times, Abergavenny's case, and Paget's. 2d. That if it did descend, it was extinguished in the co-heirs of Lady Margaret Greville, urging the Earl of Oxford's case.

The counsel for the petitioner replied that, 1st. As to the baronies of Latimer and Abergavenny, those honours followed the entail of the lands, as baronies by tenure. As to the resolutions in the Earl of Oxford's case, touching the baronies of Bulbeck, Sandford, and Badlesmere, that they were in his Majesty's disposition ; they allowed that the king might dispose of them to which of the co-heirs he pleased during the co-parcenership, but not to a stranger, nor to the heir male collateral, who had no right thereto, so long as there were heirs general. The House of Lords resolved, that the petitioner had no right to a summons to parliament. *See* 3 Cruise, Dig. 254, 255 ; Collins, 322, 412 ; 2 Dugd. *Bar.* 367; *Lords' Jour.* 15 vol. 634, 643 ; 21 vol. 266, 339: and on the subject of titles of honour being in abeyance generally, *see* 2 Cruise, Dig. 245 to 274 ; Co. Lit. 165 a, and note ; 3 Thomas's Co. Lit. 115 n ; 3 Com. Dig. 468 ; Chit. jun. on the Prerogatives of the Crown.

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same rule obtains with regard to powers of appointment (*Cave v. Holford*, 3 Ves. 657; *Cox v. Chamberlain*, 4 Ves. 631; *Maundrell v. Maundrell*, 10 Ves. 246); for if a person limits to such uses as he shall appoint, and in the meantime, and until he makes an appointment to the use of himself and his heirs, or in case he limits it to the use of himself for life, and after his decease to such use as he shall appoint, for want of appointment to the use of his right heirs, in both these cases the fee simple remains in him, subject to be diverted by the exercise of his power of appointment.

[1] It is, however, in the power of the Crown, during the continuance of the co-heirship, to terminate the abeyance or suspension of the dignity, by nominating any one of the co-heirs to it. Such nomination operates, not as a new creation, but as a revival of the ancient dignity, for the nominee becomes entitled to precedence according to the date of the dignity. 3 Cruise, Dig. 249. Although the abeyance terminates as a matter of course whenever there remains, by the death of some of the co-heirs, but one heir ; yet the attainder of one of two co-heirs does not determine the abeyance. 6 C. & F. 868 ; 2 H. 6, 865.

Dignities are not within the Statute of Limitations, and may consequently be claimed at any distance of time; and there are instances of claims being recognised after the dignities had been dormant for some centuries. 3 Cruise, Dig. 254, 261, 1172. *See* Dignity; Peer; Wharton's *Peerage*, 12 C. ; Fin. 948; and Sydney's *Appeal in Peerage Cases*.

ABIDING by. In Sc. L. a term used in cases where a deed is challenged as forged. The party founding on the deed must appear in Court and abide by it. This is done by his signing a declaration that he abides by the deed (contested) *sub periculo falsi*, which has the effect of pledging him to stand to the consequences of founding on a forged deed. Bell's *Dict.;* Paterson's *Comp.* E. & S. L. 478.

ABIDING by Plea. Formerly (1 Tidd. 674, 7th ed.) if the defendant demurred without cause, or pleaded a sham plea, it was necessary in the Q. B. to obtain an order or rule that he abide by his plea. This practice, however, was abolished by H. T. 2 W. 4, r. 46; and now, by P. R. 8, H. T. 1853, the defendant shall not be at liberty *to waive his plea*, or enter a *relictâ verificatione* after a demurrer, without leave of the Court or a Judge, unless by consent of the plaintiff or his attorney. Permission is generally given upon the terms of the defendant taking short notice of trial, and on payment of costs, and submitting to other just conditions. See *Jeffereys v. Walter*, 1 Wils. 177. *Meard v. Philips*, 2 Stra. 906; Arch. *Pr.* 357.

A defendant cannot waive his plea without leave of the Court or a Judge.

ABILITY.[1] *See* Action; Alien; Attainder; Bills of Exchange; Corruption of Blood; Deceit; Devise; Grant; Husband and Wife; Idiot; Infant; Limitations, Statute of; Lunatic; Parties to Actions; Principal and Agent.

ABILITY to pay. *See* Insolvent; Protection.

ABJUDICATIO. From *Adjudicare*. A deprivation by the judgment of a Court of competent jurisdiction; the same as *forisjudicatio*, forjudgment. Co. Lit. 100 a, b.

ABJURATION.[2] **A Renunciation or Abandonment upon Oath.** *See* Abjuration of the Realm.

ABJURATION of Allegiance. *See* Allegiance.

ABJURATION of the Realm.[3] This imports the taking an oath to depart from the kingdom and never return unless by permission; a species of sworn or self-banishment formerly allowed to offenders who confessed their crimes after fleeing to a sanctuary, as a means of saving their lives. Bract. fol. 135 b.; 3 P. Wms. 38, note; 4 Bl. Com. 332. The blood of the person thus abjuring was attainted; he forfeited all his goods and chattels, and was considered as dead in law. Id. 333, and id. 443; Co. Lit. 133 a. *See* Oath;

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[1] The effect of this word in 9 Geo. 4, c. 14, s. 16 (as to representations relating to the credit of third persons) was much discussed in *Lyde v. Barnard*, 1 M. & W. 101. See *Swan v. Phillips*, 8 Ad. & E. 457.

[2] Under the Abjuration Oath required by 6 Geo. 3, c. 53, the expression, "on the true faith of a Christian," was held to be an essential and substantive part of the oath (*Salomons v. Miller*, 22 L. J. Ex. ch. 169); and the statute 21 & 22 Vic. c. 48, substitutes a form of one oath for the Oaths of Allegiance, Supremacy, and Abjuration: sect. 4, provides a form of affirmation for Quakers; and sect. 5, 21 and 22 Vic. c. 49, the form of oath for Jews. The oath prescribed by 21 & 22 Vic. c. 48, s. 1, need not be taken by any person upon an occasion in which he would have been obliged before the passing of the Act to take the Oath of Abjuration. A person having a conscientious scruple against the form of the new oath may, therefore, be admitted an attorney on taking the Oath of Allegiance, and the Attorney's Oath, 6 & 7 Vic. c. 73, ss. 15, 19. *Tyabjee in re*, 28 L. J. Q. B. 22; 4 Jur. N. S. 1108.

[3] This practice is generally considered as having been abolished by stat. 21 Jac. I, c. 28, but it is mentioned in the books at a later period. 2 Inst. 629; 11 East, 301; 2 Kent's *Com.* 156, note; 1 Burr. D.

The subject was brought before the Q. B. in *Robinson v. Gore*, E. T. 1844, when an attempt was made to defeat a plea of coverture by replying that the husband had abjured the realm. The replication was demurred to, and held bad for not sufficiently showing that the technical requisites of a valid abjuration had been followed. Mr. Js. Willes for plaintiff; Petersdorff for defendant. *See* Form of Oaths, and regulations to be observed; Bract. 136, lib. 3, c. 16; Bract. c. 16, f. 25; Precedents of Pleas; Petersdorff's *Index*, Part I.

Sanctuary; and on this subject in general, see 26 Li. Ass. p. 19; 29 id. p. 11; 9 E. 4, 28; 7 H. 7, 7; 11 H. 7, 4; 5 Co. 12; Kelynge, 36; E. P. C. 172; Staunf. P. C. 1166; 2 Hawk. P. C. 84, 6th ed.; id. 474; 1 Leach, 398; Precedent that plaintiff has abjured, Clift. 5.

ABODE, Place of.[1] *See* Addition; Affidavit; Attorney; Bail; Bills of Exchange; Bill of Sale; Insolvent; Protection; Practice; Residence; Writs, Indorsement on.

ABODE and Occupation of Plaintiff; Right to demand.

Every defendant on being served with writ is entitled to demand of plaintiff's attorney, in writing, whether process is issued by his authority, and a statement of occupation and place of abode of his client.

By 15 & 16 Vic. c. 76, s. 7, every attorney whose name shall be endorsed on any writ issued by authority of that act shall, on demand in writing made by or on behalf of any defendant, declare forthwith whether such writ has been issued by him, or with his authority or privity; and if he shall answer in the affirmative, then he shall also, in case the Court or a Judge shall so order and direct, declare in writing, within a time to be allowed by such Court or Judge, the profession, occupation, or quality and place of abode of the plaintiff, on pain of being guilty of a contempt of the Court from which such writ shall appear to have been issued; and if such attorney shall declare that the writ was not issued by him, or with his authority or privity, all proceedings upon the same shall be stayed, and no further proceedings shall be taken thereupon without leave of the Court or a Judge. 2 Wm. 4, c. 37, s. 7, enacts to same effect.

HODSON v. GAMBLE, 3 D. P. C. 174.

He is bound to ascertain and give the required information truly.

The plaintiff had left his place of residence before the action was brought, and was known to have gone to Liverpool; the address given was, "Peele's Coffee House, Fleet Street," and it was sworn that he was then residing there. But this was held insufficient, and proceedings were stayed till a better residence was given.

NEAL v. HOLDEN, 3 D. P. C. 493.

Otherwise proceedings will be stayed, and the attorney directed to pay the costs occasioned by the inquiries.[2]

The attorney received his instructions by letter, dated at Bridport, and afterwards received from the plaintiff another dated at Lynn. An order having been obtained, he gave "Bridport" as the place of residence, but it appeared upon inquiry that the plaintiff had left that place before the action was commenced; and another order was obtained, upon which the attorney gave "Lynn." This also turned out to be incorrect, and the Court, upon a motion for an attachment for giving a false address, ordered the attorney to pay the costs occasioned by the inquiries and of the motion, and stayed proceedings till a true address was given.

SMITH v. BOND, 11 M. & W. 326.

The application should be made in an early stage of the proceedings, it will not be granted after trial.

Particulars of occupation and abode had been furnished, but the information purported to be given was untrue. An application to stay the proceedings, made after trial, was refused, as it did not appear that the defendant had been prejudiced in his defence to the action by the deficiency or falsity of the information given; but it was intimated that the persons by whom the information was falsely given were punishable for contempt.

ABOLITION of Forms of Action in Writ. *See post*, Action, 15 & 16 Vic. c. 76, ss. 3, 40, 41; and *Bracegirdle v. Hinks*, 9 Ex. R. 361. *Nargatt v. Nias*, 28 L. J. Q. B. 143.

ABOLITION of Inferior Courts. *See* 9 & 10 Vic. c. 95, ss. 1, 2, 5, 7,

[1] Under 5 & 6 Wm. 4, c. 76, s. 32, means place of residence, not of business. *R. v. Hammond*, 16 Jur. 194. *See* 2 C. B. 187; 4 id. 100.

[2] But an order to disclose the plaintiff's abode has been refused when the object of the application was unconnected with the action, and to effect the apprehension of the plaintiff on a criminal charge. *Harris v. Holler*, 7 D. & L. 319.

as to orders in council respecting. See *R. v. Dyer*, 13 Q. B. 851 ; 18 L. J. Q. B. 281 ; *Hellawell v. Eastwood*, 6 Ex. 295 ; 20 L. J. Ex. 154 ; and County Court.

ABOLITION of Real and Mixed Actions. These were abolished by 3 & 4 Wm. 4, c. 27, s. 36 (from 31 Dec. 1834), except dower, *quare impedit*, and ejectment; and now, by 23 & 24 Vic. c. 126, s. 26, the two former are abolished, and such actions are to be commenced by writ of summons, s. 27.

ABORTION[1] **and wilfully causing Miscarriage.** *See* also Concealment of Birth ; Infanticide.

I. Not an Offence at Common Law, p. 55.

II. An Offence by Statute, and how Punishable, p. 55.

III. Commitment and Indictment for, p. 56.

IV. Evidence, p. 56.

V. Expenses of Prosecution. *See* 7 Geo. 4, c. 64, s. 22 ; 14 & 15 Vic. c. 55, s. 2 ; *ante*, p. 49.

I. Not an Offence at Common Law.[2]

II. An Offence by Statute, and how Punishable.

By 7 W. 4, and 1 Vic. c. 85, s. 6, it is enacted, "that whosoever, with intent to procure the miscarriage of any woman,[3] shall unlawfully administer to her, or cause to be taken by her, any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of his or her natural life, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years." Administering any poison or noxious thing, or using instruments to procure a miscarriage, is a felony.

By 9 & 10 Vic. c. 24, s. 1, "it shall be lawful for the Court, at its discretion, to award a sentence of transportation for a term of years not less than seven." How punishable.

By 16 & 17 Vic. c. 99, which substitutes penal servitude for transportation, it is enacted by s. 1, "that no person shall, after the 1st Sept. 1853, be sentenced to transportation for any less term than fourteen years." And by s. 4, "the terms of penal servitude to be awarded, instead of the transportation to which any offender would have been liable if this act had not been passed, shall be as follows; (that is to say,)

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[1] The premature expulsion of the human fœtus, 1 Russ. C. 671; 4 Steph. Com. 128. Recently the appropriate term *fœticide* has been occasionally applied. Beck's *M. J.* 238.

[2] At common law, an infant in its mother's womb, not being *in rerum naturâ*, was not considered as a person who could be killed within the description of murder or manslaughter, and, therefore, a party administering medicine to procure abortion, whereby an unborn child might have been killed, was not punishable. Bract. 121; 1 Hale, 143; 1 Hawk. P. C. c. 31, s. 16. Though if the child were born alive, and afterwards died of the poison or bruises it received in the womb, it was murder in the person who administered or gave them. 1 Hawk. c. 31, s. 16; 4 Bl. Com. 198.

[3] If the intent be established, and it be proved that the thing administered "was a poison or other noxious thing, it seems to be immaterial that it was a thing not calculated to produce miscarriage." Arch. C. P. 538. But it is not sufficient that the defendant merely imagined the thing administered to have the effect intended, but it must appear that it was a poison or other noxious thing. (Id.) The former statutes, 43 Geo. 3, c. 58, s. 2, and 9 Geo. 4, c. 31, s. 14, contained different provisions applicable to women quick and not quick *with child*; therefore, to constitute an offence under those acts, the woman must have been proved to be in fact with child. *R. v. Scudder*, 1 Mood. C. C. 216 ; 3 C. & P. 605. The more general words of the statute in the text have rendered this proof unnecessary. *R. v. Goodhall*, 1 Den. C. C. 187; 2 C. & K. 293.

"Instead of transportation for seven years, or for a term not exceeding seven years, penal servitude for the term of four years.

"Instead of any term of transportation exceeding seven years, and not exceeding ten years, penal servitude for any term not less than four, and not exceeding six years.

"Instead of any term of transportation exceeding ten years, and not exceeding fifteen years, penal servitude for any term not less than six, and not exceeding eight years.

"Instead of transportation for the term of life, penal servitude for the term of life.

"And in every case where, at the discretion of the Court, one of any two or more of the terms of transportation hereinbefore mentioned might have been awarded, the Court shall have the like discretion to award one of the two or more terms of penal servitude hereinbefore mentioned in relation to such terms of transportation."

Power to award solitary confinement.

By 7 Wm. 4, and 1 Vic. c. 85, s. 8, "when any person shall be convicted of any offence punishable under this act, for which imprisonment may be awarded, it shall be lawful for the Court to sentence the offender to be imprisoned, or to be imprisoned and kept to hard labour, in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement for any portion or portions of such imprisonment, or imprisonment with hard labour, not exceeding one month at any one time, and not exceeding three months in any one year, as to the Court in its discretion shall seem meet."

Regina v. Wilson, 26 L. J. M. C. 18.

It is not necessary that there should be a delivery by the hand of the defendant.[1]

A woman believing herself to be pregnant, applied to the defendant to get her something to procure miscarriage. The prisoner supplied her with a drug for that purpose, and told her how to take it. She also charged two shillings. The woman, some little time after, in the absence of the defendant, took the drug as directed, which in a few days procured a miscarriage.

Held, that this was a "causing to be taken" within the statute. *See* also *R. v. Harley*, 4 C. & P. 369.

III. Commitment and Indictment,[2]

IV. Evidence.[3]

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[1] But where the defendant gave the prosecutrix a cake containing poison, which she merely put into her mouth and spit out again, and did not swallow any part of it, it was held that the mere delivery to the woman did not constitute an administering within the meaning of the statute, although the judges seemed to think that swallowing it was not essential. *R. v. Cadman*, 1 Mood. C. C. 114. On an indictment for administering, &c. statements of the woman *in extremis* are inadmissible. *R. v. Hutchinson*, 2 B. & C. 608 n. See *R. v. Lloyd*, 4 C. & P. 233; 1 Taylor, Ev. 471; 1 Phil. Ev. 282 *contra*.

[2] *Precedent for administering Poison to procure Miscarriage.*—M. to wit. The jurors, &c. upon their oath, &c. A. B. late, &c. in, &c. feloniously and unlawfully did administer to, and cause to be taken by one C. D., a large quantity of a certain noxious thing, called, &c., to wit, 1 oz. of the said noxious thing, called, &c., with intent then and there and thereby to procure the miscarriage of the said C. D. against the form of the statute, &c. *See* Precedent; 3 Chit. Crim L. 797; and Petersdorff's *Index*, C. P. 1.

Precedent for using Instrument for like purpose.—Begin as *supra*. Feloniously and unlawfully did use a certain instrument called, &c., by then and there [describe mode of using], with intent, &c., as above.

[3] It must be proved that the drug in question was administered with intent to procure the miscarriage. Whether it were in fact a drug likely or calculated to produce that effect seems to be immaterial, provided the intent be proved, and that the drug were "a poison," or "other noxious thing." Nor is it material whether it be administered with the consent of the woman or not, or whether she be pregnant at the time or not. *R. v. Goodchild*, 2 C. & K. 293; *R. v. Scudder*, R. & M. 216: but the poison, it seems, must be actually taken into the stomach. *See R. v. Cadmors*, 1 M. C. C. 114; *R. v. Harley*, 4 C. & P. 369. On such investigations the general questions are,—1st. Has the *fœtus in utero* been destroyed? 2d. Has

ABOUT[1]—AROUND.[2]

ABOVE. *See* Bail.

ABRIDGE. From the French *abbreger*, to make shorter. Thus, at common law, a man was said to abridge his plaint in assize, or a woman her demand in an action of dower, where land was put in the plaint or demand which was not in the tenure of the defendant; for if the defendant pleaded *non tenure*, *joint-tenancy*, &c., in abatement of the writ as to part of the lands, the plaintiff might leave out those lands, and pray that the tenant may answer to the rest. *Cheetham v. Sleigh*, 3 Lev. 68; Brook's Dig. Abridgment; 21 H. 8, c. 3; 3 T. R. 13; 5 T. R. 402; 4 M. & S. 94; 1 Com.; 1 Vin. Ab. 3. This law, however, is now obsolete, as all real and mixed actions, except writ of right of dower, dower, *quare impedit*, and ejectment, were abolished by 3 & 4 Wm. 4, c. 27, s. 36; and now the 23 & 24 Vic. c. 126, s. 26, enacts "that no *writ of right of dower*, or *writ of dower unde nihil habet*, and no plaint for free bench or dower in the nature of such writ, and no *quare impedit*, shall be brought after the 10th day of October, 1860; but where any such writ, action, or plaint will now lie, an action may be commenced by writ of summons issuing out of the Court of Common Pleas, in the same manner and form as in an ordinary action."

ABRIDGMENT. *See* Copyright; County Court.

ABROAD.

I. Service of Process there. *See* Attachment; Capias; Ejectment; Jurisdiction; Security for Costs; Summons, Writ of.

II. Making Affidavit there. *See* Affidavits.

III. Debtor going. *See* Absconding Debtor; Affidavit; Arrest.

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this been brought about by criminal means, or by accidental or natural causes? Great discrimination is required in distinguishing between involuntary causes of abortion and those attributable to culpable interference. Diseases of various kinds may occasion a premature expulsion of the embryo, without the slightest imputation of criminality. Dr. Beck, *M. J.* 268, observes as to the evidence, —"The mere fact of concealment, even if proved, ought to be considered as no evidence whatever of the guilt of the accused; but if she has been known to apply frequently to the same, or to different physicians, to be bled, especially in the foot; if she has endeavoured to procure any of the medicines usually given to produce this effect; if any are found in her possession, or if she can be convicted of actually taking them without medical advice, we have then the strongest circumstantial evidence which the nature of the case admits of to pronounce her *intention* to have been criminal. The means are either general or local. General, when they consist of venesection, or the administering deleterious compounds; local, when blows and other injuries are inflicted on the loins and abdomen, or the introduction of instruments into the uterus for the purpose of rupturing the membranes, and thus bring on premature action of the womb." Chit. *M. J.* 634; Beck, id. p. 262.

If the intent be not proved, the defendant may be convicted of an assault. 7 Wm. 4, and 1 Vic. c. 85, s. 11.

[1] An expression commonly used where a term or sum cannot be precisely stated, importing the possibility of a small variation from it. Hence, where goods are sold as "about" a certain quantity, "more or less," the latter words are intended to provide only for a small excess, and the purchaser is not bound to accept 350 tons on a bargain, for "about 300 tons, more or less;" at least, unless it be shown that a large excess was contemplated. Cross. Eglin, 2 B & Ad. 106. Parol evidence is inadmissible to explain the meaning of the words "more or less" in such a contract. Id. *See* Abuttals.

[2] "About the heart,"—in an indictment, might mean only *near* the heart; but "about the neck" means around it. *Park J.* in *R. v. Culken*, 5 C. & P. 121; 2 H. P. C. 185.

IV. Murder or Manslaughter by an English Subject,[1] or Offences against Customs[2] committed there, may be prosecuted in England, pp. 57, 58.

ABSCONDING. *See* Poor, Settlement of.

ABSCONDING Debtor. *See* Arrest.

ABSCONDING DEBTORS' ACT (14 & 15 Vic. c. 52[3]). *See* 1 & 2 Vic. c. 10, s. 3; Affidavit to hold to Bail; Arrest.

I. Under this Act a Warrant may be obtained upon a proper Affidavit for Arrest by a Bankruptcy-Court or County-Court Judge, p. 58.

II. Form of Warrant and Indorsement thereon, p. 59.

III. A Writ of Capias must be issued within Seven Days after Warrant, p. 60.

IV. The Warrant is only auxiliary to the Writ, p. 61.

V. Person arrested may be discharged, or Proceedings stayed, p. 61.

VI. Officers responsible for the due Execution of the Warrant, p. 62.

VII. Costs of Warrant and Fees allowed, p. 62.

I. A Warrant may be obtained on a proper Affidavit for Arrest by a Bankruptcy-Court or County-Court Judge.

A Court of Bankruptcy or

By 14 & 15 Vic. c. 52, s. 1, "it should be lawful for any Commissioner of

[1] Offences committed out of England are not cognizable by the Courts here, unless there is a special act for the purpose of giving them jurisdiction, or some part of the offence complete in England. 1 Esp. 62. By stat. 9 Geo. 4, c. 31, s. 8, where any person feloniously stricken, poisoned, or otherwise hurt upon the sea, or at any place out of England, shall die of such stroke, poisoning, or hurt in England, or being feloniously stricken, poisoned, or hurt at any place in England, shall die of such stroke, poisoning, or hurt, upon the sea, or at any place out of England, "the offender, and all accessories before or after the fact, may be tried, &c. in the county or place in England where the death-stroke, poisoning, or hurt shall happen, in the same manner as if the offence had been wholly committed in that county or place." And by s. 7, if any British subject shall be charged in England with any murder or manslaughter, or with being accessory before the fact to any murder, or after the fact to any murder or manslaughter, the same being respectively committed on land out of the United Kingdom, whether within the king's dominions or without, "a justice of the peace may take cognizance of the offence so charged, and proceed thereon, as if it had been committed within the limits of his ordinary jurisdiction."

[2] By stat. 3 & 4 Wm. 4, c. 53, s. 77, offences committed on the high seas against any act relating to the Customs shall, for the purpose of prosecution, be deemed to have been committed in the place on land in the United Kingdom into which the offender shall be carried, or in which he shall be found.

[3] Previous to this enactment the power of authorising the arrest of a debtor for a debt of 20*l.* or upwards was confined to the judges of the superior courts (*see* Arrest); but this, as the statute recites, was found insufficient and inadequate, frauds being perpetrated upon creditors residing at a distance from London, by debtors embarking for distant countries from various towns and seaports, it was desirable to extend the authority to Courts of Bankruptcy and judges of the County Courts.

In Chancery there is the writ of *Ne exeat regno*, a prerogative process, which is issued to prevent a person from leaving the realm. It is, however, only applicable to equitable debts and claims, and these must be certain in their amount, of a pecuniary character, and actually payable, and not contingent. 2 Madd. C. P. 279; Sto. ss. 825–840. See *Ne exeat regno*. In Scotland they have an analogous proceeding: where a creditor has a debt to a liquidated amount, but the time of payment has not arrived, and the debtor is *vergens ad inopiam*, the creditor may get letters of arrestment to secure the debtor till caution is found. Pater. S. & E. L. 485.

the Court of Bankruptcy acting for any district in the country, or the Judge of any district County Court (except the County-Court Judges acting in the counties of Middlesex and Surrey), on application by or on behalf of any creditor upon due proof by affidavit, intituled in one of her Majesty's superior courts of common law, of the creditor applying, or of some other person (or by solemn affirmation, in cases in which solemn affirmation is allowed by law, to the satisfaction of such Commissioner or Judge, that a debt of 20*l.* or upwards is owing to such creditor, and is then payable from the person or persons against whom such application shall be made, and that there is probable cause for believing that such debtor or debtors, unless he or they be forthwith apprehended, is or are about to quit England, with intent to avoid or delay the said creditor, or with intent to remain out of the jurisdiction of the courts of law in England so long that thereby the said creditor will, or may be delayed in the recovery of the said debt, to grant a warrant[1] to the messenger of the said Court of Bankruptcy, or to the high bailiff of the said County Court, whereby the said messenger or high bailiff shall have authority, at any time within seven days after the date of the said warrant (including the day of such date), to arrest the person or persons named in such warrant, and him and them safely keep until he or they shall have given bail to such messenger or high bailiff, or made deposit with him according to the practice observed in the superior courts of law, or until he shall have paid the debt and costs indorsed on the said warrant, or be otherwise discharged from arrest under such warrant by due course of law,[2] and that such warrant shall bear date the day of the issuing thereof, and may be executed in any part of England, and that a copy of such warrant or warrants shall at the time of the arrest be served upon the party arrested. By s. 2, the affidavit may be made before a Court or Judge, or before any person having authority to administer oaths in courts of law."

County-Court judge may, upon proof by affidavit of the debt, and that the debtor is about to leave England, issue a writ for the arrest of the absconding party.

II. Form of Warrant[2] and Indorsement thereon.

By 14 & 15 Vic. c. 52, s. 4, "the person to whom the warrant hereby authorised to be issued shall be directed, shall, immediately on the same being executed, indorse a certificate thereupon of the time and place where the debtor was arrested, and the production of such warrant and certificate to the sheriff of

Every person executing a warrant shall indorse the time and place

[1] Where such a warrant has been issued by a County-Court Judge, an order to hold to bail, under 1 & 2 Vic. c. 110, s. 3, may be made by a judge at chambers upon examined copies of the affidavits filed in the County Court. *Pearce v. Mastin*, 16 Jur. 270. If, however, the *capias* be issued upon the same materials as the warrant, it must be issued and served within the seven days above specified, otherwise the warrant and *capias* will both be void, and the debtor will be entitled to his discharge. This rule does not hold where the *capias* was obtained upon fresh materials, for in the one case the principle applies that a defendant shall not be *bis vexatus pro eâdem causâ*, in the other it is in no way applicable. *Masters v. Johnson*, 21 L. J. Ex. 253; 8 Exch. 63. See *Stammers v. Hughes*, 18 C. B. 527; 25 L. J. C. P. 247.

[2] This is given in the schedule to the act. Whereas A. B. [the creditor] hath this day proved upon oath [or solemn affirmation, as the case may be,] to my satisfaction that C. D. [the debtor] is indebted to the said A. B. in the sum of £ , and that there is probable cause for believing that the said C. D., unless he be forthwith apprehended, is about to quit England, with such intent as is mentioned in the Absconding Debtors' Arrest Act, 1851. These are to desire and authorise you that you take the said C. D. wheresoever he may be found, and him safely keep until he shall have given you bail or made deposit with you, according to law in an action ["on promises," or "of debt," or "covenant," as the cause of action may be], at the suit of A. B., or until the said C. D. shall have paid the debt and costs indorsed on this warrant, or shall by other lawful means be discharged from your custody. I do further command you to whom this warrant is directed that, on execution hereof, you do deliver a copy hereof to the said C. D. And I hereby require the said C. D. to take notice that application will be made forthwith to the Court of [Queen's Bench, or Common Pleas, or Exchequer, or Common Pleas at Lancaster, or Pleas at Durham, as the case may be], for a writ of *capias* to be issued against the said C. D.; and a copy of such writ, if obtained, will be served upon the said C. D., if still in custody, within seven days from the date of this warrant,

where debtor was arrested.

the county where such warrants shall have issued, or to the keeper of the gaol of such county, shall be a sufficient authority to such sheriff or keeper to detain such debtor or debtors until he or they shall be discharged by due course of law."

As soon as arrest is made the warrant shall immediately cease and determine, and the sheriff shall hold the defendant under the writ of *capias*.

By sec. 6, "as soon as the person so arrested as aforesaid has been taken into custody, or detained under the writ of *capias* hereinbefore mentioned, the force and effect of the said warrant so granted as aforesaid shall immediately cease and determine; and the said sheriff shall hold the said person under or by virtue of the said writ of *capias*, in like manner as if the said person had been first arrested under and by virtue of the same, or in case the person so arrested shall have made deposit with the said messenger or high bailiff as aforesaid, or entered into such bail-bond as aforesaid, then, upon delivery to the messenger or high bailiff respectively by whom such person was arrested of a copy of the warrant granted by the sheriff upon such writ of *capias* as aforesaid, the said messenger or high bailiff shall pay over to such sheriff as aforesaid the said deposit, or assign to the said sheriff such bail-bond as aforesaid, and the said sheriff shall then hold the said deposit or bail-bond, and shall be entitled to enforce the said bail-bond in his own name, or to assign the same in the same manner as if the said person had been first arrested on the said writ of *capias*, and the said deposit had been made, or bail-bond entered into with the said sheriff: Provided always, that the said sheriff shall not be in any manner liable or answerable for any default, misbehaviour, or miscarriage of the person to whom such warrant was addressed, or of the person or persons making the arrest under and by virtue of the said warrant: Provided also, that if no writ of *capias* be issued and served within seven days from the date of the said warrant, including the day of such date, the person arrested under such warrant shall be entitled to be discharged from custody, or in case the deposit has been made with a bail-bond given to the said messenger or high bailiff, then the said deposit shall be returned, and the said bail-bond given up to be cancelled."

How warrant indorsed.

By sec. 7, "such warrant shall be indorsed with the amount of debt and costs claimed by the plaintiff, in such manner as writs of *capias* are now directed to be indorsed, and on payment of the amount so indorsed all proceedings shall be stayed, and the person so arrested be discharged from custody, and he shall be at liberty afterwards to tax the costs so indorsed as if he had been arrested under a writ of *capias*."

III. A Writ of Capias must be issued within Seven Days after the Warrant.

The act requires that the creditor shall issue a writ of

The 1st section contains a proviso "that every creditor who shall cause such warrant to issue, shall forthwith cause to be issued a writ of *capias*, and also in cases where no action shall be pending shall, before the issuing of such writ of

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including the day of such date. And I do further command you to whom this warrant is directed that, immediately after the execution hereof, you do certify by indorsement hereon the time and place when and where you shall have executed the same. Dated the day of A.D. .

This warrant is to be executed within days from the date hereof, including the day of such date, and not afterwards.

Indorsement.

This warrant was issued by of attorney for the within-named

A Warning to the Defendant.

Within seven days from the day of the date of this warrant, including the day of such date, you will be served with a writ of *capias*, and thereafter you will be considered as arrested by virtue of such writ of *capias;* and all proceedings will be had upon the said writ of *capias* as if this warrant had not issued; or you may be discharged forthwith on depositing in the hands of the officer to whom this warrant is directed the sum of £ , and ten pounds for costs, or on payment to such officer of the debt and costs endorsed on this warrant, or on entering into a bail bond to such officer with two sufficient sureties for the amount indorsed on this warrant. The plaintiff claims £ for debt, and £ for costs.

By order of [the party issuing the warrant]. Bail for the sum of

capias, cause a writ of summons to be issued out of some one of the superior courts of law against such debtor or debtors, and that upon such *capias* all mandates and warrants shall issue according to the practice now in use, notwithstanding that the defendant shall have been arrested by virtue of any warrant or warrants granted by such Commissioner or Judge, and such debtor or debtors shall, if in custody, be served with such writ of *capias* within seven days from the date of such warrant, including the day of such date, and thereupon such debtor or debtors shall be considered and deemed to have been arrested by virtue of the said writ of *capias*, and all proceedings shall be had upon such writ of *capias* as if the same had been issued prior to the issuing of such warrant, and the arrest made on such writ of *capias*, and according to the practice now observed in the said superior courts of law.

capias within seven days from the date of the warrant, and where there is no action pending writ of summons.

IV. The Warrant is only auxiliary to the Writ.

By sec. 3, the warrant or warrants which shall be issued by virtue of this act shall be auxiliary only to the processes now in use, and shall be wholly void and of none effect whatsoever as a protection to the person on whose behalf such warrant shall have issued, unless such writ of *capias* shall be issued and served in manner aforesaid. See *Masters v. Johnson*, 8 Ex. R. 63; S. C. 21 L. J. Ex. 253.

The warrant is to be deemed only auxiliary to the writ of *capias*.

V. Person arrested may be discharged, or Proceedings stayed.

By sec. 5, "it shall be lawful for any person arrested upon any such warrant forthwith, before the issuing of the said writ of *capias*, to pay the debt and costs which shall be indorsed on such warrant to the said messenger or high bailiff as aforesaid, or to enter into a bail-bond to such messenger or high bailiff, with two sufficient sureties, for the amount which shall be indorsed on such warrant, conditioned to put in special bail as required by the said warrant, or to make deposit of the sum indorsed on such warrant, together with 10*l.* for costs, and thereupon he shall be entitled to be discharged from custody, and such messenger or high bailiff is hereby authorised to discharge such person accordingly."

On payment of debt and costs indorsed on warrant, or on entering into bail-bond, or defraying sum endorsed, with 10*l.* for costs, defendant is to be discharged.[1]

By sec. 8, "it shall be lawful for any person for whose arrest a warrant shall have been granted, to make application, either before or after arrest shall have been made by virtue of the said warrant, and before a writ of *capias* shall have been issued as aforesaid, to any Commissioner of Bankrupt or County-Court Judge as aforesaid, or to any Judge of the said superior Courts, or to the Court mentioned in the affidavit of debt or warrant for the arrest, for a summons or rule calling upon the creditor who shall have obtained such warrant to show cause why the warrant should not be set aside and vacated if such application shall be made before arrest, or why the debtor should not be discharged out of custody if the application should be made after arrest; and that it shall be lawful for such Commissioner, or Judge, or Court, to make absolute or discharge such summons or rule, and direct the costs of the application to be paid by either party, or to make such other order therein as to such Commissioner, Judge, or Court, shall seem fit: Provided that any such order made by a Judge may be discharged or varied by the Court, on application made thereto by either party dissatisfied with such order."

May apply to Court of Bankruptcy, or Judge, or to the Court named in the warrant, for debtor's discharge.

[1] Where a defendant is discharged upon making a deposit in lieu of bail it is not necessary to serve him with a writ of *capias*, although he may be in custody upon another warrant. *Eld v. Vero*, 8 Ex. R. 655; 22 L. J. Ex. 276; 17 Jur. 737.

VI. Officers responsible for the due Execution of the Warrant.

The officer executing the warrant is responsible to the Court or a Judge in which the action is brought.[1]

By sec. 9, "the officer to whom such warrant shall be directed or addressed as aforesaid, shall be subject to the jurisdiction of the Court in which the action shall be brought, or of any judge thereof, and shall be responsible to such Court or Judge, and to the person at whose suit such warrant shall issue, for the due execution of the said warrant, in the same manner exactly as sheriffs are now responsible for the due execution of all writs of *capias* directed or addressed to them, and shall be entitled to the same protection as sheriffs now are entitled to on executing such writs."

VII. Costs of Warrant and Fees allowed.

The costs of warrant and arrest to be costs in the cause, and fees to be taken as in schedule.[2]

By sec. 10, "the costs of and attending the warrant hereby authorised to be issued, and the arrest thereon, shall be deemed to be costs in the cause: Provided always, that no such costs shall be allowed to a plaintiff unless the Court or the proper officer thereof is satisfied, by affidavit or otherwise, that the plaintiff had good reason to believe that he would probably have failed in causing the defendant to be arrested if he had proceeded in the first instance by application to a Judge of one of the superior Courts for a writ of *capias*, without first applying to a Judge of a County Court, or a Commissioner of the Court of Bankruptcy, as the case may be, under the provisions of this Act." By sec. 11,

Fees to be taken.

"the fees mentioned in Schedule (B) to this Act annexed, shall be paid to the parties in the said schedule named, and that no other fees shall be allowed or taken in respect of the warrant to be issued by virtue of this Act."

ABSCONDING Witness.[3] *See* Witness.

ABSENCE.[4] *See* Appearance; Conviction; Execution; Judgment; Master and Servant; Poor, Settlement of; Summons, Writ of.

ABSENCE of Counsel. *See* New Trial for.

ABSENCE of Witness. *See* New Trial postponed.

ABSENTING himself. *See* Bankrupt; Insolvent.

ABSOLUTE Rule. *See* Rules; Motions; Orders.

ABSOLUTE Warrandice.[5]

ABSQUE hoc. These words, signifying *without this, that*, were words in the old *special* traverse, as introducing a qualification in a traverse of a

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[1] The applying for a warrant from a County-Court Judge under which to arrest an absconding debtor has been held not to be a proceeding in the County Court within the 29th sect. of 9 & 10 Vic. c. 95, so as to render the high bailiff of the Court liable for a penalty for acting as attorney in the application; this decision resting mainly on the ground that the obtaining the warrant in the inferior is ancillary merely to the proceedings in the superior Court. *Warden v. Stone*, Q. B. East T. 1857; 5 W. R. 501; Broom's. C. C. 558.

[2] The following scale of fees is inserted in Schedule (B). "To the attorney for preparing affidavit, and showing that the debtor is about to abscond, and oath, 10*s.*; to the same for attending to issue warrant, 6*s.* 8*d.*; to the clerk of County Court for issuing warrant, 5*s.*; to the party executing the same for caption, 1*l.* 1*s.*, with mileage of 6*d.* from the place where the warrant shall be issued to the place where it shall be executed, and an additional mileage of 1*s.* from the place of arrest to gaol.

[3] In Scotland, a witness about to abscond, may be apprehended till he find caution for his appearance. Pater. E. & S. L. 478. Such a proceeding cannot be adopted in England.

[4] According to Sc. L. a pursuer may obtain a decree in absence on which he may proceed, subject to defendant's right to be repaid on paying expenses, or to produce in England when defendant is absent. *See post*, Appearance.

[5] In Sc. L. a warranty against all encumbrances whatever. 1 Horne's *Equity*, 290–293.

matter of fact; as where the defendant pleaded that such a thing was done at *B.* &c. *absque hoc*, that it was done at, &c. Steph. *Pl.* 189, 203. Special traverses are now abolished by C. L. P. Act, 16 & 17 Vic. c. 76, s. 65.

ABSQUE impetione vasti. *See* Waste; and 10 H. 7, 3; 21 H. 7, 30.

ABSQUE tali causa. These words were used in the old replication of *de injuriâ*, which when allowed operated as a general denial of all the material averments in the plea. As to when this replication was allowable, see *Crogate's case*, 8 Co. 66, and the cases cited in the notes to that case in Smith, *L. Ca.* vol. i. Now, however, this form of replication is abolished by the C. L. P. Act, 16 & 17 Vic. c. 76, which makes the joinder in issue a denial of the substance of the plea. *See* De injuriâ.

ABSTRACT of Pleas. *See* Pleas, several.

ABSTRACT OF TITLE.[1]

I. Definition and Objects.

Is an Epitome of the Evidences of Ownership,[2] p. 63.

II. Purchaser is entitled to, even from Representatives of deceased Owner, p. 65.

III. Requisites of, p. 66.

(A) *Must enable Purchaser to complete, and should show every Incumbrance*, p. 66.

(B) *Purchaser's Right to, is not waived by being let into Possession*, p. 66.

(C) *Delivery of Title-Deeds is not equivalent to an Abstract*, p. 67.

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[1] This subject is so intimately woven with that of vendor and purchaser, and involves so many considerations connected with that relation, as to render very difficult the line of demarcation between the two. To draw it very strictly would be to sacrifice comprehensiveness to a fixed rule; while, on the other hand, an encroachment on the general law of vendor and purchaser would exceed the limits allotted to this portion of these volumes. In order, then, to reconcile these conflicting claims, a discretion must be exercised, at the risk of disappointing the expectations of some and of exceeding those of others. *Blackburn v. Smith*, 2 C. & K. 561; S. C. 18 L. T. Ex. 187.

In like manner, as the subject depends so much for illustration on equitable, as distinguished from legal, considerations, no apology is offered for the frequent reference to reports of cases in the different Courts of Equity.

Although we sometimes speak of *the law of abstracts*, there is in fact but little law, in its strict sense, applicable to the subject. In disclosing a title the abstract has relation to the law of vendor and purchaser, with which, however, this division of our work does not propose to deal; but the law of abstracts, if the expression may be used, has no legislative enactment for its basis, and but scanty judicial authority for its elucidation. It is the result of a course of practice recognised by the profession, and sanctioned by long usage, the rules in connexion with it resulting principally from the usage of Conveyancers, to which even courts of justice yield a willing deference. According to Lord Eldon, great weight should be given to the practice of Conveyancers. *Howard v. Ducane*, Turn. & Russ. 87.

[2] An abstract of title is an abridgment of the deeds or documents which confer on the owner the right to the possession and enjoyment of property real or personal, and which exhibit the legal and equitable incumbrances or charges upon it, and the circumstances modifying its future destination. It shows, or ought to show, in a concise yet comprehensive form, the provisions of every instrument which, when submitted for examination, can, either directly or collaterally, affect the ownership, whether present or future; every vested, contingent, and executory interest; every actual and possible estate. At the same time that no right, however remote or improbable, ought to be suppressed, no superfluous matter ought to be introduced. The abstract should present a perfect epitome of the existing condition of the title, and no more.

These are general requirements which it is easier to point out than satisfy; for a

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Every species of Property may form the subject of, p. 67.

V. Duty in preparation of, p. 67.
(A) *Fraudulent Suppression of Deeds is a Misdemeanour*, p. 67.
(B) *At whose Cost*, p. 68.
Vendor generally pays for Abstract, p. 68.
(C) *Legal Charge for*, p. 68.

VI. Non-delivery of, relieves Purchaser at Law from Contract, p. 68.

VII. Form of; that sanctioned by common usage should be observed, p. 69.
(A) *Writing and Division of Page*, p. 69.
(B) *Explanatory Matter*, p. 69.
(C) *Heading of Abstract should be concise and comprehensive*, p. 69.
(D) *Mode of abstracting Deeds and their component parts, and other matters*, p. 70.
(*a*) *Chronological Order should be observed*, p. 70.
(*b*) *Commencement of Title*, p. 70.
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(5) *Parcels, Maps or Plans, Exceptions, and Reservations*, p. 71.
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(*d*) *Execution and Attestation*, p. 72.
(*e*) *Receipt of Consideration*, p. 72.
(*f*) *Registration, Enrolment, Livery of Seisin, and Stamps*, p. 72.

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minute's thought will show that the preparation of an abstract calls for a degree of acuteness and caution, and an amount of legal knowledge, far exceeding those usually deemed adequate to the purpose; but they only who are practically engaged in the task can estimate the degree of subsequent labour imposed, or of time saved in the work, by the employment of a skilful or unskilful hand. The earlier deeds form no test of the later state of title; and it is only by a careful comparison of the two, and a judicious elimination of obsolete matter, that the title can be exhibited in a perfect shape. Is it, then, a subject of surprise that we too often find a crude mass of matter incumbering an abstract, when its preparation is confided to a noviciate, who fancies his duty best performed by crowding his pages with useless clauses, and screens himself under the belief that it is safer to set out too much than too little of the deed before him? Such a belief may perhaps be justified in the main, for idle excess may be rejected by one qualified to advise on title, while an important omission may occasion difficulties, or involve a purchaser in consequences most serious. But this same excess leads to confusion, and diverts the mind from the real points for consideration.

(*g*) *Wills*, p. 73.
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XI. Consequence of Nonperformance of Contract by Vendor, p. 78.
(A) *Purchaser may recover Costs of investigating Title and search for Judgments, &c.* p. 78.
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XII. Property in Abstract, p. 80.

II. Purchaser is entitled to, even from Representatives of deceased Owner.[1]

Morris v. Kearsley, 2 You. & C. Exch. 139.

The purchaser has a right to the usual abstract, though the vendors be only the representatives of the deceased owner.

The survivor of two partners (brewers) agreed with the representatives of the deceased to purchase his moiety of the brewery business, and of the property belonging to the partnership. It was contended on behalf of the representatives that they were not bound to furnish any other title than that derived from the deceased by means of the letters of administration. The Court, however, held that the vendors were bound to furnish the usual abstract of title.

[1] In sales, alike by public auction and by private contract, it is usual to provide that the vendor shall, at his own expense, within a specified number of days, supply the purchaser with an abstract of title, a duty, however, flowing from the relation of vendor and purchaser independently of express stipulation. Dart's V. & P. 3d ed. 80.

III. Requisites of.

(A) *Must enable Purchaser to complete, and should show every Incumbrance.*

Blackburn v. Smith, 2 Car. & Kir. 561; S. C. 2 Exch. 783.

A perfect abstract of title is one which enables the purchaser to complete the purchase.

A. contracted to sell lands to B., and B. afterwards contracted to sell them to C., and agreed to furnish C. with a full and sufficient abstract of title, and, before any conveyance by A. to B., A. died. B. before the death of A. delivered to C. an abstract, bringing the title down to the contract by A. to sell to him:—*Held*, that this was a performance of the agreement by B.; and *per Rolfe, B.*, a perfect abstract of title is one which shows such a title as enables the purchaser to complete the purchase.

Richards v. Barton, 1 Esp. 268.

An abstract ought to mention every incumbrance affecting the estate, and should therefore contain an account of every judgment by which the estate is affected.[1]

Plaintiff declared in *assumpsit*, stating that the defendant had undertaken to grant him an annuity, charged upon certain premises, and that he had represented to the plaintiff that there was only one outstanding judgment; but it appeared that, prior to the execution of the deeds, it was ascertained that the estate was charged with another incumbrance. The plaintiff consequently refused to complete his contract, and brought the present action to recover the expenses for preparing the deeds, and the interest of the money from the time of making the first contract to the final abandonment of the business.

Per Lord Kenyon. The grantor in his abstract of title ought to have recited every incumbrance charged upon the premises; the abstract is, therefore, imperfect: and, as the defendant has misrepresented the nature of the proposed security, and not disclosed those defects with which he was acquainted, I am of opinion that the plaintiff is entitled to recover. Verdict for plaintiff. *See* Precedents of Declaration for not delivering an Abstract, Pl. Ass. 62; 2 Chit. Pl. 159; 4 Taunt. 334; and, Preston *On Abstracts*, 41. *Hodges v. Earl of Lichfield*, 1 Bing. N. C. 492. *Metcalfe v. Fowler*, 6 M. & W. 830. *Orme v. Broughton*, 10 Bing. 533.

(B) *Right not waived by being let into Possession.*

Seaton v. Booth, 4 Ad. & E. 528.

A purchaser being let into possession under an arrangement to pay a percentage on the purchase-money does not waive his right to an abstract.[2]

A., B., and C., having separate interests in lands, by arrangement amongst themselves employed an agent to put them up to sale, which was done in separate lots, and the defendant became the purchaser, subject to the conditions of sale, by one of which the vendors were to deliver an abstract, and the conveyance was to be executed and the purchase-money paid on a certain day, from which time the purchaser was to have possession: and it was agreed, that if he was let in before payment he was to be deemed tenant at will, and pay four per cent "as for rent." The defendant knew of the private arrangement, and was let into possession, but no abstract was ever delivered or interest paid. The Court held, that no implied contract to waive the delivery of the abstract could be raised from the mere circumstance of the defendant being let into possession.

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[1] The term "Abstract" signifies an abstract as perfect as the vendor can furnish at the time of delivery. *Blackburn v. Smith*, 2 Exch. 783; *Savory v. Underwood*, 23 L. T. Q. B. 141; *Hobson v. Bell*, 2 Beav. 17; *Blacklow v. Laws*, 2 Hare, 40; *Southby v. Hutt*, 2 Myl. and C. 211; *Morley v. Cook*, 2 Hare, 111.

In equity, the abstract is considered as complete whenever it appears that upon the fulfilment of certain acts the legal and equitable estate will be in the purchaser, although it may be long before the title can be completed.

[2] And a purchaser may require to be furnished with an abstract in the usual way, although he may have agreed to accept the title. *Morris v. Kearsley*, 2 You. & C. 139; *Keyse v. Hayden*, 20 L. T. 244, V. C. W.

(C) *Delivery of Title-Deeds not equivalent to an Abstract.*

HORNE v. WINGFIELD, 3 Scott's N. R. 340.

Delivery of vendor's title-deeds is not equivalent to delivery of an abstract.

Assumpsit. The plaintiff put up certain leasehold premises for sale by auction, and by his conditions of sale was bound to deliver, at his own expense, an abstract of his title to the purchaser. Instead of an abstract, the plaintiff handed to the purchaser (the defendant) the original lease and an assignment of it to the plaintiff; and, on the refusal of the defendant to complete, brought an action, averring that he had delivered an abstract. The defendant by his plea traversed the averment.

Per Cur. Upon this averment the defendant tenders a precise issue. The question, therefore, is, whether or not the evidence shows that an abstract was given. We think not. We are not aware of any case in which it has been held that a delivery of the vendor's title-deeds is equivalent to a delivery of an abstract.[1]

IV. SUBJECTS OF ABSTRACT.[2]

Every species of property may form the subject of an abstract.

V. DUTY IN PREPARATION.[3]

(A) *Fraudulent Suppression of Deeds is a Misdemeanour.*

Seller or mortgagor, or his agent, fraudulently suppressing document material to title, guilty of misdemeanour.

By a late act further to amend the law of property (22 & 23 Vic. c. 35), it is enacted, sect. 24, "that any seller or mortgagor of land, or of any chattels real or personal, or choses in action, conveyed or assigned to a purchaser, or the solicitor or agent of any such seller or mortgagor, who shall, after passing of the act, conceal any settlement, deed, will, or other instrument material to the title, or any incumbrance, from the purchaser, or falsify any pedigree upon which the title does or may depend, in order to induce him to accept the title offered or produced to him, with intent in any such cases to defraud, shall be guilty of

[1] Formerly the title-deeds were delivered to the purchaser, whose solicitor prepared the abstract at the purchaser's expense, and the abstract was compared with the title-deeds by his counsel. 1 Prest. *Abst.* 200; Sugd. V. & P. 13th ed. 336, pl. 2. This practice, however, has long since fallen into disuse.

[2] With regard to the subjects of an abstract, they are as multifarious as are the dealings of society. They comprise property real, personal, and mixed; land of every tenure, freehold, copyhold, and leasehold, and every estate in it, from a fee-simple to a chattel interest. They include incorporeal hereditaments, such as rents-charge, tithes, advowsons; and deal with choses in action, annuities, debts, legacies, portions, stock, interests in letters patent, and matters of comparatively modern creation, like shares in dock, railway, canal, banking, gas, and similar companies; in fact, every species of property transferable from man to man. And they introduce for consideration all kinds of assurances, of which conveyances, mortgages, settlements, wills, partnership deeds, deeds of release, deeds of composition with creditors, and declarations of trust, may be mentioned, merely by way of example.

With such a body of matter to digest and arrange, there will be little difficulty in appreciating the remarks above made relative to the skill and knowledge required in the preparation of the abstract, and still less in estimating the patient attention indispensable to its examination, and a just estimate of the combined operation of its contents.

To enter, in detail, into these various matters would far exceed the limits assigned to this division of our work. It will, therefore, be advisable to confine ourselves at present to abstracts of title relating to land, except so far as the other subjects above alluded to may occasionally call for comment or tend to illustrate the principal matter.

[3] The first duty of the party preparing the abstract, the vendor's or mortgagor's solicitor, is to show, without exception, all the deeds and documents which the purchaser or mortgagee has, according to the law of vendor and purchaser, a right to inspect. Common honesty requires this course, and he who furnishes a garbled abstract is guilty of a fraud. The vendor's solicitor, moreover, is, independently of the act noticed in the text, personally responsible for suppressing an incumbrance. (Sugd. V. & P. 13 ed. 337, pl. 5; 341, pl. 32.) The purchaser or mortgagee pays his money honestly, and has a moral right to a corresponding honesty on the vendor's or mortgagor's part. It is, however, to be feared that this principle, if recognised by

a misdemeanour, and, being found guilty, shall be liable, at the discretion of the Court, to suffer such punishment, by fine or imprisonment, for any time not exceeding two years, with or without hard labour, or by both, as the Court shall award; and shall also be liable to an action for damages at the suit of the purchaser or mortgagee, or those claiming under the purchaser or mortgagee, for any loss sustained by them, or either or any of them, in consequence of the settlement, deed, will, or other instruments or incumbrance so concealed, or of any claim made by any person under such pedigree, but whose right was concealed by the falsification of such pedigree; and, in estimating such damages, where the estate shall be recovered from such purchaser or mortgagee, or from those claiming under the purchaser or mortgagee, regard shall be had to any expenditure by them, or either or any of them, in improvements on the land: but no prosecution for any offence included in this section against any seller or mortgagor, or any solicitor or agent, shall be commenced without the sanction of Her Majesty's Attorney-General, or, in case that office be vacant, of Her Majesty's Solicitor-General; and no such sanction shall be given without such previous notice of the application for leave to prosecute to the person intended to be prosecuted as the Attorney-General or the Solicitor-General (as the case may be) shall direct."

(B) *At whose Cost.*

As a general rule, the vendor pays for the abstract.[1]

(C) *Legal Charge for.*

The charge for drawing an abstract is 6*s.* 8*d.* a sheet.

The strict legal charge for drawing an abstract is 6*s.* 8*d.* for each sheet of ten folios, of seventy-two words each folio, and 3*s.* 4*d.* for the copy; but, unless objected to, an abstract is usually passed in taxation if it contain an average of eight folios per sheet. *Re* Walsh, 12 Beav. 490.[2]

VI. Non-delivery of, relieves Purchaser at Law from Contract.[3]

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the profession, was not invariably acted upon in practice; and it was in part to meet this laxity that the legislature interfered, and passed the clause set out in the text *supra*.

A seller may, upon a suit for a specific performance, be compelled on oath to bring into the office of the Court all documents in his possession or power relating to the title; yet he is not bound to furnish an abstract commencing before the proper period, whether the purchase is completed in or out of Court. (Sugd. V. & P. 13th ed. p. 337, pl. 3.) But there is no pretence for a purchaser requiring, or a seller's solicitor furnishing, an abstract of all the deeds in his possession, however ancient. This is never done by a respectable solicitor, and could not be justified; nor could a purchaser insist upon such an abstract. Ibid. pl. 5.

Where circumstances disclosed by the instruments abstracted, or otherwise known to the purchaser, require the production of any portion of the earlier title, the true rule, perhaps, is, that the seller must furnish an abstract of any instrument, however ancient, upon the contents and construction of which the title depends; but that where the instrument is required simply to establish a fact or to negative an inference, it is sufficient to produce the instrument itself as such evidence. Ibid. pl. 3.

[1] But on sales to a company, under the Lands C. C. Act, 1845, whether such sales be voluntary or compulsory, and whether made by absolute or merely statutory owners, the costs of the abstract, in the absence of agreement, are thrown on the company (7 & 8 Vic. c. 18, s. 82); and similar provisions are contained in most of the earlier Railway and other similar Acts. (*See* London and Greenwich Rwy. Co. 3 Ha. 22). Such costs seem to be included in any general stipulation throwing on the purchaser the costs of *the contract*. (*Ex parte* Addie's Charity, 3 Ha. 22, 5.) Where property held under the same title is sold in lots, it is not unusual to provide that a purchaser of several lots shall not be entitled to more than one abstract.

[2] A solicitor who merely furnishes a copy of a former abstract is not justified in making the usual charge for preparing an abstract. *McCulloch v. Gregory*, 1 Kay & J. 291.

[3] Non-delivery of an abstract on the day named relieves the purchaser at law from the contract. (Dart's V. & P. 3d ed. p. 201; Sugd. V. & P. 224.) But in equity the same rigour does not exist. The purchaser, however, in such a case, is absolved from the conditions providing for his making objections to title within a limited time after delivery. *Southby v. Hutt*, 2 Mylne & C. 241; and see *Roberts v. Berrey*, 3 De G. M. & G. 291; *Buchannan v. Poppleton*, 27 L. J. C. P. 210.

VII. Form of Abstract.[1]

(A) *Writing and Division of page.*[2]

(B) *Explanatory Matter.*

Matter of this description must be distinguishable from the deeds abstracted.

(C) *Heading of Abstract.*[3]

[1] In noticing the form of the abstract, or the mode of its exhibiting the contents of the instruments abstracted, it may be premised that the abstract should be written on the paper ordinarily used for the purpose, in a clear, open, bold, and legible hand, with reasonable space between the words and lines. Matters like these, apparently trifling in themselves, affect very materially the progress of business. An abstract may be written so illegibly, or on paper of such an inconvenient size or substance, as to justify the purchaser's solicitor or counsel in declining to receive it. (Sugd. V. & P. 13th ed. 337, pl. 4; Dart's V. & P. 3d ed. 207.) And Lord St. Leonard's states that he has many times, in his practice as a conveyancer, refused to peruse papers illegibly written, or written upon such thin large paper that a long abstract could not be conveniently perused. Sugd. V. & P. 13th ed. 337, pl. 4.

[2] With a view to present the different parts of the deed abstracted as distinctly as possible, and, by relieving the eye of the heaviness and monotony of an unbroken page, to facilitate perusal, it is usual to divide the page into several portions vertically. The sheet is first folded or marked from top to bottom in the centre; the left-side half is again folded or marked in the centre, by which, of course, two quarters of the entire page are secured; and the second quarter, the right hand, is then subdivided into three equal portions; so that, on the whole, the page has five perpendicular divisions of unequal width.

The date of the deed invariably occupies the extreme left division, without exceeding the boundary line. The names and descriptions of the parties, and the covenants and provisoes, commence at the first line, or crease, and extend over the whole width of the rest of the page to the right hand; and if, as is usually the case, occupying more than a line, the second line ranges immediately under the first, and the third under the second. At the line, or crease, of the next division, the recitals and *habendum* commence, running over the whole width of the rest of the page to the right. The operative part of the deed and the limitations and trusts commence at the third line or crease, running to the right in a similar manner; while the parcels invariably occupy the right-hand half of the page; and in this division, or perhaps a little to the right of the line or crease, are noticed the circumstances of the execution and attestation of the deed, and the receipt of the purchase-money; and, if any, the registration or enrolment of the deed. These arrangements may differ a little in different offices: for instance, the operative part may commence at the first instead of the third crease; but the divisions above indicated are those in general use.

In the body of the abstract no explanatory matter whatever should be introduced beyond that contained in the deed abstracted. All remarks should be confined to the left-hand margin, or added after the attestation, and then made so clearly as to be distinguishable from the matter abstracted. For instance, in abstracting a recital of an estate tail, or a limitation of a term for securing pin-money, a jointure, or portions, a statement inserted in the body of the abstract that the estate tail failed for want of issue, that the pin-money or jointure ceased by death, or that a right to portions never arose, would lead to the conclusion that the allegation formed a portion of the recital, and would be treated accordingly; while it might receive a different degree of attention if known to be the allegation of the party furnishing the abstract.

The margin should be as free from notes as possible. It is better to make explanatory statements in chronological order, or in connexion with a regular sequence of events.

[3] The first consideration is a neat and compendious heading or statement of the subject of the abstract, and it should mention briefly the name of the owner, and the parcels, mentioning their tenure, their name, if any, their acreage, locality, parish, and county. For example:—

> Abstract of title of Henry Spencer, Esq., to a freehold messuage called Broadlands, and certain pieces of copyhold land, containing 110A. 2R. 3P., respectively situate in the parish of Greenford, in the county of Wilts.

The effect of which is, to draw the reader's attention at once to the specific subject of his work, and to enable him to dismiss from his mind collateral matter.

Minuteness is to be deprecated, except in cases admitting of no doubt. But where the parcels are not well defined, or the interests of many persons are involved, as in the case of a vendor and his mortgagees, or other incumbrancers, it is better to have a more general heading: for instance:—

> Abstract of title of Henry Spencer, Esq., and his mortgagees and annuitants, to certain freehold hereditaments situate in the parish of Greenford, in the county of Wilts.

At all events, the heading, whether compressed or diffuse, should be intelligible.

(D) *Mode of abstracting Deeds and their component parts, and other matters.*[1]

[1] As a general rule, not to be lightly departed from, the *chronological order* of the documents should be observed. Nor should wills form an exception to the rule, although the testator may have long survived the date of his will. With regard to wills, chronological order of dates is not so important now as it was before after-acquired realty passed by previous disposition by will (1 Vic. c. 26, s. 24).

It is not within the range of this article to discuss the period at which an abstract should commence; but we may mention that, notwithstanding the abridgment, by the statute of 3 & 4 Wm. 4, c. 27, of the period of limitation, a purchaser is, in the case of freeholds and copyholds, entitled to a sixty-years' title at least (*Cooper v. Emery*, 1 Phil. 388. *Hodgkinson v. Cooper*, 9 Beav. 304. *Finch v. Shaw*, 18 Jur. 937. *Blackburn v. Smith*, 2 Exch. 783); and even to an earlier one, if the recitals in a deed of that age lead to an inference that the vendor at that time had a less estate than a fee-simple, that he was but a tenant for life, or a tenant in tail conveying by a common deed of release or grant, in each of which cases, notwithstanding lapse of time, the title would be *primâ facie* bad.

The late Lord Langdale, M. R., said, that he was very much afraid that one of the objects of the legislature in passing the act, namely, that of shortening the period of deducing titles, had not been effected, in consequence of the construction put upon the statute. *Hodgkinson v. Cooper*, 9 Beav. 304–9.

So where a conveyance dated sixty years ago is but a derivative assurance, as a settlement made in pursuance of articles, or an appointment in pursuance of a power, or is a recovery to bar an estate tail and remainders, the purchaser has a right to require an abstract of the articles, or of the deed conferring the power, or creating the estate tail.

In the case of leaseholds, the lessor's title is very rarely shown, and the purchaser takes the lease contracted for as the root of title. In long leaseholds of ancient creation, the usual practice is to abstract the lease, and then to trace the title for the last sixty years, omitting all notice of the dealings in the interval; nor will the absence of the deed creating the term render the title unmarketable. 1 Jarm. Conv. by Sweet, 3 edit. p. 69; 1 Prest. *Abst.* 249; Dart, V. & P. 3rd ed. p. 194.

(*c*) Having thus glanced at the general nature of an abstract and its contents, we may speak of the *component parts* of the deed to be abstracted, and the mode of dealing with them.

(1) *Date of Deed.*

The date, as already mentioned, is shown by itself in the extreme left-hand column, and it is usual for the year to precede the month and day; that is, 1796, January 5, instead of 5 January, 1796. The year strikes the eye at once, and fixes the date more strongly in the memory.

(2) *The Parties.*

The names of the parties should be set out in full, and, unless the deed be of ancient date, their addresses and occupations should be abstracted in the original instance; but, when their identity is unquestionable, they should be referred to in the subsequent parts of the abstract as "the said."

Where changes of abode or occupation occur, they ought to be distinctly noticed, so as to enable a purchaser to form his own opinion of the identity of the persons described.

Where several persons of the same name concur in a conveyance, some addition—the place of abode, for instance—should be made for the sake of distinction; and the abstract might run thus:—"*The said Henry Spencer, of Reading, did,*" &c. "*Covenant by the said Henry Spencer, of Brighton,*" &c.

It assists the eye and memory to have the parties arranged in distinct lines, thus:—

A. B. of —— of the first part,
C. D. of —— of the second part,
E. F. of —— of the third part,

instead of running them in a continuous line.

If either party is stated to convey or concur in any specific character, as trustee, heir, executor, &c., the abstract should faithfully notice the circumstance.

(3) *Recitals.*

As a general rule, such only of them should be abstracted as are necessary to render the deed intelligible. This is a question of discretion. For example, supposing a deed to be a conveyance in fee, with a single recital of a contract for sale, it would be idle to abstract that recital fully, as it is implied in the operative part of the deed.

It is equally futile to say, "Reciting as therein is recited." The reader is baldly apprised of the existence of recitals without a clue to their nature or effect.

Deeds already abstracted in chief often reappear on the title as recitals in subsequent deeds. In this case they should be referred to in abstracting the subsequent deeds, but a second abstract of them as recitals is not justifiable. The proper course is to say, "After reciting the indenture of the —— day —— of ——, before abstracted, p. ——."

So recitals, once abstracted, should never be repeated at length in a later stage of the title, though reference should be made to them, either generally as, "After recitals similar to those contained in the hereinbefore abstracted indenture of the —— day of ——, p. ——."

All recitals of facts which keep up the links of title, or remove difficulties, such as marriages, births of issue, deaths, deaths without issue, and the like, should be carefully abstracted.

Where a settlement recites the articles in pursuance of which it is professed to have been executed, but the articles are not forth-

coming, the recital should be set out at length, to enable the purchaser to judge whether the settlement was in conformity with the articles.

If, however, the articles can be produced, they should be abstracted in chief.

(4) *The Testatum.*

In abstracting the *Testatum*, or operative part of a deed, the safest plan is to set it out at length (except the part which acknowledges the receipt of the purchase-money), specifying the names of the grantor and grantee, and the words of limitation. This is especially necessary where the deed assumes the form of an appointment of a use as well as of a conveyance of a seisin, with a superadded limitation of uses. The ownership of the legal estate would depend upon the language employed.

The consideration should be stated, so as to obviate a question as to the conveyance being voluntary. Nominal considerations should be only briefly referred to. Where the deed operates as an appointment, and also as a conveyance of an estate, the operative parts should be kept distinct. An attempt to blend the operative words of appointment with those of grant and conveyance might be the cause of a misconception as to the ownership of the legal estate. *Roach v. Wadham*, 6 East, 289; S. C. 2 Smith, 376.

Deeds are sometimes found deficient in the name of the granting party, or the grant is to one and the *habendum* to another. (See *Trethewy v. Ellesdon*, 2 Vent. 141. *Spyve v. Topham*, 3 East, 115.) Where such an omission or inaccuracy occurs, the person abstracting the deed should never attempt to supply the want. He should abstract the deed as it stands, and by a marginal note draw attention to the fact of the omission.

Where, according to former practice, now abandoned, the grant was first in the past tense, "hath granted," &c., and was succeeded by a grant in the present tense, "and by these presents doth grant," &c., the abstract merely states "did grant," &c.

Deeds of a complicated nature, involving, say, a conveyance of freeholds, copyholds, and leaseholds, or freeholds and personalty, or a conveyance by A. to B., redeemable by C. on payment of money to B., or a conveyance and an assignment or surrender of an attendant term, each *testatum* and each *habendum* should be separately abstracted. An attempt to combine their effect in one clause would only lead to mistake.

(5) *Parcels, Maps or Plans, Exceptions, and Reservations.*

As the parcels constitute the pith of the conveyance, corresponding care should be given to ensure accuracy. They should be set out at length from the first deed abstracted, and referred to only in the later deeds, supposing them to pass under the same description. But where the descriptions respectively in the early and subsequent deeds vary, the difference should be carefully expressed, either by a brief notice where the difference is small, or by a full description where the difference is great, or the identity open to doubt.

The abstract should be confined to the parcels contracted for. To admit others into the description can tend only to confusion. Thus, if the abstract, as originally furnished by the vendor to the purchaser, relate to other parcels sold at the same time to other persons, the purchaser's solicitor, before submitting it to counsel, should expunge the parcels not comprised in his client's purchase.

And where more parcels than those forming the subject of the abstract are comprised in the deed abstracted, the fact should be intimated by showing that the premises in question were, *inter alia*, conveyed, &c.; a circumstance which will often account for the difference in the value of the property.

When in the vendor's possession, a map or plan of the parcels should accompany the abstract. A map, though it is not a necessary part of an abstract (*Blackburn v. Smith*, 2 Exch. 783), should accompany it, for the purpose of aiding as much as possible the identification of the lands sold.

When a plan of the property is exhibited, it should be so framed as to convey clear information to the ordinary class of persons who frequent sales by auction, and should show rights of way, objectionable projections of houses, and other like disadvantages, if they exist; though, when accurate, it is merely tantamount to a view of the estate, and does not afford any guarantee that rights which appear to exist in connexion with other property shall be reserved, or that intended improvements shall be carried out. 1 Dav. *Prec.* 2d ed. p. 446.

Exceptions and *Reservations* should be set out *totidem verbis*. The expression, *except as therein is excepted*, is wholly inadmissible.

(6) The *General Words*, unless there be some special addition or particular object in view, are not usually abstracted at length.

(7) Nor are the "*Reversion*" and "*All the Estate*" Clauses.

(8) The grant of "*All Deeds*," &c. should be rather fully abstracted.

(9) The *Habendum* should be nearly a transcript of the words of the deed, the ownership of the use as well as that of the seisin being distinctly shown. Where they vest in the same person, it is usual in the abstract to blend them in one clause; thus, —"To hold, &c. unto and to the use of the said A. B., his heirs and assigns," instead of,—"To hold, &c. unto the said A. B., his heirs and assigns, to the use of the said A. B., his heirs and assigns for ever."

(10) *Special Limitations* should be abstracted fully. The ordinary limitations in strict settlement, such as to first and other sons in tail, may be abstracted in so many words, the limitations over being introduced by the concise expression, "with remainder." But this mode of abstracting can only be con-

fided to persons cognizant of the operation of the limitations. In cases of doubt, the exact language should be used in the abstract.

So in all cases where there are contingent, executory, or shifting uses, the limitations should be abstracted *totidem verbis*, together with the words introducing the remainders, or substituted estates. It is better to sacrifice brevity to perspicuity than to risk error, bearing in mind the Horatian caution,—"*Brevis esse laboro, obscurus fio.*"

Similar remarks apply to *Declarations of Trust.*

Powers, if exercised—such as powers of leasing, sale or exchange, of jointuring, of portioning, of appointing new trustees, of giving receipts for purchase-money—should be set out almost at length; otherwise they may be briefly referred to.

Where trustees for sale have a power to give receipts for the purchase-money, the trusts of the proceeds of the sale need not be detailed.

(11) *Covenants, Provisos, and Declarations*, are usually abstracted rather fully.

With regard to covenants, it is material to set out the lien or obligatory part of the covenant, so as to show the relative liabilities and rights of covenantor and covenantee, and persons respectively claiming under them. Thus, instead of saying, "covenant by A. B. with C. D.," the abstract should show that the covenant was (according to the fact) by A. B. "for himself, his heirs, and assigns," or "for himself, his heirs, executors, and administrators,"—the language of the deed being transferred to the abstract. And, in like manner, the abstract should show whether the covenant was entered into with the covenantee, "his heirs and assigns," or "his heirs, appointees, and assigns," or "his executors, administrators, and assigns." Upon distinctions such as these may depend the fact of the covenant running with the land, either in point of benefit or charge.

Where covenants for title are qualified by an exception, the exception should be clearly set out.

(*d*) The abstract should specify the parties by whom the deed abstracted was *executed*, and by whom *attested*. In ordinary cases the words, "duly executed and attested," will suffice; but in cases requiring a particular mode of execution or attestation, as in the case of the exercise of powers, the particular mode of attestation should be fully shown. If the power required the deed exercising it to be "signed, sealed, and delivered," the facts of signing, sealing, and delivery, should be noticed in the abstract. If two or more witnesses were required, the number of witnesses should be specified. These remarks apply with less force to recent deeds than to those of earlier date; for a late statute (22 & 23 Vict. c. 35), which received the royal assent on 13th August, 1859, enacts (sec. 12), "that a deed hereafter executed in the presence of, and attested by two or more witnesses, in the manner in which deeds are ordinarily executed and attested, shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by deed, or by any instrument in writing not testamentary, notwithstanding it shall have been expressly required that a deed or instrument in writing, made in exercise of such power, should be executed or attested with some additional or other form of execution or attestation, or solemnity: Provided always, that this provision shall not operate to defeat any direction in the instrument creating the power that the consent of any particular person shall be necessary to a valid execution, or that any act shall be performed in order to give validity to any appointment having no relation to the mode of executing and attesting the instrument; and nothing herein contained shall prevent the donee of a power from executing it conformably to the power, by writing or otherwise, than by an instrument executed and attested as an ordinary deed, and to any such execution of a power this provision shall not extend."

The act of 1 Vict. c. 26, in relation to Wills, had already provided (s. 9) that no will should be valid unless attested by two witnesses; (s. 10), that no appointment "made by will in exercise of any power should be valid, unless the same should be executed in manner thereinbefore required; and that every will executed in manner thereinbefore required should, so far as should affect the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it should have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity."

(*e*) The memorandum indorsed on the conveyance acknowledging the *receipt* of the purchase-money should be noticed in the abstract; for, notwithstanding the acknowledgment in the body of the deed of the receipt of the money, which is sufficient evidence at law of payment, the absence of such an indorsement, at least on deeds of comparatively modern date, affords in equity an implication of non-payment, and raises a question as to the vendor's right in equity to a lien on the land. 1 Prest. *Abs.* 72.

A different rule, however, prevails where the fact of previous payment of the consideration is the subject of a distinct express recital. In that case the want of an indorsed memorandum of receipt will not be material. Ibid. 73.

(*f*) The circumstance of *Registration* or *Inrolment* of the deed should also be stated, with an accompanying reference to the date, time, and book.

Livery of Seisin, in the case of a feoffment, should also be noticed, as well as the date of livery.

The *Stamps* impressed on the deeds ab-

stracted ought to be stated in the margin, under the date.

(*g*) In abstracting *Wills*, the exact language of the words of limitation should be set out, unless they be the ordinary technical terms, and clearly create a certain estate — an estate tail, for example; in which case their effect may be given.

(*h*) *Acts of Parliament* are seldom abstracted at great length. The common practice is briefly to abstract the chief clauses applicable to the subject, and to send a copy of the act with the abstract.

(*i*) *Where different classes of property*, as freeholds and copyholds, or freeholds and leaseholds, are embraced by the abstract, and have been blended together in the course of dealing, as in the case of their being mortgaged by the same deed as a security for the same sum, it requires some discretion and skill to make the abstract clear. As a general rule, chronological order should be observed; and this is easily done with freeholds and leaseholds, as both the legal and equitable estate are transferred by the same instrument. With freeholds and copyholds combined the case is different, for the equitable estate only in the latter is transferred by the deed comprising the former, the legal estate passing by the customary assurance in the lord's court. In this case, the conveyance of the freeholds and the covenant to surrender the copyholds are to be kept together in the abstract, while the legal copyhold title, the actual surrender, and, as the case may be, the admittance, form the subject of a distinct portion of the abstract.

In order, however, to preserve the chain of events as unbroken as possible, reference to the fact of subsequent surrender and admittance may be added to the deed abstracted. Thus:—

Surrender accordingly; post, p. ——; or,

Surrender and admittance accordingly; post, p. ——.

By these means the state of the title is at once disclosed, on the assumption that the alleged fact is established by the customary conveyance, which it is the duty of the purchaser's adviser to ascertain.

(*k*) In like manner, if *portions* have been raised by mortgage of a term limited for securing them, and are brought into settlement, or mortgaged, or otherwise dealt with, by the parties entitled, chronological order must yield to perspicuity, and either separate abstracts, or separate parts of the same abstract, should be allotted to the respective titles, each with its appropriate heading, thus:—

As to Mary Spencer's portion of 1000*l.*

As to the 1000*l.* portion of Sarah Browning, formerly Sarah Spencer.

The original mortgage of the term for raising the portions would appear, according to its date, on the chief abstract.

(*l*) *Collateral facts*, such as births, baptisms, marriages, deaths, and descents, should be noticed in the order of date.

(*m*) From these remarks it will be apparent that a well-digested abstract must be the work of careful attention and revision, and that the copiousness or conciseness of the early part must depend on the dealings in a later stage of the title. Nothing short of an examination of the whole can indicate the clauses to be of necessity abstracted. Let us, for the sake of illustration, take the case of a strict settlement on marriage as the root of title, and suppose the estate to be limited—

To the use, intent, and purpose that the intended wife should receive an annual sum as pin-money, and, subject thereto,

To the use of trustees for a term of ninety-nine years for securing it, with remainder

To the use of the intended husband for life, with remainder

To the use of intended wife for life, with remainder

To the use of trustees for a long term of years, for securing portions for younger children, with remainder

To the use of the first and other sons of the intended marriage in tail, with remainder

To the use of the daughters of the intended marriage in tail, with cross remainders between them in tail, with remainder

To the use of the intended husband in fee;

With the customary powers of leasing, selling, and exchanging, and of appointing new trustees.

Now, it is obvious that more or less of this must be disclosed according to the development of the title consequent on the results of the marriage; the deaths of the husband and wife; the failure or existence of issue; the class of issue, male or female; the descent or destruction of the estate tail; the failure or exercise of the powers. If the entail and remainder over have been barred, it would be superfluous to abstract them in detail, as it would be to set out fully powers which have never been called into action. In these and similar cases, the remainders or powers may be briefly referred to. On the other hand, if a sale or exchange has taken place under the power, and the property contracted for is affected by it, or if new trustees have been appointed, and their concurrence is required in the proposed purchase or conveyance, the powers so acted upon should be fully abstracted.

Hence arises the necessity of revision of the abstract after an examination of the entire title; and, with a view to save time and labour in abstracting, the best plan, perhaps, is to refer briefly, in the first instance, to the provisions of the deed abstracted, expanding them according to circumstances, rather than to state them fully at first with the prospect of subsequent retrenchment.

Some, however, think it better to commence the preparation of an abstract with the latest, and to proceed, retrogressively, to the earlier deeds.

(*n*) *Precedent of Abstract.*

1842, January 18.

INDENTURE of this date between [*vendor*] of ——, Esq. of the first part, [*vendor's trustee*] of ——, Gent. of the second part, [*purchaser*] of ——, Merchant, of the third part, and [*purchaser's trustee*] of ——, Gent. of the fourth part.

RECITING Indentures of Lease and Release, dated 1 and 2 Feb. 1830, the release between A. B. of ——, and M. his wife, of the first part, C. D. of ——, of the second part, the said [*vendor*] of the third part, and the said [*vendor's trustee*] of the fourth part, and by a fine *sur conuzance de droit come ceo*, levied by the said A. B. and M. his wife, pursuant to a covenant contained in the said Indenture of Release, the messuage or tenement and hereditaments thereinafter described were conveyed and assured To such uses, upon such trusts, and for such intents and purposes, as the said [*vendor*] should at any time, or from time to time, by any deed or deeds, direct or appoint: And, in default of such direction or appointment, To the use of the said [*vendor*] and his assigns during his life, with a limitation to the said [*vendor's trustee*], his executors or administrators, during the life of the said [*vendor*], Upon trust for the said [*vendor*] and his assigns, with remainder To the use of the said [*vendor*] his heirs and assigns for ever.

AND RECITING that the said [*purchaser*] had contracted with the said [*vendor*] for the purchase of the said hereditaments for £——.

TESTATUM, That, in consideration of the said sum of £——, paid by the said [*purchaser*] to the said [*vendor*], the receipt, &c., the said [*vendor*] by virtue and in execution of the power or authority given or reserved to him by the thereinbefore recited Indenture of Release, and of all other powers and authorities enabling him in that behalf, did, by the deed now abstracted, direct, limit, and appoint that the said messuage or tenement and hereditaments, with their rights, members, and appurtenances, should thenceforth remain, continue, and be to the uses, upon the trusts, and for the intents and purposes thereinafter limited and declared concerning the same.

FURTHER TESTATUM, That, for the consideration therein aforesaid, and also for the nominal consideration therein mentioned, the said [*vendor's trustee*], according to his estate and interest as such trustee as therein aforesaid, by the direction of the said [*vendor*], by the deed now abstracted (made so far the same, should operate as a release in pursuance of an Act of Parliament passed in the fourth year of the reign of Queen Victoria, entitled "An Act for rendering a Release as effectual for the Conveyance of Freehold Estates as a Lease and Release by the same Parties"), bargain, sell, and release; and the said [*vendor*] did grant, bargain, sell, release, and confirm unto the said [*purchaser*], and his heirs,

ALL, &c.
TOGETHER with all and singular outhouses, &c.
AND all the estate, &c.
AND also all deeds, papers, and writings relating to or in anywise concerning the title to the said messuage or tenement and hereditaments, or any part thereof, either alone or together, with any other hereditaments of less value, then in the custody of the said [*vendor*], or which he could procure without suit.

HABENDUM Unto the said [*purchaser*] and his heirs,
TO SUCH USES, upon such trusts, and for such intents and purposes, and charged and chargeable in such manner and form, as the said [*purchaser*] should at any time, or from time to time, by any deed or deeds, appoint; and, in default of, and subject to, such appointment,
TO THE USE of the said [*purchaser*] and his assigns, during the term of his natural life, without impeachment of waste, with remainder To the use of the said [*trustee*], his executors and administrators, during the natural life of the said [*purchaser*], Upon trust for the said [*purchaser*] and his assigns with remainder
TO THE USE of the said [*purchaser*], his heirs and assigns for ever.

AND the said [*purchaser*] did thereby declare that his widow (if any) should not be entitled to dower out of the said messuage or tenement and hereditaments.

COVENANT by the said [*vendor's trustee*], for himself, his heirs, executors and administrators, with the said [*purchaser*] and his heirs, That he, the said [*vendor's trustee*], had not incumbered the premises.

COVENANTS by the said [*vendor*] for himself, his heirs, executors and administrators, with the said [*purchaser*] and his heirs: That, notwithstanding anything made, done, or permitted to the contrary, by the said [*vendor*], or any person or persons rightfully claiming through, under, or in trust for him, the said [*vendor*] and [*vendor's trustee*] then had in themselves, or one of them had in himself, good right &c., to appoint and

VIII. Verification of Abstract by Purchaser's Solicitor.[1]

(A) *Vendor should be prepared to produce his Deeds on the day named in the Contract.*

Berry v. Young, 2 Esp. 640, n.

Per Cur. A seller of an estate ought to be prepared to produce his title-deeds at the particular day. A court of equity may enlarge the time. Though a purchaser, before completion, has no right to the possession of the deeds, he has a right to inspect them. And, therefore, as the seller has here failed in completing his engagement, the plaintiff is entitled to a return of his deposit money.

(B)

Drax v. Scroupe, 1 Dowl. P. C. 69.

In this case it was contended, that, as the solicitor of a purchaser had submitted the abstract of title to counsel, he was not entitled to charge for a previous perusal of it by himself, as the client had no advantage from the consideration bestowed by the attorney; but,

And a purchaser's solicitor is entitled to charge for perusal of an abstract, though he submits it to counsel.

Per Taunton, J. "Yes he had; because the attorney peruses it, and when he has perused it he thinks that he ought to have the opinion of counsel. He

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release or otherwise assure the said messuage or tenement and hereditaments as therein aforesaid;

And also, that, notwithstanding any such act, deed, matter, or thing as aforesaid, the said messuage or tenement and hereditaments should be quietly enjoyed accordingly without any interruption, &c. by the said [*vendor*], or any person or persons whomsoever rightfully claiming, &c. by, from, under, or in trust for him, &c.;

And that free and clear, &c. of incumbrances created or occasioned by the said [*vendor*], or any person or persons rightfully claiming from, through, under, or in trust for him, &c.;

And for further assurance, &c.

Signed, sealed, and delivered by all the said parties, except the said [*purchaser*], and, as to each of them, attested by two witnesses.

Receipt for consideration money indorsed, and signed by the said [*vendor*], and attested by one witness.

Registered, &c. [*If registered.*]

[1] We may now suppose the abstract to have been delivered to the purchaser's or mortgagee's solicitor, whose duty it is to verify it with the deeds and other instruments professed to be abstracted. It is for him to see that the documents are duly set forth, that their effect, where their effect only is stated, is correct in point of law, that no important matters are omitted, no misrepresentations made. Upon his vigilance his client's security depends, and none but a competent hand should undertake the task; for the observations already made with regard to the responsibilities incident to the preparation of the abstract apply with tenfold force to those of the person employed to examine it on behalf of the purchaser.

A solicitor negligent of his duty in these respects would be liable to his client for any loss consequent on such neglect. *Ireson v. Pearman*, 3 B. & C. 799; S. C. 5 Dow & Ry. 687.

The practice as to the comparison of the abstract with the deeds is not uniform, some solicitors preferring it before the abstract is submitted to counsel; others, relying on its general accuracy, deferring the comparison till counsel has advised upon the title.

According to Lord St. Leonard's (V. & P. 13th ed. 341, pl. 34), if the abstract is on the face of it properly framed, which, he says, a competent person will be able to tell at a glance, the examination of it may be delayed until after the abstract has been perused by counsel, when the solicitor can at the same time ascertain the correctness of the abstract, and investigate the points suggested by the counsel.

The vendor must produce the deeds for verification with the abstract at his own residence, if they are in his custody; if not, at the residence of the party who holds them. If they are at a great distance from the abode of the purchaser's solicitor, he is not justified, without the express direction of his client, in undertaking, at his client's expense, a personal journey for the purpose; but, according to the usage of the profession, he should confide the examination to his agent on the spot. Even if directed by the client to undertake the journey, the solicitor cannot charge the client with the expense of it, unless he previously apprise him of the professional usage. *Alsop v. Lord Oxford*, 1 Myl. & K. 566; Sugd. V. & P. 13th ed. 356; Dart's V. & P. 3d ed. 267.

Absence of deeds leads to an inquiry as to the cause of their absence, and no purchaser should complete his purchase without having their absence satisfactorily accounted for.

would have been much more to blame if he had sent it at once to counsel for his opinion."

IX. Duty of Counsel.[1]

[1] The solicitor's duty being performed in this respect, and the abstract being a truthful, though condensed, exposition of the title, it is usually submitted to counsel skilled in the law of conveyancing for perusal; a precaution seldom, if ever, to be neglected, for few solicitors, with their various engagements and frequent interruptions, can give to a title the exclusive attention devoted to it by a conveyancer, confined to his chambers, and in daily familiarity with this branch of law. To depart from this course is unwise, both as regards policy and economy. Indeed, where a title is supposed to be defective or difficult of proof, a vendor would act judiciously in having it investigated before entering into a contract for sale, when appropriate terms and conditions might be imposed on the purchaser, or the defects, if incurable, would be confined to the knowledge of the vendor or his solicitor. Sugd. V. & P. 13th ed. p. 7; Dart's V. & P. 13th ed. p. 200.

In sales under the decree of the Court, the abstract, whenever it may be deemed necessary, will be submitted to one of the conveyancing counsel appointed by the Court. Sugd. V. & P. 13th ed. p. 350, pl. 31.

A copy of the particulars and conditions of sale, or of the contract for sale, should always accompany the abstract when submitted to counsel, who, before entering upon an examination of the abstract, should make himself familiar with the conditions or terms of sale, which, in most cases, materially modify the purchaser's rights under a naked contract for purchase.

(A) *Mode of Examination and Analysis.*

This leads us to consider what is the best plan to be adopted by the conveyancer in the examination of an abstract.

In more than one book of authority we find that the title should be perused at one sitting, if possible. But rules of this kind must yield to circumstances. The strength of memory, the health, and general physical condition of the person engaged, must be taken into account, as well as the length of the abstract and its complexity. So soon as the mind gets confused, the abstract should be closed till the faded energies be recruited.

Some men are possessed of such happy vigour of intellect and memory, that one perusal of a lengthy abstract will suffice for an opinion, not only on its general condition, but on all the details required for the completion of the title. Others proceed by a more laborious, but not less secure, process.

Some merely make marginal remarks on the abstract on the points as they arise, crossing out such of them as are superseded by the later title, leaving those only which call for attention. Others combine in an entire opinion their remarks and requirements, referring to the respective pages of the abstract for the matters to which such remarks and requirements relate. Each mode has its peculiar advantages; the former presenting the point as it arises, the latter exhibiting at one view the state of the entire title: each, accordingly, has its advocates.

So, one takes a cursory glance over the abstract to get a general view of the title, reserving its detail for a more careful examination. Another proceeds deliberately, masters its facts, and decides on the operation of each instrument as he advances. The first mode is objectionable, on the ground of its leading to hasty conclusions not easily erased from the mind. The second, perhaps, is preferable. But in no case is it advisable to break the thread of examination for determining a difficult point, such, for instance, as the construction of the word *issue* in an obscure devise, the force of which may be weakened by subsequent events: it is better to proceed to the end, and reserve such questions for separate inquiry.

In analysing an abstract, where written analysis is resorted to, two modes present themselves, one longer, the other shorter.

(*a*) The former mode sets out, not in the abstract, but in distinct margins of a separate paper, the date, the parties, and the operation of the deed; the latter, the short effect only of the deed, or of the date and effect of the deed.

In the former case, the paper may be divided perpendicularly into four equal parts. The date may occupy the first division; the parties, the second; the operation of the deed, the third; while the fourth is reserved for the devolution of terms. Thus:—

25 Nov. 1830. P. 1 of Abstract.	John Green ..... 1 Saml. West ..... 2 George Harris 3	1000*l.* Conveyance to such uses as West should appoint: In default, to usual uses to bar dower in favour of West.	
27 Jany. 1833. P. 3.	Saml. West ..... 1 Henry Jones 2	500*l.* Mortgage to Jones for 1000 years,*	* 1000 years in Hy. Jones, redeemable.
6 June, 1835. P. 5.	Hy. Jones..... 1 Saml. West ..... 2 Thos. Wilson 3	Transfer of mortgage to Wilson, and further charge of 100*l.*	Assigned to Thos. Wilson, redeemable, 600*l.*

2 March, 1837, P. 6.	Will of Thos. Wilson.	Peter Fletcher, executor.	Peter Fletcher, executor.
9 April, 1840. P. 7.	Saml. West ..... 1 Peter Fletcher.... 2 Philip Barton 3	600*l.* paid to Fletcher. 400*l.* „ West. —— 1000*l.* Conveyance to Barton in fee, and surrender of 1000 years to merge.	Surrendered to Philip Barton.

(*b*) Or the process may be more concise. Thus:—

25 Nov. 1830. Conveyance by John Green to Samuel West.

27 Jan. 1833. Mortgage by West to Jones for 1000 years, for securing 500*l.*

6 June, 1835. Transfer by Jones to Wilson, and further loan to West of 100*l.*

2 March, 1837. Fletcher, exor. of Wilson.

9 April, 1840. Conveyance to Barton in fee; Fletcher paid off, and term merged.

The advantages of the longer mode consist in the facility afforded for checking dates as the work advances, in establishing the existence of certain persons at certain times, and in affording the conveyancer, on the abstract again coming before him for further opinion, or settling the conveyance, a perfect epitome of the title.

(*c*) Titles sometimes take different ramifications, in consequence of sales or devises to different persons, as tenants in common of undivided shares, or descents among coparceners. In these cases, each distinct share must be the subject of a separate analysis, until their reunion in one person, or the concurrence of the owners in the contemplated dealing. Thus:—

As to A. B.'s undivided third: this third being pursued to its termination, in chronological order, without regard to the dealings of the other two undivided thirds, which, of course, will be subject to a similar process.

(*d*) In cases depending on descents, pedigrees set out in a tabular form are almost indispensable; for, like figures in lieu of words, they express in a concise compass the essence of a long statement. Where names are numerous, the abstract should be accompanied by a pedigree, care being taken to place corresponding degrees of descent in corresponding lines.

(*e*) A hint or two, apparently trifling in themselves, but practically of great use, may here be given.

One is, to distinguish in the analysis, by underlining or other arbitrary mark, the ownership of the legal estate, as it shifts from one to another; and this is the more desirable when there are frequent changes of the equitable, in comparison with those of the legal estate. These marks, such as the letters L. E., (Legal Estate), by catching the eye in an instant, may effect a valuable saving of time.

Another aid is, in the perusal of lengthy abstracts, to make occasional rests or summaries of the state of title, which may be taken as future starting-points. For example:

Here the title stands thus:—

A. B. mortgagee for 1000 years for securing payment of 2000*l.* and interest: portions.

C. D. Surviving trustee of that term, subject to the mortgage.

E. F. Mortgagee of fee for securing 800*l.* and interest, subject to the term.

G. H. Equity of redemption, fee.

This being ascertained, the earlier portions of the abstract may, on further examination, be dispensed with.

(*f*) Another, while the subject is fresh on the mind, is to note who are to be the parties to the conveyance; the order in which they are to be named; the deed or fact first to be recited; the instrument from which the parcels are to be taken, and such other details as otherwise could only be recovered by an entire retrospect of the abstract. Indeed, when there is every chance of the purchase being completed, a brief outline of the conveyance, and, if any, of the accompanying deeds—such as covenants for production, for indemnity, or the like—will be found of great service.

(B) *Summary of Counsel's Duty and Qualifications.*

Whatever may be the mode which counsel may find most convenient for analysing an abstract, it is his duty to call for evidence of alleged facts, such as baptism, marriage, or death; receipts for the last payment of a portion or annuity; letters of administration, in proof of intestacy; an official copy of the act of Court on granting probate to an executor; official copies of, or extracts from, wills of real estate; extracts from awards under Inclosure Acts; and the queen's printer's copies of private acts. He should notice whether deeds have been, according to circumstances, duly enrolled or registered; that, in case of feoffments, livery of seisin has been made; that wills are duly attested, regard being had to the fact of the will taking effect before or after the act of 1 Vic. *c.* 26. He should also inquire whether powers have been exercised. He should direct proper searches to be made for judgments, crown debts, *lis pendens*, &c.; and, in the case of copyholds, he should require the abstract to be examined with the court rolls. If a deed be executed by attorney, he should call for the production of the power, and require proof that the principal was living after the execution of the deed.

These are but a few instances of his duties in advising on a title, and when it is considered that his office demands a knowledge

X. Practice after Counsel's Opinion taken.[1]

XI. Consequence of Nonperformance of Contract by Vendor.

Hodges v. Earl of Lichfield, 1 Bing. N. C. 492.

If a party contracting for the sale of land cannot make a good title, the intended purchaser cannot recover, as damages for a breach of the contract, preliminary expenses;

In this case an action was brought for a breach of contract for sale by the defendant to the plaintiff of a right of fishery in the river Trent, &c., for the sum of 21,500*l.*, of which 1500*l.* was paid by way of deposit. The vendor failed to make out a good title.

It appeared that the plaintiff had, during the progress of the negotiation and contract, incurred charges and expenses: 1. in and about the negotiating and agreeing for the purchase of the estate agreed to be sold, and having the same conveyed; 2, in and about investigating the title to the said estate, and the existence and effect of a supposed *modus* in lieu of tithes; 3, in and about the defence of a suit in Chancery mentioned in the declaration; 4, in and about the making and performing of divers journeys, and otherwise respecting the purchase; 5, for the plaintiff's loss on being deprived of the gains and profits he might have made from using the 1500*l.* mentioned in the declaration. And the question was, which of these expenses the plaintiff could recover from the defendant?

Per Cur. As to the first head, the expenses preliminary to the contract ought not to be allowed. The party enters into them for his own benefit, at a time when it is uncertain whether there will be any contract or not.

such as a survey for the land contracted for;

The charge for a survey must also be disallowed. It would have been prudent in the purchaser to defer the survey till he knew whether or not a title could be made out.

or for a conveyance or counsel's fees thereon, in expectation of a performance of the contract:

The second head, the charges for preparing a conveyance, and 10*l.* 10*s.* for counsel's fees thereon, was abandoned; but a charge of 7*l.* 12*s.* 6*d.* for a journey to Stafford to investigate the title, and another of 6*l.* 17*s.* 2*d.* for searching for judgments, were objected to.

but expenses for a journey for investigating the title, and for a search for judgments, may be recovered.

Per Cur. These charges may be allowed. Unless judgments are searched for at an early stage of the proceedings, great expense may afterwards be incurred unnecessarily; and, for the same reason, the comparison of deeds with the abstract should be made early.

As to the third head:—*Per Cur.* We all think that the extra costs in Chancery are not a damage which is a necessary consequence of the breach of

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of the quantities and qualities of estates, the rights which they confer, and their incidents, both legal and equitable; of the rules of construction applicable respectively to deeds and wills; of the effect produced on the title by descent, devise, succession, executorship, administration, marriage, bankruptcy, insolvency, forfeiture, merger, and extinguishment; of the statutes of limitations; of uses, springing and shifting; of powers, appointments, trusts, remainders, vested and contingent, executory devises and limitations; of the effect of mortgages and other charges on the property; and of the evidence requisite to substantiate the various allegations of fact arising at every step of the title; and that he must, moreover, be familiar with the late legislative alterations of the law with regard to the dower, descent, wills, escheat, illusory appointments, executors; the abolition of recoveries; the statutes for the amendment of the law of real property, the assignment of satisfied terms, and the defective execution of powers of leasing; and that in most cases he will have to consider the early title with reference to the old law, and the recent title with reference to the new, and the periods over which they operate, and the provision made by statute in favour of purchasers, as regards voluntary settlements, and settlements with power of revocation, unregistered deeds, judgments, and crown debts (*see* Sugd. V. & P. 13th ed. p. 343, pl. 6); it is obvious that his labour and responsibility call for qualifications of a high order.

[1] If the vendor's answers to the requisitions of counsel are unsatisfactory, the abstract, with the answers, is usually returned to the same counsel for further advice; and, should he insist upon requisitions with which the vendor refuses to comply, the result is generally a compromise or litigation. Frequently, however, the parties agree to refer the points in dispute to some eminent conveyancer, on the understanding that his decision is to be final, and that the costs of the reference be paid by the unsuccessful party. *See* Tyrrell's *Suggestions*, 1 Real Prop. Rep. App. 566.

this contract. Every expense which is a necessary consequence of the breach of contract ought to be allowed; but the filing of a bill for enforcing a specific performance is one degree removed from a consequence of the contract, and the plaintiff must take the consequences of the suit, as in other cases. Upon this principle, and in adherence to the cases cited for the defendant, we think this claim ought not to be allowed.

Extra costs, however, incurred in a suit by the vendor, though unsuccessful, for specific performance, cannot be recovered.

A claim to damages for a loss on the resale of certain sheep, bricks, and hurdles, purchased by the plaintiff for the stocking of the premises, and improving the same, with a view to a completion of the purchase, was abandoned.

Nor can damages for a loss on resale of stock for the improvement of the premises.

WALKER v. MOORE, 10 B. & C. 416.

This was an action of *assumpsit*. By an agreement in writing, dated the 5th July, 1827, in consideration of 8000*l*., the defendants contracted to convey, on or before the 6th of April, 1828, to the plaintiff, or to whom he should appoint, certain hereditaments, and the plaintiff agreed to pay the sum of 8000*l*. on the said 6th day of April, upon receiving a conveyance, and a good legal and marketable title being made to the premises at the expense of the defendants, the abstract of which was to be delivered to the plaintiff or his appointees within one month after the date of the agreement. After the delivery of the abstract, but before its verification with the title-deeds, the plaintiff contracted with a third party to undersell part of the premises at a considerable profit; but, when the abstract was examined with the deeds, the title was found to be defective as to an undivided twentieth part of the land: whereupon the plaintiff brought his action, averring in his declaration that he was ready to pay the purchase-money at the time specified on receiving a conveyance and a good title made out to the premises, but that no such good title and no proper conveyance was made by the defendants to the plaintiff, or to any other person appointed by him, whereby plaintiff had lost the profits which might have accrued to him from having a good and marketable title to the said premises, and had been put to great expense in investigating the title, and in endeavouring to complete sales of certain parts of the said premises which he had contracted to sell to other persons on the faith of having such good title; that he had been compelled to abandon his contracts with such persons, and had thereby become liable to pay them damages for the breach of his contract with them, and for the expenses incurred by them in the investigation of the plaintiff's title to such parts as he had contracted to sell to them.

Nor, in the case of a sub-sale by the purchaser before the examination of the deeds with the abstract, can he recover as damages the difference between the price which he has contracted to pay, and the improved price contracted to be paid to him by the sub-purchaser.

The plaintiff had been put to 150*l*. expense on the resale, and claims were made by the sub-purchasers against him to the further amount of 72*l*. for the expenses incurred by them in investigating the title furnished to them by the plaintiff, which was a copy of the abstract delivered to him by the solicitors of the defendant. These two sums, with 1500*l*. as damages to the plaintiff for the loss of the beneficial contract, composed the sum of 1722*l*. for which the arbitrator, to whom the matter was referred, directed a verdict to be entered.

Per Cur. It is usual and reasonable, before any expense is incurred, to compare the abstract with the deeds.

As to the sum of 1500*l*., it seems clear that the plaintiff is not entitled to recover. When a contract for the purchase of lands is made, each party cannot but know the title may prove defective, and must be taken to proceed upon that knowledge. The ordinary course is to deliver an abstract, and, whether the title is good or bad, that is to be compared with the deeds; for, until it has been compared and found correct, it is useless to take an opinion as to the title which it shows. Here the statements of the title in the abstract proved to be incorrect, whereupon the plaintiff refused to take the land. He had a right to do so, but cannot claim as damages the difference between the price that he contracted to pay, and that at which he could have resold the premises. Then, as to the two sums of 150*l*. and 72*l*., we think that they cannot be recovered,

because the loss was occasioned by the premature act of the plaintiff in offering the premises for resale before he had examined the abstract with the deeds.

See *Flureau v. Thornhill*, 2 W. Black. 1078. *Hopkins v. Grazebrook*, 6 Barn. & Cres. 31. *Metcalfe v. Fowler*, 6 M. & W. 830. *Orme v. Broughton*, 10 Bing. 353.

RICHARDSON v. CHASEN, 10 Q. B. 756.

And an averment that a plaintiff has *been put to expense* in investigating the title, is satisfied by proof that he has incurred a liability to pay.

The plaintiff brought an action of *assumpsit* on breach of an agreement, by which the defendant undertook to sell his interest in a public-house, and to make an effectual assignment thereof. *Averment*, that the plaintiff had necessarily been put to great expenses, amounting to 200*l.*, in and about the endeavouring to procure such title, sale, and assignment, and in and about the investigation of the title.

On the trial it appeared that the plaintiff had incurred a bill of costs for investigating the title, but that he had not paid the bill until after action brought. It was contended for the defendant, that, as the attorney was employed, but not paid, the plaintiff could not say he was forced to pay; for it was only a debt which he might be thereafter forced to pay, but liable to contingencies, as if he should be discharged by the bankrupt law; and, therefore, that it was unreasonable that the plaintiff should recover what he might perhaps never pay.

Per Cur. If a plaintiff chooses to allege in his declaration that he has paid money, he must prove that he has paid it; but if he merely says that he has been 'put to expense,' the allegation is satisfied by proof that he has incurred a liability to pay.

XII. PROPERTY IN ABSTRACT.[1]

ROBERTS v. WYATT, C. P. 2 Taunt. 268.

Where, under a sale, conditioned to be void if the vendor cannot make a good title, an abstract of it is delivered to the vendee, the latter may maintain trover for it against the vendor. When the contract is determined, the abstract becomes the property of the vendor, but an opinion written thereon by the seller's consent continues the property of the purchaser.

The defendant had agreed to sell to the plaintiff an estate under the usual conditions, that in case the vendor could not make out a title the contract should be void. It was stipulated in the contract of sale that the vendor should, within two months from the date thereof, make out and deliver an abstract of the title. The plaintiff laid the abstract before counsel; and, having received it back with an opinion written at the foot, and several queries in the margin, left it with the defendant, requesting him to copy the opinion and marginal observations, and return the abstract as soon as he had copied them. After the plaintiff had several times in vain applied to have the abstract returned, he at length made a formal demand of it, when the defendant refused to re-deliver it, observing, that, as he had been unable to clear up the objection of the plaintiff's counsel, the abstract would be useless to the plaintiff. The plaintiff offered to take the estate with such a title as defendant could make, but the latter refused to assent to the proposal. An action of trover having been brought for the abstract, a verdict was found for the plaintiff, as it was considered that, by means of the notes and remarks made by counsel on the abstract, he had such a species of property as would enable him to recover, subject to the opinion of the Court as to the general right of property. A rule *nisi* was now obtained to set aside the verdict, and enter a nonsuit.

Per Cur. As to the general property in the abstract while the contract is open, it is neither in the vendor nor in the vendee absolutely; but, if the sale is perfected, it is the property of the vendee: if the sale is broken off, it is the property of the vendor. For although a proviso (that in case the vendor of an

[1] If the contract be finally abandoned, the purchaser must not retain a copy of the abstract. (Dart's V. & P. 3d ed. p. 183.) But he may retain counsel's opinion and observations, if written on separate paper. (Sugd. V. & P. 13th ed. p. 355, pl. 12. *Alexander v. Crosbie*, 2 Ir. Eq. Rep. 141.) Or, if written upon the abstract, he may erase them before returning it. *Wood v. Court*, 2 Sol. Atk. Conv. 463.

estate cannot deduce a good title, or the purchaser shall not pay the money on the appointed day, the agreement shall be utterly void) gives an option to the vendor to rescind the sale in case the vendee does not pay the money, and to the purchaser to rescind in case the owner does not make a title, the plaintiff cannot say, "I am not ready with my money, and therefore I will avoid the contract." Nor can the seller say, "My title is not good, and therefore I shall be off." If the present plaintiff had said, "The sale is abandoned by me, as the defendant cannot make a title," the matter might be at an end. But on the contrary, the plaintiff says that he will take the estate with the title such as it is. He has therefore a temporary property, which continues until all the purposes are answered for which the abstract was delivered, on which he may recover not only against a stranger, but against the proprietor of the estate, and may keep it, even if the title be rejected, until the dispute be finally settled for his own satisfaction, in order to show on what ground he did reject the title. Besides, the abstract is in this case returned for a particular purpose. The plaintiff's attorney told the defendant that it was delivered to him for the express purpose of enabling him to examine and answer the objections, and that it must be again restored to the purchaser, and the defendant accepted it on these conditions. The opinion written on the abstract was necessarily written on the vendor's paper, and by his consent, and continues the property of the vendee. The rule for a nonsuit must be therefore discharged. Rule discharged. See *Parker v. Patrick*, 5 T. R. 175, as to trover being the proper remedy.

ABUTTALS. From the French *aboutir*, to limit, to bound. Commonly defined "the buttings and boundings of lands east and west, north and south, showing on what other lands, highways, or places they abut, or are limited and bounded." Cowell and Tomlins' *Dictionary*. Properly, the limits or boundary lines of lands on the ends, as distinguished from those on the sides. Well expressed in the old phrase, "Buttels and sockings." Cro. Jac. 183. Perhaps also the angles or terminating points of the lines, especially in lands of an irregular shape. Abuttals (1 Burr, D. 16), in its strict sense, includes the idea of contiguity. 1 Taunt. 495. *See* also Boundary; Parcels; 2 Platt on Leases, 35; Trespass; Way.

In trespass to land the *locus in quo* must be described by name, abuttals, or other description.[1]

By r. 18, T. T. 1853, "in actions of trespass to land, the close or place in which, &c. must be designated in the declaration by name, or *abuttals*, or other description; in failure whereof the plaintiff may be ordered to amend, with costs, or give such particulars as a Court or a Judge may think reasonable."

HUMPHREY v. LONDON AND NORTH-WESTERN RAILWAY, 7 Ex. 325; 22 L. J. Ex. 149.

And this description must apply to the land as it stood at the time of the trespass.

Action by reversioner. The *locus in quo* was described as "abutting on the south and east, on a close in the occupation of the defendants." The defendants pleaded that they took possession of part of the said close, abutting on the south on the fence of their railway, under the provisions of 8 & 9 Vic. c. 20, ss. 22, 23, which was the trespass complained of. It appeared at the trial, that at the time the trespass was committed the close in question abutted on the fence of the railway of the defendants; but that afterwards the defendants took possession of, and purchased under the provisions of the above act, a small part of it adjoining the railway: so that the plaintiff's description was correct at the time of the declaration, but not at the time of the trespass:—*Held*, that the plaintiff ought to have new assigned, and that not having done so, he was not entitled to recover.

[1] Abuttals are never construed very strictly. Thus, if premises be described as abutting to the east, it may be to the north-east or south-east. *Roberts v. Karr*, 1 Taunt. 495. It is sufficient to give such description that the defendant may know which close is intended. A designation by two abuttals is sufficient. *North v. Ingamells*, 9 M. & W. 249; S. C. 1 Dowl. N. S. 151. The object of the rule is to prevent the necessity of a new assignment. It has been held a sufficient description to say "lands of the plaintiff, covered with water, being the bed and channel of the river T., and under the

ACCEDAS ad Curiam. Lat. *You go to the Court.* A writ which lies at common law to remove a cause from an inferior court, not of record—such as a hundred court, or court baron—into one of the superior courts. 3 Bl. Com. 34; F. N. B. 18, 145 E.; Termes de la Ley; 1 Tidd's *Prac.* 38. The writ is directed to the sheriff, commanding him to go to the Court designated, where the suit or plaint is pending, and there to make a record of such plaint (*recordari facias loquelam*), and to have such record before the superior court at a days pecified. Reg. Orig. 5 b; Dyer, fol. 169, n. 20. It is peculiar for the most part to the action of replevin, and is merely a *recordari facias loquelam*, with a clause of *accedas ad curiam*. *See* Replevin; Gilbert on Replevin, 93; and Wilkinson on Replevin, 26.

ACCEPTANCE is Receipt and something more. There cannot be acceptance without receipt, but there is often receipt without acceptance. Smith on Contracts, 71, n. a. As to acceptance of goods, see *Johnson v. Dodgson*, 2 M. & W. 653. *Chapman v. Morton*, 11 id. 534. *See* Accord and Satisfaction, p. 94; Bills and Notes; Condition; Dignity; Dower; Escheat; Estoppel; Executors and Administrators; Frauds, Statute of; Homage; Landlord and Tenant; Office; Rent; Surrender; Vendor and Purchaser.

ACCESS. *See* Bastard; Heir; Husband and Wife.

ACCESSORIUM non ducit sed sequitur suum principale. *The incident does not draw, but follows its principal.* Co. Lit. 152, and 4 Rep. 44.

ACCIDENT.[1] *See* Accidents, Insurance against; Act of God; Admiralty; Amends; Assault; Carriers; Collision; Driving; Fire; Highway; Insurance; Master and Servant; Murder; Navigation; Negligence; Party Walls; Patent; Railways; Ship and Shipping.

I. Definition.[2]

II. No Action lies for an Inevitable, p. 83.

III. In Trespass such Defence should be pleaded, in case it may be proved under Not Guilty, p. 85.

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same, in the several parishes of L. and L., in county of G." (*Duke of Beaufort v. Vivian*, 7 Ex. 580; 21 L. J. Ex. 204); or to describe the *locus in quo* as "Hall Close." *Brownlow v. Tomlinson*, 1 S. N. R. 426; 1 M. & G. 484; 8 Dowl. 827. *See* also *Holt v. Daw*, 16 Q. B. 990; S. C. 20 L. J. Q. B. 365. It must be borne in mind, however, that the plaintiff, though he will not be defeated on the trial by a minute variance in one out of several particulars in the description of the abuttals, he must nevertheless faithfully describe the close in substance. *Webber v. Richards*, 1 Q. B. 439; 1 G. & D. 114. And describing the close as abutting "towards," instead of "upon," is too indefinite. *Lempriere v. Humphreys*, 3 Ad. & E. 181; 4 N. & M. 638. An insufficient description cannot be objected to after pleading to it (id. and *Banks v. Angell*, 7 Ad. & E. 843; *Lethbridge v. Winter*, 2 Bing. 49); and it should correspond with the state of the close at the time of the trespass. *Humphrey v. London & N. W. Ry.* 325; S. C. 22 L. J. Ex. 149. Under the repealed stat. 57 Geo. 3, c. 90, s. 1, as to night poaching, it was held by a majority of the Judges that the *locus in quo* must be described either by name, ownership, occupation, or abuttals, and that it is not sufficient to allege that the prisoner was found "in a certain close in the parish of A." R. & R. 115. As to highway, *see* Highways.

[1] Under this title are considered the cases applicable to inevitable accidents, un-associated with negligence, or any omission or default.

[2] At law, an accident comprises any effect produced by any physical cause which is inevitable: such as a loss by lightning or storms, by perils of the sea, by an inundation or earthquake, or by sudden death or illness. Story on Bailm. § 25; and see *Briddon v. Great Northern*, 28 L. J. Ex. 51. *Withers v. North Kent Railway*, 27 id. 417, and 8 T. R. 312. The maxim *Actus Dei nemini facit injuriam* (2 Bl. Com. 122; 5 Co. 87; *see* that title) did not formerly apply when a party to a suit died pending the proceedings, and great delay and additional expense were often created by such an event. These evils can scarcely now occur, as most of them are removed by the recent regulations, as shown *ante*, Abatement of Suit by Death, p. 8. See *Actio personalis moritur cum Personâ*. In equity, relief against accident forms an acknowledged branch of equity jurisdiction. It has been described as an unforeseen event, misfortune, loss, accident, or omission, as is not the result of any negligence or misconduct. 1 Story, Eq. 178. But

II. No Action lies for an Inevitable Accident.[1]

Wakeman v. Robinson, 1 Bing. 213; S. C. 8 Moore, 63, S. P.
Aston v. Heaven, 2 Esp. 533.

Trespass for an injury done to the plaintiff's horse, in consequence of the

An action cannot be supported for an

Mr. Spence (vol. i. c. 628) says, every attempt to define accident in its judicial acceptation has failed. Mr. Smith defines it as an occurrence not referable to design; and that, as remediable in equity, it may be defined to be an unforeseen and injurious occurrence, not attributable to mistake, neglect, or misconduct. Thus, the reduction by an Act of Parliament of public stock directed by will to be set apart to answer an annuity, is an accident remediable in equity by decreeing the deficiency to be made up against the residuary legatees. (Sto. Eq. s. 93; Smith, 32.) But when relief can be obtained at law, equity will not interpose (Id. s. 179); nor will relief be granted where the accident arose from gross neglect or fault of the party seeking relief, or his agents (Id. s. 105); and where a person has expressly and absolutely contracted or covenanted to do a particular thing, it is no ground for the interference of a court of equity that he has been prevented by accident from fulfilling his engagement, or from deriving the full benefit of the contract on his side; for he might have prevented any injury to himself from accident by making proper exceptions: but since he has made no such exceptions, the law will not conjecturally limit a liability which, in terms, is general and unqualified. *See* Sto. 101–104. Nor will relief be granted in favour of a person whose equitable right to assistance is not equal, or not more than equal, to the equitable right to protection which is possessed by the party against whom the relief is sought, or in favour of a person who, although a great loser through an accident, has no equitable title to relief, or not more than the person against whom relief is sought. (Smith, 34.) But where a court of law cannot, or in similar cases originally could not, give adequate relief, and take due care of the rights of all persons interested, and the party prejudicially affected is free from blame in respect of the accident, it will be granted by the Court of Chancery, if it can be conceded without derogating from any superior claim in another person. *See* Sto. Eq. s. 28.

As to lost Instruments. — Where an instrument on which a title is founded is lost, a court of equity will interfere to supply the defect occasioned by such accident. So in the case of lost bonds (unless, perhaps, where they are voluntary, 1 Madd. 31), relief will be given: one ground of the jurisdiction being the difficulty of procuring a sufficient indemnity at law. But another, and the principal reason was, that formerly the obligee could not recover in an action without profert and oyer of the bond. (Id.) And the same relief might have been had on lost bills or notes, though this is now provided for by 17 & 18 Vic. c. 125, s. 87. *See post*, Bills and Notes. A court of equity will not only give relief against the principal where a bond is lost, burnt, or cancelled by accident or mistake, but will make it available against a surety, even though the principal be out of the jurisdiction of the court. 9 Ves. 464; 1 Madd. p. 33.

If a deed or instrument upon which the demand arises is lost, and nothing but a discovery is sought, an affidavit of the loss is unnecessary; but if relief is prayed beyond the discovery, *e. g.* to have payment of the debt, or the profits of the land under the deed, an affidavit of the loss must be annexed, not as evidence of the loss, but as a security for the propriety of exercising the jurisdiction. Smith, 35, 36, 37, 5th ed.

Relief is also granted in the case of defective execution, or non-execution of powers. 2 Sugd. 88. *See* Powers and Smith, 17, 38, 39.

[1] In *Leame v. Bray*, 3 East, 599, *Mr. J. Grose* says: "Looking into all the cases from the *Year Book*, in the 21 Hen. 7, down to the latest decision on the subject, I find the principle to be that if the injury be done by the act of the party himself at the time, or he be the immediate cause of it, though it happen accidentally, or by misfortune, yet he is answerable." Therefore, where to an action of *trespass* the defendant pleaded that he was a soldier in the trained bands, and was skirmishing with muskets charged with powder for exercise *in re militari*, and that in discharging his musket he accidentally and unintentionally injured the plaintiff, it was held that the plea, being a mere excuse and no justification, afforded no answer to the action. *Weaver v. Ward*, Hob. 134. So where the defendant was uncocking his gun, and the plaintiff was stopping to see it, and the gun went off and wounded the plaintiff, it was held that the plaintiff might maintain an action for the injury. *Underwood v. Hewson*, 1 Stra. 596. See *Dixon v. Bell*, 5 M. & S. 198; Add. T. 237, 238. But a surety is not liable for the unavoidable default of his principal; therefore, where a treasurer of a building society, having received money for the society which it was his duty to carry to the society's bankers, was robbed of it by irresistible violence, without any default of his, before he could pay it into the bank:— *Held*, that his sureties were not liable to the society for such money upon a covenant for his duly accounting for all monies received on account of the society, the declaration alleging the receipt of 170*l.* on account of the society, and as a breach the non-paying over that sum. *The British Guarantee Association*, 19 L. T. 87, Q. B. What is deemed an accident in neglecting to apply for a renewal of a lease, *see* 1 Platt, 759. When trustees not responsible, *see* Lewin on Trustees, 641.

unavoidable accident, but if blame can be imputed to the party causing the injury, he is liable, though he had no intent to injure.

defendant driving a gig against it; it was proved that the defendant drove a high-spirited horse unskilfully, and without a curb-chain, and the defendant pleaded, first, not guilty; and secondly, that his horse took fright, and became ungovernable, in consequence of a cart being driven furiously against it, which was not supported by evidence; and the Judge was of opinion that the defendant was liable, although he might not have been guilty of an act of negligence or want of caution, and the jury found a verdict for the plaintiff. The Court refused to grant a new trial, which was moved for on the ground that it should have been left to the jury to say whether, under all the circumstances, the accident was unavoidable, or occasioned by the negligence of the defendant. See *Keighley's case*, 10 Rep. 139; 1 B. & C. 477; 10 Ad. & E. 398.

ASTON v. HEAVEN, &c. 2 Esp. 533. S. C. GIBBONS v. PEPPER, 1 Ld. Raym. 38.

As where horses take fright without any default in the driver, or any defect in harness, or known propensity of the animals.

Case against coach proprietor, for upsetting a coach, whereby, &c. At the trial it appeared that the coach was driven at a regular pace on the Hammersmith road, but that on the side was a pump of considerable height, from whence the water was falling into a tub below; that the sun shone bright at the time, and being reflected strongly from the water, the horses had taken fright, and run against the bank on the opposite side, where it was overset.

By *Eyre, C. J.*—This action is founded entirely on negligence. The immediate cause of the accident is agreed on all hands; the question, therefore, depends on the consideration of whether there was any negligence in the driver. It is said he was driving with reins so loose that he could not readily command his horses: if that was the case the defendants are liable, for a driver is answerable for the smallest negligence. But if this does not appear, and the accident appears to have arisen from any unforeseen accident or misfortune, as from the horses suddenly taking fright, in such case the defendants are not liable.

DAVIS v. SAUNDERS AND OTHERS, 2 Chit. Rep. 639.

Or where chattels are inevitably driven against each other by the violence of the wind and rolling of the sea.

Action of trespass. The first count in the declaration alleged that the defendant took and converted a large quantity of spirituous liquors belonging to the plaintiff to his own use; the second count stated that the defendant, with force and arms, broke, damaged, and spoiled a ship of the plaintiff's, whereby he was put to great expense in repairing her, and prevented from using her for a long space of time. *Plea*, general issue, not guilty. At the trial a verdict was found for the defendants on the first count of the declaration, and for the plaintiff on the second, subject to the opinion of the Court on the following case. The plaintiff and defendants, respectively, were the owners of certain vessels, and having heard that some smugglers had deposited a raft of brandy in the sea, several ships, and among others the vessels of the plaintiff and defendants, went out to endeavour to find the contraband spirits; and whilst the plaintiff was drawing up some of the casks, the defendants in one boat, and C. and B. in another, came up, and obtained possession of part of the raft, and while accomplishing the object, from the blowing of the wind, their ships came in contact with that of the plaintiff, and did the vessel considerable damage: the casks which were taken were removed to the Custom House, and afterwards condemned, no one claiming them.

The question reserved for the opinion of the Court was, whether the plaintiff was entitled to recover. And after argument they determined, that as the original act of the defendant was lawful, and the injury merely accidental, the defendant was entitled to a general verdict upon the whole declaration. Judgment for defendant. *See* also *Beckwith v. Shordike*, 4 Burr. 2093. *Williams v. Holland*, 6 C. & P. 23. *Wakeman v. Robinson, supra*, p. 83. *Crofts v. Waterhouse*, 3 Bing. 319, 321.

GOODMAN v. TAYLOR, 5 C. & P. 410.

In an action for an injury arising out of alleged negligence in driving it was proved, on the part of the defendant, that his wife was holding a pony by the bridle in a public thoroughfare, when a showman came by and frightened the animal, who ran off with the chaise.

Injury occasioned by the incautious act of a third party will not deprive the defendant of the defence of inevitable accident.[1]

Lord Denman, C. J., said, if credence be given to the evidence, he thought the jury would be disposed to consider the event as an inevitable accident; one which, at least, the defendant could not prevent.

DIXON v. BELL, 1 Stark. 287; S. C. 5 M. & S. 198.

Case for negligently entrusting a girl with a loaded gun, whereby the son of the plaintiff was wounded, and the plaintiff put to expense in effecting his cure. It appeared by the evidence adduced on the part of the plaintiff, that the defendant had sent a verbal message by a child twelve years old to A. B., to deliver a gun to her, but requested him not to give it to the child until he had removed the priming. A. B. on examining the gun could discover no priming, and accordingly delivered the instrument to the child, who, imagining that it was unloaded and harmless, presented it at the plaintiff's son, when it went off, and occasioned the injury sought to be redressed by the present action.

It is the duty of a party, before he trusts a dangerous instrument in the hands of an inexperienced person, to prevent accident by rendering it innoxious.

Per Lord Ellenborough. I think the defendant, in only desiring A. B. to remove the priming, which request was complied with, did not go far enough. It was incumbent upon him to have directed A. B. to render, by a careful examination, the gun perfectly harmless and innoxious. Verdict for plaintiff.

The Court afterwards refused to set the verdict aside.

III. IN TRESPASS, INEVITABLE ACCIDENT SHOULD BE PLEADED, IN CASE IT MAY BE PROVED UNDER NOT GUILTY.

COTTERILL v. STARKEY, N. P.; 8 C. & P. 691; S. P. KNAPP v. SALSBURY, 2 Campb. 500.

In an action of trespass for negligently driving, whereby the plaintiff's wife was injured, the defendant pleaded first, not guilty; and second, a plea, which stated, in substance, that the accident arose by and through the mere negligent, careless, and improper conduct of the plaintiff.

In trespass, the defence of inevitable accident must be pleaded.[2]

And *per Patteson, J.* This is an action of trespass; and if, in trespass, a

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[1] But if a squib is thrown amongst a crowd in a public place, and is then tossed from one person to another, the first thrower, and all who have tossed the squib, otherwise than in pure self-defence, are responsible for the injury it occasions. *Scott v. Shepherd*, 3 Wils. 403; S. C. 2 Bl. Rep. 892. And *Lord Denman*, in *Lynch v. Nurden*, 1 Q. B. 36, remarked, "If I am guilty of negligence in leaving anything dangerous in a place where I know it to be extremely probable that some other person will unjustifiably set it in motion, to the injury of a third party, and if that injury should be so brought about, the sufferer may have redress by action against both or either of the two, but unquestionably against the first. If, for example, a gamekeeper returning from his daily exercise should rear his loaded gun against a wall in the play-ground of school-boys, and one of these should playfully point the gun at a school-fellow, and fire it off and maim him, the gamekeeper must answer in damages to the wounded party." See *Illidge v. Goodwin*, 5 C. & P. 190. *Waite v. North-Eastern Ry.* 27 L. J. Q. B. 417; 28 id. 258.

[2] If, however, the inevitable accident arose from superior agency, the defence would be admissible under the general issue. *Hall v. Fearnley*, 3 Q. B. 919. *Wakeman v. Robinson*, *supra*, p. 83; 7 Jur. 61; 12 L. J. Q. B. 22. *See* Form of Plea, *Cotterill v. Starkie*, 8 C. & P. 691. And it need not be specially pleaded in an action on the case. *Marriott v. Stanley*, 1 M. & G. 568; and *see* 3 C. B. 1; 8 id. 92; 8 W. R. Q. B. 6. *Gough v. Bryan*, 2 M. & W. 770; S. C. 5 D. P. C. 766. *Bridge v. The Grand Junction Company*, 3 M. & W. 244; 6 D. P. 340. *Vennall v. Garner*, 1 C. & M. 21. *See* also 10 Ad. & E. 437, 5 E. & B. 195, because such plea negatives the charge of the defendant being guilty of negligence, and amounts to not guilty. See *Lygo v. Newbold*, 9 Ex. R. 302.

defendant means to say that the matter did not arise from his fault, that must be stated in a special plea.[1]

ACCIDENTAL DEATH. Action for compensating families of persons killed by accident. *See* "Campbell's (Lord) Act" (9 & 10 Vic. c. 42).

ACCIDENTS, Insurance against. And *see* Insurance, Fire; Life; Marine.

I. In its Nature and Principle analogous to Life Insurance.[2]

II. Policies construed and governed by the same Rules as Life Insurances, p. 86.

III. As to payment of the Premiums. *See* Life Insurance.

IV. Damages calculated as on a Contract of Indemnity, p. 87.

II. Policies construed and governed by the same Rules as Life Insurances.

Threw v. Railway Passengers' Insurance Company, 1 L. T. (N. S.) 377; S. C. 29 L. J. Ex. 1, 218; 5 Ex. Rep. 211.

A policy to pay for an injury caused by some outward and visible means does not apply where a party is found drowned, and no other evidence of cause of death.[3]

A policy of insurance against any injury caused by accident or violence within the meaning of the policy contained a proviso, "that no claim should be made under the policy in respect of any injury, unless the same should be caused by some outward and visible means, of which satisfactory proofs could be furnished to the directors." A claim was made by the executors of an assured person, upon evidence that he went to bathe in the sea, and was not seen alive afterwards, his clothes being found on the beach, and his body subsequently washed ashore:—*Held*, that there was no evidence of a death from injury within the meaning of the policy. That, even admitting the defendant had died in the water, and that the body found was his, yet the fact of his so dying was no evidence that his death proceeded from an injury caused by accident or violence within the meaning of the policy, and that the Company were not liable.

Hooper v. The Accidental Death Insurance Company, 2 L. T. N. S. 247 Ex.; affirmed, 3 id. 22 Ex. Ch.

A party is entitled to recover in pro-

The plaintiff, a solicitor, registrar of a County Court, and clerk to a board of guardians, met with an accident by spraining his right ankle, and was thereby

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[1] *See* Form, *M'Laughlin v. Pryor*, 4 M. & G. 48. "That the alleged trespass was caused by the negligence and improper conduct of the plaintiff, and not otherwise." B. & L. *Pre.* 448.

[2] But not identical, as an insurance against injury to life or limb by accidents is strictly a contract of indemnity, and not for the payment of a specific sum on the happening of a contingent event. The original form of these insurances comprehended railway accidents only, but the contract thus suggested has been widely extended, so as to include those which may arise from other causes. In all such cases the premium varies with the risk and occupation of the assured. Commencing at a small sum where death by railway accidents is alone intended, and increasing where compensation for partial injury is to be also given; and again where accidents of all kinds are included, and in like manner where in the latter case compensation is also added. In some companies, moreover, the further contingency of loss of limb or sight is taken as an alternative to that of death for the payment of the insurance monies. Bunyon, *Ins.* 97.

[3] In insurances of this kind the plaintiff should be prepared to show affirmatively the cause of death. *Midland Railway v. Bromley*, 25 L. J. C. P. 94. On an insurance against bodily injury, "provided that the accident operated by external causes," insurers are liable for an injury to the spine, caused by lifting a heavy burden in the course of business. *Martin v. Travellers' Insurance Company*, 1 F. & F. 505.— *Wightman, J.* As to describing insured, *see* Perrin's *Marine Insurance*, 6 Jur. N. S. 627; 2 L. T. N. S. 633; 29 L. J. Q. B. 17 and 242.

confined to his room for several weeks, and to his house much longer. His duties of County Court Registrar during that time were discharged by his clerk, who attended to part of his other business for him, but some portion of his business was wholly stopped for want of his personal attention and attendance. The terms of the policy provided, if he should receive or suffer bodily injury from any accident or violence, in case such accident or violence should cause his death, the sum of 1000*l.*; and in case such accident or violence should not cause his death, but should cause any bodily injury to him of so serious a nature as wholly to disable him from following his usual business, occupation, or pursuits, a compensation in money, at the rate of 5*l.* per week, during the continuance of such disability, &c.:—*Held*, that it was an accident which caused bodily injury to the insured of so serious a nature as wholly to disable him from following his usual business, occupation, or pursuits, within the terms and true meaning of the policy, and that he was entitled to a compensation in money from the Company for it, according to the stipulations contained in the policy.

portion as he is disabled from following his usual occupation or pursuits.

Shilling v. Accidental Death Insurance Company, 1 F. & F. 116; S. C. 27 L. J. Ex. 16.

An insurance was effected in the name and on the life of a pauper dependent on his son for support. It appeared that the son had caused his father to make the proposal for the insurance, and almost immediately afterwards caused him to make a will bequeathing to him the benefit of it, and that the son had paid the premiums. The jury were directed, that if they believed it were procured by the son for his own use and benefit, and that in reality the insurance was his act and not the father's, they should find for the Insurance Company, on a plea based upon the 14 Geo. 3, c. 48, s. 1; and they found accordingly. See *Triston v. Hardy*, 14 Bea. 232, 26 Ex. 260; S. C. 2 Ex. Rep. 42.

An insurance against death by accident is within 14 Geo. 3, c. 48, s. 1.

IV. Damages calculated as on a Contract of Indemnity.

Theobald v. Railway Passengers' Insurance Company, 10 Ex. Rep. 45; S. C. 18 Jur. 583; S. C. 23 L. J. Ex. 249.

The plaintiff effected with a Railway Assurance Company a contract, which stated that the plaintiff was thereby assured by the Company in 1000*l.*, to be payable to his legal representatives in the event of death happening to the assured from railway accident whilst travelling in any class carriage on any line of railway in Great Britain or Ireland; or a proportionate part of the 1000*l.* will be paid to the assured himself in the event of his sustaining any personal injury by reason of such accident. The plaintiff was travelling in a railway carriage, and on the arrival of the train at a station, and after it had stopped, the plaintiff in stepping out of the carriage, without any negligence on his part, slipped off the iron step, whereby he sustained an injury:—*Held*, that this was a railway accident, and that the damages could not be estimated by the proportion which the injury bore to the amount payable on loss of life.

Held, also, that the plaintiff was entitled to recover damages for the expenses and suffering occasioned by the injury, but not for the loss of time or loss of profit. If, where a party is unintentionally injured by the act of another, it may be unmanly, though undoubtedly legal, to claim damages for pain and suffering. —*Per Pollock, C. B.* ib.

The damages for an injury not causing death is the amount of damage actually sustained, excluding remote consequences.

ACCOMMODATION. *See* Bills of Exchange.

ACCOMPLICE. *See* Aiders and Abettors.

ACCORDANT. *See* Hardr. 93; 6 Mod. 298; 12 id. 7.

ACCORD and SATISFACTION.[1] *See* Arbitration; Bills of Exchange; Composition with Creditors; Payment; Release.

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(D) *One Promise may be pleaded in discharge of another Promise before Breach*, p. 106.

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[1] The expression, "accord and satisfaction," technically imports an agreement to accept, and the receipt of some equivalent for an antecedent vested right. The accord is the contract; the satisfaction, the substituted equivalent. The former must not be of an inferior nature to the contract to which it relates (*Preston v. Christmas*, 2 Wils. 86); hence, a deed cannot be revoked or discharged by parol, or even by writing not under seal; but an executory agreement in writing (not a sealed instrument) may, before breach, be discharged by subsequent parol agreement (*Lord Milton v. Edgworth*, 6 B. P. C. 587); but, after breach, even a simple contract, or any right of action once vested, cannot be discharged, unless by deed, or by an accord and satisfaction. B. N. P. 152. *Willoughby v. Backhouse*, 2 B. & C. 824. Nor can a bond be discharged after forfeiture, except by payment, or a release. *Groom v. Groom*, 14 L. T. 377. 1 Saund. 58 c. n.

I. Must be complete and executed.

Cock v. Honychurch, 1 Mod. 69; S. C. Raym. 203; 2 Keb. 690.

The performance of one of two things stipulated by an accord is nugatory.[1]

In trespass, &c. The defendant pleaded an accord between him and the plaintiff, viz. that he should pay the plaintiff 3*l.*, and should undertake to pay the attorney's bill; and averred that he had paid the 3*l.* and was always ready to pay the attorney's bill, if it had been shown to him. It was argued, that here the accord is executed; for the 3*l.* is paid, and the agreement is not to pay, but to undertake for the payment of the attorney's bill, which he has done; and that upon his undertaking the plaintiff or the attorney would have a remedy. But the accord not being executed, judgment was given for the plaintiff. *See* Dy. 75 b.; 356 a.; Plow. 5; 9 Co. 796; 1 Rol. 129, c. 12; 1 Rol. 471, c. 10; Cro. Car. 193; 1 Bac. Ab. Accord, 7; 2 H. Bl. 317; 5 T. R. 720. *Russell v. Russell*, 3 Lev. 189.

Allen v. Harris, 1 Ld. Raymond, 122; S. C. 2 Lutw. 1538.

Or a promise to pay the whole where the promises are not mutual.[2]

To an action of trover, the defendant pleaded that the plaintiff, in consideration that the defendant, at the special instance of the former, had promised to pay to the plaintiff a certain sum, the latter had agreed to discharge the defendant of the tort, &c., stating mutual promises. To this plea the plaintiff demurred. For the defendant it was contended that the old rule, that an accord with satisfaction ought to be pleaded as executed, did not apply to the present case; that an arbitrament might be pleaded without performance, because the parties may have reciprocal remedies.

Sed per Cur. If arbitrament be pleaded with mutual promises to perform it, though the party that brings the action has not performed his part, yet he cannot maintain the suit, because an arbitrament is like a judgment, and the party may have his remedy upon it. But upon accord no remedy lies (see *James v. David*, 5 T. R. 141; *Lynn v. Bruce*, 2 H. Bl. 317); and the authorities are so numerous that an accord ought to be executed, that it is now impossible to overthrow all the decisions. *See* 15 Hen. 6, 1; 7 Edw. 4, p. 6; Raym. 203; T. Jones, 159; Cro. Eliz. 193; Dyer, 75 b, pl. 26; 1 Mod. 67; 2 T. R. 25; Carth. 188; 1 Salk. 69; 1 Roll. Ab. 267; Lutw. 67.

Flocton v. Hall, 16 Q. B. 1039; 15 Jur. 600; 20 L. T. Q. B. 201; 19 L. J. Q. B. 1.

But if a person agrees to

Case for infringement of a patent. *Plea*, that it was agreed between the

[1] Hence, to a declaration for money lent, a plea that the defendant gave the plaintiff, and the plaintiff received from the defendant, authority to receive, as the defendant's agent, money due to the defendant, for an amount exceeding the amount sued for, and to pay himself, and agreed not to receive the same otherwise than by the plaintiff's agency, and that the moneys were not received through the plaintiff's negligence and default, and thereby became wholly lost to the defendant:—*Held* bad on general demurrer, as amounting neither to accord nor satisfaction. *Gifford v. Whiltsher*, 6 Q. B. 249; S. C. 13 L. J. Q. B. 325; S. C. 8 Jur. 1134.

[2] And *assumpsit* for a breach of contract in not re-delivering to the plaintiff certain promissory notes, which had been delivered by the plaintiff to the defendant, for the purpose of setting off their amount against a debt due from him to the makers. *Plea*, that the defendant, after breach, delivered to the plaintiff, at his request, *for and on account* of the said notes and of the promise, and damages in respect thereof, an order in writing on B., in whose hands the said notes then were, whereby the defendant requested B. to deliver them to the plaintiff; that the plaintiff took and received the said order for and on account of the notes, and of the said promise or damages; that B. was always ready and willing to deliver the notes to the plaintiff on the order being presented to him, but that the plaintiff did not present the same within a reasonable time, but kept the order for an unreasonable time without making any application to B. for the notes, until the same were, without any default of the defendant, feloniously stolen from B.:—*Held*, on special demurrer, to be a bad plea of accord and satisfaction. *Griffiths v. Owen*, 2 D. & L. 190; S. C. 13 L. J. Ex. 345; 13 M. & W. 58.

accept a promise of the defendant in satisfaction, the plaintiff's performance of such promise need not be averred; but it must be expressly stated that the agreement was accepted by the plaintiff in satisfaction.[1]

plaintiff and the defendant, that the defendant should do certain specified things, and that the action, and the causes of action included in the same, should be settled, satisfied, discharged, and terminated by the arrangement and agreement before mentioned. It then averred performance by the defendants of some of the things specified; and as to the others, that the defendants were ready and willing to do them, and to perform the agreement. Demurrer.

Per Cur. As a general rule, an accord without satisfaction is no answer to an action. Now, an action may be agreed to be settled in one of two ways: either an agreement to do certain things may itself be the ground of settlement, or the doing of those things may be the ground of settlement. It is clear that in the latter case a plea would be bad which did not go on to aver that the things stipulated for were done. If the agreement itself is the ground of settlement, the usual course is certainly to go on and say that the agreement was accepted in satisfaction of the causes of action, for that shows that the agreement no longer remains *in fieri*, but has become executed. The plea is defective, in not stating that the plaintiff accepted the substituted agreement in satisfaction. See *Evans v. Powis*, 1 Exch. 601, 607. *Cartwright v. Cooke*, 3 B. & Ad. 701. *Wentworth v. Bullen*, 9 B. & C. 850. *Buttigieg v. Booker*, 19 L. J. C. P. 330.

WICKHAM v. TAYLOR, T. Jones, 168.

And at the time of the arrangement a right of action must be given on the mutual promises.[2]

In *assumpsit* for the price of goods, the defendant pleaded an agreement to pay 9*l.* and such sum as Mr. L. should tax for costs, in satisfaction of all matters between him and the plaintiff, and alleged mutual promises to perform the bond, with an allegation of the costs having been taxed, and notice thereof and tender of 9*l.* and the costs. The plaintiff demurred generally, and resolved.

Per Cur. If a right of action be not given upon the mutual promises at the time of the arrangement, such *assumpsit* is no bar to the prior action, and judgment for the plaintiff.

See *Allen v. Harris*, 1 Ld. Raym. 122; 1 Com. Dig. Abatement, D. *Case v. Barber*, T. Jones, 158; T. Raym. 450.

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[1] So that it would seem, that where the plaintiff has agreed to accept the promise of the defendant in satisfaction, if the promise be not performed the remedy of the plaintiff is by action for the breach of the agreement he has so accepted. But if he has agreed to accept only the performance of the promise as satisfaction, there shall be no satisfaction without performance or execution. *Carlin v. Wormald*, 1 Ex. 81. *Reeves v. Hearne*, 1 M. & W. 323. *Evans v. Powis*, 1 Ex. 607. *Henderson v. Stobart*, 5 Ex. 99. *Sard v. Rhodes*, 1 M. & W. 153. It is also laid down in Com. Dig. Accord, B. 4, cited by *Parke, B.*, in *Good v. Cheeseman*, 2 B. & Ad. 335, and *per Cur.* in *Cartwright v. Cooke*, 3 B. & Ad. 702, "that an accord, *with mutual promises to perform*, is good, though the thing be not performed at the time of action; for the party has a remedy to compel the performance." And this is no exception to the rule that the satisfaction must be executed; for if the promise is the agreed satisfaction, when it is given and accepted it becomes executed.

The defendant must prove the accord executed according to its terms; therefore, when there is an agreement to pay money in satisfaction, it is not enough to show that the party has always been ready to pay it, or a tender and refusal. (*Peyton's case*, 9 Rep. 79 b; but see *Bradley v. Gregory*, 2 Camp. 385.) So, though an accord to perform a thing at a future period is good, yet it must be proved to be executed before commencement of the action. (1 Rol. Ab. 129, l. 17. See *Sells v. Hoare*, 1 Bing. 401; *Good v. Cheeseman*, 2 B. & Ad. 328; *Thomas v. Heathorn*, 2 B. & C. 477.) But an accord by deed, though without satisfaction, may operate as a conclusive extinguishment of a right. (*Rowntree v. Jacob*, 2 Taunt. 141; S. C. 4 Moore, 192.) So may a rule of Court (*Cameron v. Reynolds*, Cowp. 406); but a judgment against a co-contractor is no extinguishment, unless realised by execution, and then only to the amount received. *Ayrey v. Davenport*, 2 N. R. 474; 11 Henry, 370.) Taking a bond, or bill, or note, is not a waiver of the right to distrain. (*Palfrey v. Baker*, Ex. 3 Price, 572. *See* 3 East, 251.) Nor is the right of distress taken away by an agreement to take interest. (*Skerry v. Preston*, 2 Chit. Rep. 245; Bullen in Dis. 173.)

[2] The slightest additional consideration imported into the agreement suffices. *Ruck v. Brown*, 2 Ir. Jur. 142. Hence withdrawal of plea of infancy is sufficient consideration for an agreement to take a less sum. *Cooper v. Parker*, 24 L. J. C. P. 68; 22 L. T. 88.

II. Must be certain.

Sanford v. Sutcliffe, Yelv. 124; S. P. Russell v. Russell, 3 Lev. 189.

Performance of an accord with certainty does not aid an accord that was uncertain in its foundation.

Covenant by the heir in reversion against executor of tenant for life, for breach of covenant by testator, in not repairing the house demised. *Plea*, that the testator, tenant for life, died on such a day, and that afterwards it was agreed between the plaintiff and defendant that the latter should quietly depart and leave possession to the plaintiff; and in consideration thereof, the plaintiff agreed to discharge him from the breach, and averred that within five days from the day of agreement he left the house. On demurrer, the plea was holden to be bad; for the time was not fixed, by the terms of the agreement, when the executor should depart; and although it was averred that he departed within five days, yet that would not aid the first uncertainty, for the agreement was the foundation of the whole, which ought to be certain as to when it should be performed.

Adams v. Tapling, 4 Mod. 88.

An accord that defendant shall employ workmen for three or four days is too uncertain.

In covenant the breaches assigned were, that the houses were not in repair; that the locks were taken away, the hedges broken down, and the ditches not scoured. Defendant pleaded an accord that he should employ a workman three or four days about repairing the house, which was to be accepted in satisfaction of the breach, and that he had employed a workman, &c. It was moved that this was no more than the defendant was obliged to do; that it was an answer only to the repairs of the house; and that the satisfaction pleaded is uncertain, viz. to employ a man for three or four days. And judgment was arrested; but (afterwards, as it seems) the Court held, that in covenant, where the damages are uncertain, and to be recovered, as in this case, a lesser thing may be taken in satisfaction, and pleaded in bar.

III. Must be with Satisfaction.

James v. David, 5 T. R. 141.

An accord without a satisfaction is no bar to a pre-existing right to damages for a tort.

Where to breaking and entering the plaintiff's close the defendant pleaded, "that in Easter Term last past the plaintiff declared against the defendant in this cause for the several trespasses above supposed by the defendant to have been committed, and that afterwards, and before plea pleaded in this cause, it was agreed between the plaintiff and defendant that the defendant was to pay 1*l.* 1*s.* on account of the matter in dispute, and the plaintiff was to pay the law charges; and further, that whatsoever disputes then were, or had, or might be, in being, touching suits or actions, to the day of the date of the said agreement, should cease and terminate for ever; and they further agreed mutually to forfeit the sum of 100*l.*, if either party should commence an action by suit, in respect of anything in being at the then present day." It was then averred, that the present action, and the action in the agreement mentioned, were the same. On demurrer to this plea it was contended in support of it, on the authority of an admission in *Reniger v. Fogassa*, Plow. 5, that an agreement, to constitute an effectual plea in bar, is either such an agreement as is executed and satisfied with a recompense in fact, or with an action or other remedy to execute it, and to recover a recompense; that here the parties agreed to bind themselves in the penalty of 100*l.* to abide by their accord; that, therefore, was a new remedy, which fell directly within the authority cited. But the Court were of opinion that the plea was bad; for, even supposing the proposition true, that whenever the agreement is such, for the breach of which an action might be maintained, it may be pleaded in bar, yet it is incumbent on the party pleading it to show that an action could have been supported on it. In order to found an action on this agreement, the plaintiff must have stated not only the agreement, but also that he tendered an obligation in 100*l.* ready executed to the defendant, and

that the defendant refused to execute, &c.; but no action could have been sustained on this contract without that previous step, which is not pleaded here. See *Lynn v. Bruce*, 2 H. Bl. 317; *post*, Composition with Creditors.

ALLIES v. PROBYN, 2 C. M. & R. 408; 4 D. P. C. 153.

Nor an answer to a pecuniary legal demand.[1]

Declaration in *assumpsit* by plaintiff, as drawer of a bill of exchange, against defendant as acceptor, and for goods sold. *Plea*, that after the cause of action arose, as to part, in consideration that the defendant would execute a mortgage when called on so to do, the amount to carry interest and be payable by instalments, the plaintiff would take no proceedings as to that sum unless default were made in payment of the instalments, and averring that the defendant was always willing to execute such mortgage, but was never called upon to do so. The Court held the plea bad on demurrer, as being a mere accord without satisfaction. See *Evans v. Powis*, 1 Exch. 601, 11 Jur. 1043. *Graham v. Gibson*, 4 Exch. 768. 19 L. J. Ex. 204. *Crisp v. Griffiths*, Ex. 2 C. M. & R. 159. *Bayley v. Homan*, C. P. 3 Bing. N. S. 915; S. C. 3 Scott, 384. *Edwards v. Chapman*, 4 D. P. C. 732. *Collingbourne v. Mantell*, Ex. 5 M. & W. 289. *Siboni v. Kirkman*, 1 M. & W. 418.

GOODWIN v. CREMER, 13 C. B. 56; 17 Jur. 2; 22 L. J. Q. B. 30.[2]

And where a party has a claim to costs as well as for a debt, satisfaction for the debt does not

Indorsee v. Acceptor on bill of exchange for 49*l.* 16*s.*, indorsed by W. T. to plaintiff. *Plea* (*puis darreign continuance*), that W. T. had paid to the plaintiff. then being the holder of the bill, 60*l.*, being the full amount of the bill and all interest due thereon, in full satisfaction of all monies due and payable in respect thereof. Demurrer and joinder. *Held*, that as there might be a demand for costs recoverable in this action, beyond the amount of the money paid in respect

[1] Hence, where a declaration in *assumpsit* stated that an action had been commenced by the public officer of the North of England Joint-Stock Banking Company against T. for the recovery of the amount of a bill of exchange drawn by him upon, and accepted by, the defendant for 1250*l.*; that whilst the action was pending it was agreed between the Company and T., and the defendant, that the action should be settled as follows: 250*l.* and 500*l.* by the promissory note of T., and 500*l.* to be paid by the defendant's promissory note of 800*l.*, the defendant consenting to the Company appropriating the securities held by them to the payment of the balance, and the defendant agreeing to give them a power of selling certain property, the Company to forego all interest on receiving the three notes, and to guarantee to give up the bill sued on, and also the 1000*l.* bill. *Breach*, that the defendant did not give the Banking Company the promissory note for 500*l.*, together with the said power of sale. *Plea*, that the defendant made the said agreement jointly with M. B., B. B., and J. B., and that after breach thereof by an indenture, to which the public officer of the Banking Company, the plaintiffs, the defendants, M. B., B. B., and J. B. and T. were parties, the public officer did remise, release, and for ever discharge the said B. B., M. B., and J. B. from the said action, and all actions, &c. without the consent of the defendant, and thereby released the defendant from the same:—*Held*, on motion to arrest the judgment, first, that the release stated in the plea operated only as a covenant not to sue. Secondly, that the agreement in the declaration was a binding agreement, and not a mere accord, inasmuch as it would be broken if the plaintiffs proceeded with the action. *Henderson v. Stobart*, 5 Ex. Rep. 99; S. C. 19 L. J. Ex. 135.

[2] To an action by the indorsee of a promissory note the defendant pleaded, that the note was made by the plaintiff and E.; that whilst the plaintiff was holder, the defendant, and E. his partner, delivered to him nineteen signed bills, which were referred to taxation; that it was agreed that the balance found due from the plaintiff to the defendant on such taxation should be applied in part payment of the note, and that the balance of the note should be secured by a judgment payable at certain times, which had elapsed before the commencement of the suit; that the taxation was still pending, and the balance not ascertained; and that the defendant and E. had always been ready and willing to apply the balance due to the defendant towards payment of the note, and on the completion of the taxation to secure the balance of the note by a judgment:—*Held*, that the plea was bad. *Carter v. Wormald*, 5 D. & L. 731; S. C. 16 L. J. Ex. 231; S. C. 1 Ex. R. 81.

of the bill, that the plea was no answer to the action. *See* also *Field v. Robins*, 3 N. & P. 226.

operate as satisfaction for the costs.[1]

IV. The Chattel given in Satisfaction must be of some Value in Law.[2]

Preston v. Christmas, C. P. 2 Wils. 86.

To an action of debt upon a bond the defendant pleaded accord and satisfaction; viz. that he released to the plaintiff all his equity of redemption of certain tenements, in satisfaction of all bonds wherein he was bound to the plaintiff; and upon demurrer judgment was given for the plaintiff, because a release of an equity of redemption is of no value in a contemplation of law. *See* S. P. Cro. Jac. 254.

A release of an equity of redemption in satisfaction is not sufficient.[3]

Cartwright v. Cooke, 3 B. & Adol. 701.

An annuity bond was executed by two brothers; one as principal, the other as surety. By agreement afterwards between them and a third brother, for the settlement of their several claims and debts, and for the apportionment of property, to meet the latter the annuity-bond was included. The surety in that bond was afterwards compelled to pay, and his representatives brought an action against their principal to be reimbursed the amount:—*Held*, that the agreement was an accord in respect of the annuity-bond, and that, as the third parties were bound by that agreement, the surety was also bound, and that the action could not be maintained.

A *third* party being bound by an agreement is a sufficient consideration to make it operate as an available accord.

(A) *But if uncertain in value, Court will not inquire whether it be adequate.*

Cooper v. Parker, 24 L. J. C. P. 68; 23 L. J. C. P. 41; 15 C. B. 822; 3 W. L. R. 710; 1 Jur. N. S. 281.

Declaration for work and labour.

Defendant pleaded that after the cause of action, and before suit, the

Giving up a contested right

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[1] And plaintiff cannot plead in discharge of the promises without also stating that it was accepted in discharge of the damages. *Francis v. Crywell*, 5 B. & A. 886; 1 D. & P. 546.

[2] It is laid down in the old authorities that the satisfaction should, in contemplation of law, be *advantageous* to the party agreeing to receive it; and that it will be inoperative if it appear that it cannot possibly benefit him. Bac. Abr. Accord, A.; Com. Dig. Accord, B. 1. Thus, the mere fulfilment of an act which a party is already bound in law to do, is no satisfaction, as it confers nothing. *Per Grose, J., Edgecombe v. Rodd*, 5 East, 302. An order to obtain goods is not sufficient. (*Griffiths v. Devey*, 13 M. & W. 58); but money paid and accepted in pursuance of a void award may be pleaded, or taken as an accord and satisfaction. *Bacon v. Dubarry*, 1 Salk. 70.

[3] *Sed quære*, whether this would not now be held sufficient by way of equitable defence under C. L. P. 17 & 18 Vic. c. 125, s. 83. *See* also *Thorpe v. Thorpe*, 1 Ld. Raymond, 662; Salk. 171; Holt, R. 96, 29; 12 Mod. 455; where it was held that, "without doubt, a release of an equity of redemption is a very good consideration, and that the common law will take notice that the mortgagor has an equity to be relieved in Chancery." *Wells v. Wells*, 1 Lev. 273. *See* Equitable Defences.

Debt upon two indentures, whereby the defendant's testator covenanted to pay the plaintiff the respective sums of 1300*l.* and 700*l.* with interest. *Plea*, in substance, that the plaintiff was a mortgagee, by two mortgages, of an estate, which was insufficient upon an estimate of its value to pay the mortgage money due from the testator; that three other mortgagees were in the same situation, the estate realised to each being less in estimated value than the charge upon it; that the defendants were devisees of the real estate, and executors of the deceased mortgagor; that they had received assets, which after deducting the costs and expenses payable by them in the first instance, and in preference to the debts due from the testator, and also excepting some furniture, amounted to the deficiency on each mortgage; and thereupon it was agreed between the plaintiff and the defendant, and each of the mortgagees, as the common consent of all, and at the request of each, that no suit should be instituted for the administration of assets, and that the said balance of the assets, after deducting the furniture which should be given to the widow, should be divided rateably between the different mortgagees, and paid to them in satisfaction of the sums due to them over and above the estimated value of the estates; and that all respective rights, equities of redemption, or other rights of the defendants, as executors and trustees to the mortgaged property, should thenceforth be wholly

is a good satisfaction,[1] and if the thing given be uncertain in value the Court will not determine whether it be equivalent to the debt.

plaintiff levied a plaint against the defendant in a County Court for 50*l.*; that defendant, being then an infant, gave notice that he should defend himself against the plaint on that ground. And before trial of the said plaint it was agreed between the plaintiff and the defendant, that the defendant should pay to the plaintiff his costs and 30*l.*, and that the plaintiff should accept the 30*l.* and the performance by the defendant of the agreement in satisfaction, as well of the cause of action for which the plaint was levied, as of all other causes of action which the plaintiff then had against the defendant. Averment of payment of 30*l.* and costs beyond suit, and acceptance by the plaintiff in pursuance of the agreement:—*Held*, in the Exchequer Chamber, that the plea shows clearly a good satisfaction of the plaintiff's demand. The rule of law that a demand cannot be satisfied by payment of a smaller sum, applies only to an agreed debt, an ascertained and liquidated demand, and not to an unliquidated demand. But, assuming that the claim here was for a liquidated debt, we think the plea shows a good satisfaction. By the arrangement stated, the defendant gives up the chance of succeeding on his plea of infancy in the County Court; the plaintiff is saved the trouble of litigating the plea, and he gets his costs. If his demand had been defeated, he would have had to pay them. *If the thing given and accepted in satisfaction of a debt be uncertain in value, the Court will not determine whether it be equivalent to the debt.* The judgment of the Court below must be affirmed.

V. The Acceptance must be an Act of the Will.

Hardman v. Bellhouse, 9 M. & W. 596; 11 L. J. Ex. 135.

To constitute an acceptance there must be an act of the will.

Per Cur. The question is, What is an acceptance in satisfaction? To constitute an acceptance there must be an act of the will. Every *receipt* is not an *acceptance*. But if the party accepts the thing, though but for a moment, for that for which the other pays it, he cannot afterwards, by his subsequent dissatisfaction, get rid of the effect of it. *See* also *Hall v. Flocton*, 16 Q. B. 1039; 15 Jur. 600; 20 L. J. Q. B. 201, Ex. Cham; *ante*, p. 89.

VI. Satisfaction must not be with a Stranger.

James v. Isaacs and others, 12 C. B. 791; 17 Jur. 69; 22 L. J. C. P. 73.

When the satisfaction proceeds

Declaration for work and labour. *Plea*, that the money was due under an agreement for the building of a church; that plaintiff having suspended the

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barred, extinguished, satisfied, and discharged; and the mortgagees should thenceforth become absolute owners, both at law and in equity, of the mortgaged estates, and that the covenants in the declaration should be satisfied and discharged, in consideration of the premises. The plea then averred payment to each of his share of the assets, and that the several rights and equities of redemption were barred and extinguished. *Replication*, that it was not agreed, nor did the defendants pay to the plaintiff the sum of money in the plea mentioned; upon which issue was joined. The Judge at the trial having ruled that the plea could not be proved except by an agreement in writing:—*Held*, that although an agreement to convey an equity of redemption must be in writing, this plea would have been good on demurrer, even though it had expressly stated the contract to have been by parol, inasmuch as the agreement by the plaintiff to forego the balance of his mortgage beyond the value of the estate upon his receiving his share of the assets, was binding upon him, and the receipt of his share of the assets was a satisfaction for the estate, because the agreement of the other mortgagees to take their shares of the assets also was a good consideration for giving up the claim for the residue of the debt against the defendants. *Massey v. Johnson*, 1 Ex. Rep. 241; S. C. 17 L. J. Ex. 182.

[1] And when matters in difference existed between the plaintiff and the defendant, some of which were the subject of an action, it was agreed between them that, in consideration that the defendant would consent to refer to arbitration the matters of the action, the plaintiff would accept such agreement in satisfaction of all damages in respect of the other matters:—*Held*, that the agreement and its performance was a good accord and satisfaction to an action on the last-mentioned matters. *Williams v. London Commercial Exchange Company*, 10 Ex. 569.

work, another agreement was entered into between the plaintiff and one A., under which the plaintiff, in consideration of certain stipulated payments to be made by A., undertook to complete the work, and to rely for the residue of the contract price upon certain subscriptions that were to be raised; that the said A. duly made the stipulated payments, and the plaintiff accepted the same, in complete performance of the agreement between himself and A.; and the plaintiff accepted the last-mentioned agreement, and the performance thereof by A., in satisfaction and discharge of the agreement between the plaintiff and the defendants. Demurrer and joinder.

entirely from a stranger, the defendant being no party, it is not sufficient.[1]

Per Cur. The substantial objection is, that the contract set up by the plea is made between the plaintiff and a third person, and the defendants are no parties to it. So that the defendant seeks to show that the agreement declared upon is put an end to by another agreement, to which the defendant himself is no party. It is not said that A. made the agreement on behalf of the defendant, so as to entitle him to adopt it. We think the plea is bad in substance, on the ground stated. See *Kemp v. Balls*, 10 Ex. 607; 24 L. J. Ex. 47. *Belshaw v. Bush*, 11 C. B. 191; 17 Jur. 67; 22 L. J. C. P. 24. *Jones v. Broadhurst*, 9 C. B. 173.

COOMBS v. THE BRISTOL AND EXETER RAILWAY COMPANY, 27 L. J. Ex. 269.

The declaration charged the defendants as common carriers for the loss of goods alleged to have been delivered by them to the plaintiff.

Nor when it has been given to a stranger,

Plea, that the goods were delivered to the defendants by one A. to be delivered to the plaintiff; that the goods having been accidentally lost, and A., as consignor, having claimed compensation, the defendants, before the bringing of this action, paid to A. a sum of money, who received the same as full value of the said goods, and in satisfaction and discharge of the claim; that the defendants had not, at the time of the delivery or payment, any notice that A., in delivering the said goods, was acting as agent for the plaintiff, and that the payment was made in the *bonâ fide* belief that A. was the person entitled. Demurrer.

In support of the demurrer it was contended that the plea admitted that the contract was with the plaintiff, and that the goods were his, and were to be delivered to him; that it did not show even a *de facto* contract with A., so that it could not be said he was the agent of the plaintiff.

Held, the plea is bad for the defect pointed out. It does not show that A. was the agent, for it contains nothing more than a statement that A. was the hand to deliver, and that he was the person who, when there was a loss, came and said, "I am the consignor; I am entitled to payment for the loss." The declaration alleges that the plaintiff delivered the goods to the defendants; therefore, he is the consignor on the face of the declaration. The consequence is, that the defendants must settle with the real owner, who could not be bound by what A. did. See *Belshaw v. Bush*, 22 L. J. C. P. 24, and 1 Salk, 299; 6 Bing. 754.

THURMAN v. WILD, 3 P. & D. 289; 11 Ad. & E. 453.

To an action of trespass for breaking and entering the plaintiff's close, the defendant pleaded that he acted as servant of A. B.; that he delivered up possession of the close to A. B.; and that A. B. afterwards, and with the *consent* of the defendant, made satisfaction to the plaintiff, and the plaintiff accepted and received the same. Replication traversing the *consent*.

But satisfaction from a stranger not party to the record when a joint wrongdoer is good.[2]

[1] In *Ghrimes v. Blofield*, Cro. Eliz. 541, recognised in 5 East, 300, and in 1 Com. Dig. Abatement, A., it was determined to be no plea if the satisfaction accrues from a stranger; as if an obligee plead that A. surrendered a copyhold to the plaintiff, which he accepted in satisfaction.

[2] But we have seen, if to an action for work done the defendants plead that the work was done under an agreement made by the plaintiff with the defendants on certain terms; that the plaintiff stopped the works until another agreement was entered into with T. P. for completing the work;

On demurrer the Court held, they need not decide whether accord and satisfaction by a stranger could be pleaded; because it appeared from the plea that A. B. was a co-trespasser, so as to make a satisfaction which might enure to the benefit of the defendant, and therefore the traverse of his consent in the replication was immaterial and bad on demurrer. *See* 5 East, 294; 3 Taunt. 117.

VII. Satisfaction with one of several enures to all.

Dufresne v. Hutchinson, 3 Taunt. 117.

The acceptance of satisfaction from a joint tort-feasor discharges co-wrong-doers.[1]

In an action of trover against the defendant it appeared that the plaintiffs, prior to the commencement of the present suit, had sued out a writ in a joint action against B. and M. and the defendant, which he discontinued, upon receiving from B. and M. a certain sum of money in satisfaction, and subsequently brought this action against the defendant for the same cause. The jury found a verdict for the plaintiff; and, upon a motion being made on other grounds for leave to enter a nonsuit, the Court observed that it would be a question whether the discharge made to one tort-feasor would not operate as a release to all, for if it were otherwise the plaintiff might get paid by each defendant to the whole amount of the injury sustained. Rule absolute to enter nonsuit.

Wallace and two others v. Kelsall, 7 M. & W. 264; 8 D. C. P. 841; 4 Jur. 1064.

And a plea of accord and satisfaction with one of several plaintiffs need not aver authority from the others.

Debt. *Plea*, accord and satisfaction, with one of the plaintiffs, by a part payment in cash and a set-off of a debt due from that one to the defendant. Demurrer, on the ground that it did not appear that there was any authority from the other plaintiffs that the set-off should be allowed, or any authority to him to settle the debt. Joinder.

Per Cur. This plea is good; as it is competent for one of three joint-plaintiffs to release a joint debt, it is competent to one of them to settle this action. Suppose, after this accord and satisfaction, two of the plaintiffs were to die, and the only person surviving were the person who took the accord and satisfaction, it is quite plain, in that case, that he could not have sued for this debt. If it is not illegal, the accord and satisfaction operates as a release by him. It is a clear case of accord and satisfaction. *See* also *Smith v. Lovell*, 10 C. B. 6; 20 L. J. C. P. 37; 15 Jur. 250; and *per Parke, B.*, in *Wilkinson v. Lindo*, 7 M. & W. 87.

Field v. Robins, K. B.; 3 N. & P. 226.

But payment by, and acceptance of, a sum of money from one of several obligors does not discharge the others.

A. B. and C. D. entered into a joint and several bond for 2000*l.* An action having been brought against A. B., the plaintiff accepted in his discharge 215*l.*, and brought an action against the defendant, C. D. on the same bond; to which the defendant C. D. pleaded, that after forfeiture of the bond, and while the damages were unliquidated, and before the commencement of this suit, A. B.

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that T. P. paid the consideration-money under the second agreement; and that the plaintiff accepted the second agreement, and the performance thereof by T. P., in full satisfaction and discharge of the agreement between the plaintiff and the defendants; that the plea was bad in substance, because it did not show that the agreement and payment made by T. P. were made on behalf of the defendants, or that they had adopted them, the case thereby being distinguishable from *Belshaw v. Bush*, 22 L.J. C. P. 24. *James v. Isaacs*, id. 73; *supra*, 94.

[1] Accord and satisfaction by one defendant is a bar for all. Com. Dig. Accord, A. 1. *Hillman v. Uncles*, Skin. 391. So in an action for a trespass committed by defendant as servant for, and by command of A. B., acceptance of satisfaction by plaintiff from A. B. is a defence. *Thurman v. Wild*, 11 Ad. & E. 453; 3 P. & D. 489. *See* 22 L. J. C. P. 24. *Edgecombe v. Rodd*, 5 East, 294.

had paid 215*l.* to the plaintiffs in satisfaction of the breaches of the said bond, and that plaintiffs accepted the said sum in satisfaction as aforesaid.

The plaintiff had a verdict, subject to the opinion of the Court; and the Court held, that the composition in the former action was not a discharge of the whole damages on the bond, and refused to set aside the verdict.

VIII. Payment of a less Sum no Satisfaction of greater.

Fitch v. Sutton, 5 East, 230; S. C. 1 Smith, 415.

Acceptance of a less sum cannot be a satisfaction in law of a greater.[1]

Action for goods sold. Plea, *non assumpsit.* It appeared that the defendant, who owed the plaintiff 50*l.*, had compounded with his creditors, and paid them seven shillings in the pound, and, at the time of such payment to the plaintiff, promised to pay him the residue when he should be of ability so to do. The defendant produced a receipt signed by the plaintiff for the composition, which purported to be in full of all demands. The Court *in banco*, after a verdict for the defendant, granted a new trial, on the express ground that the acceptance of 17*l.* 10*s.* could not be a satisfaction for a debt of 50*l.* "There must be some consideration," said *Lord Ellenborough*, "for the relinquishment of the residue, something collateral, to show the possibility of benefit to the party relinquishing his further claim. But the mere promise to pay the rest when of ability, puts the plaintiff in no better condition than he was in before. See *Thomas v. Heathorne*, 2 B. & C. 477; 3 D. & R. 647. *Heathcote v. Crookshanks*, 2 T. R. 24. *Knight v. Cox*, cited 5 East, 231; Bull. N. P. 153; 1 Stra. 426; 5 Rep. 117; 4 Mod. 88; Co. Litt. 212 b; 1 B. & A. 103; 4 id. 440; 7 Price, 604; 8 Taunt. 227; 2 Campb. 124, 383; 11 East, 390–2; 2 Taunt. 124; Cro. Eliz. 304; 3 Campb. 175; 16 Ves. 372; 2 Lev. 81; 1 Esp. 236.

Cooper v. Parker, 15 C. B. 822; 24 L. J. C. P. 68; 23 L. J. C. P. 41; 3 C. L. R. 710; 1 Jur. N. S. 281.

This rule applies only to an agreed and ascertained debt.

Per Cur. The rule of law, that a demand cannot be satisfied by payment of a smaller sum, applies only to an agreed debt, an ascertained and liquidated demand, and not to an unliquidated claim. See *Longridge v. Dorville*, 5 B. & A. 117. *Watters v. Smith*, 2 B. & Ad. 889. *Atlee v. Backhouse*, 3 M. & W. 651. But see *Wright v. Acres*, 6 Ad. & E. 729.

Down v. Hatcher, 2 P. & D. 292; 9 Ad. & E. 121.

And such a plea to a larger ascertained debt is bad, even after verdict.

This was an action against an executrix for a cause of action due from her testator; the declaration admitted a part payment, and assigned a breach as to the residue, to wit, the sum of 500*l.*; to which the defendant pleaded, that, after the making of the promise therein mentioned, and before the commencement of the suit, to wit, &c., the defendant as executrix, &c., paid to the plaintiff 6*l.* 10*s.* in full satisfaction and discharge of the said residue, &c., and of all causes of action in respect thereof, and the plaintiff then accepted the said 6*l.* 10*s.* in such full satisfaction and discharge as aforesaid.

After verdict, application was made for judgment *non obstante veredicto*, on the ground that a plea of payment of a smaller sum in satisfaction cannot be a bar to an action for a larger. And of that opinion were the Court, who decided that the plea was bad, and not even *cured by verdict.* See *Reay v. Richardson*, 2 C., M. & R. 422. But *qu.* good by way of equitable plea. 25 L. J. Ex. 193.

[1] But payment and acceptance in full satisfaction of a less sum, either before the day or at *another* place than that mentioned in the condition of a bond, extinguishes the debt. Co. Litt. 212 b; *Pinnell's case*, 5 Rep. 117; 2 Wils. 86.

(A) *Unless in Discharge of an unliquidated Claim.*

Wilkinson v. Byers, 1 Ad. & E. 106.

But this rule does not hold where the demand is unliquidated.

Assumpsit. The declaration stated that T. R. had sued the plaintiff for 13*l.* 10*s.*, which action was depending; and, thereupon, in consideration that the plaintiff would pay the defendant the 13*l.* 10*s.*, the defendant promised the plaintiff to settle with the attorney for the costs of the action, and indemnify the plaintiff against them; that plaintiff accordingly paid the 13*l.* 10*s.*; but that defendant neglected to settle with the attorney, who proceeded with the action, and signed judgment against the plaintiff, who was obliged to pay 7*l.* 10*s.* costs, and 3*l.* in endeavouring to set aside the judgment. A verdict was found for the plaintiff, subject to the opinion of the Court upon the question whether, as the payment of the 13*l.* 10*s.* was a payment in discharge of an admitted debt, it could be any consideration for the defendant's promise to indemnify the plaintiff against the costs. The Court held that the verdict was right. "The case," said *Parke, J.*, "may be decided shortly on this ground. If an action be brought on a *quantum meruit*, and the defendant agree to pay a less sum than the demand in full, that is a good consideration for a promise by the plaintiff to pay his own costs, and proceed no further. Payment of a less sum than the demand has been held to be no satisfaction in the case of a liquidated debt, but where the debt is unliquidated it is sufficient. Now, here, we cannot say that there was originally any certain demand. A jury if asked could not, in my opinion, have said so. In the great majority of actions of this nature, for work, labour, and goods sold, it is not a specific sum that forms the subject-matter of the action; and unless that could have been shown in the present case there was a good consideration for the promise."

(B) *Or paid by a third Person.*

Welby v. Drake, 1 Car. & P. 557.

And the acceptance of a less sum than the original debt from a third party is binding.

Action on bill of exchange against defendant as drawer. It appeared that plaintiff had agreed with a third party, that if he would advance part of the money for the defendant he would take it in discharge of the whole debt; and such third party advanced the sum. *Tenterden, C. J.*, held the partial payment a bar; because, by suing the defendant, he commits a fraud on the party advancing the money. See *Edgecombe v. Rodd*, 5 East, 292; S. C. 1 Smith, 515. *See* also Composition with Creditors.

IX. Payment of agreed Balance on Settlement of Cross Demands is good: *aliter* where no Cross Demands.

Callandar v. Howard, 10 C. B. 290; 1 Pr. R. 562; 14 Jur. 672; 19 L. J. C. P. 312.

A settlement of account in which one item is agreed to be set off against another amounts to a payment of the sums set off, and may be pleaded by way of accord and satisfaction.

Drawer against acceptor of three bills of exchange, amounting to 912*l.* *Plea*, that after the accruing of the causes of action an account was stated between the plaintiff and the defendant concerning the said causes of action, and certain other demands of the plaintiff against the defendant, and certain demands of the defendant against the plaintiff; and that 50*l.* and no more was found to be due from the defendant to the plaintiff: which sum the defendant paid to the plaintiff, and the plaintiff accepted in full satisfaction and discharge. Demurrer and joinder.

Per Cur. If the plea in this case amounts to an allegation of the allowance of cross demands upon an account stated, there seems to be no doubt but that it sets up substantially a good defence to the action.[1] And it is certainly convenient

[1] *See* Co. Lit. 203 a; 1 Roll. Ab. Condition, E. pl. 5; *Hayford v. Andrews*, Cro. Eliz. 697; and the elaborate judgment of *Talfourd, J.*, in the case cited in the text.

to plead it in its present shape, rather than to plead it directly as a plea of payment, because it explains to the plaintiff in what way the defendant proposes to contend that the payment has taken place. We think the plea is sufficient.

PERRY v. ATTWOOD AND ANOTHER, 25 L. J. Q. B. 408.

But *aliter* where there are no cross demands but the items are all on one side.

Declaration on a covenant in a lease for non-payment of certain sums due for fixed and tonnage rents, and not keeping books of account. *Plea*, to so much of the declaration as related to the tonnage rent alleged to be due during eight years, ending the 25th day of March, 1851, that the defendants did, during the said eight years, keep such books containing an account of all ore gotten, and that such account was submitted for examination to the plaintiff, and that the plaintiff and defendants in each of those years stated an account concerning all the ore got by the defendants during the preceding year, and the tonnage rent payable in respect of the same; and that in each of such accounts a certain sum was agreed upon between the plaintiff and defendants to be the balance due, which sum was paid by the defendants to the plaintiff, and accepted by him in full satisfaction and discharge of the tonnage rent payable by the defendants during the said period.

To this plea there was a demurrer and a replication. That the said accountings were not true and correct accountings according to the intent and meaning of the deed, but were erroneous in this; that divers tons of ore which ought to have been included in the account, and divers quantities of tonnage rent payable in respect thereof, were, by mistake and ignorance of the facts on the part of the plaintiff, omitted from the said accounts; and that the balances were erroneously agreed to be the balances due from the defendants to the plaintiff under the deed.

Per Cur. According to the law, as laid down in *Smith v. Page*,[1] we must decide that this plea is insufficient, as it shows that the settlement took place with regard to an account in which the items were all on one side. There was a mere agreement as to the amount of the balance, and that amount was paid; but this is not in the nature of an *accord and satisfaction*, and cannot be binding on the parties. It is alleged to be paid in satisfaction, no doubt, but still there is no consideration for such a payment. But if there were any doubt on the plea, the replication is clearly sufficient, unless such a settlement is to be looked upon as absolutely binding at all times, although great errors may have occurred in adding up the figures, or in calculating the number of tons of ore. It cannot be said that this is so, and therefore we are bound to give judgment for the plaintiff. See *McKeller v. Wallace*, 8 Moore, P. C. C. 378.

X. EFFECT OF SUBSTITUTING ONE SECURITY FOR ANOTHER.

(A) *Acceptance of a Non-negotiable Security for a smaller Sum no Satisfaction for a liquidated larger Debt.*

CUMBER v. WANE, 1 Stra. 426.

Acceptance of a non-negotiable security for a less sum cannot be pleaded in satisfaction of a larger debt.[2]

To an action of *indebitatus assumpsit* for 15*l.*, the defendant pleaded that he gave the plaintiff a promissory note for 5*l.* in satisfaction, and that the plaintiff received it in satisfaction. The plaintiff put in an immaterial replication, to which defendant demurred. After judgment for the plaintiff in the Common Pleas it was objected, on error, in the King's Bench, that the plea was ill, it being obvious that the note for 5*l.* could not be a satisfaction for 15*l.*

[1] 15 Mee. & W. 683.

[2] The general doctrine in *Cumber v. Wane*, and the exceptions and distinctions engrafted on it, may be summed up as follows: viz. that a creditor cannot bind himself by a simple agreement to accept a smaller sum in lieu of an ascertained debt of larger amount, such an agreement being *nudum*

Per Cur. We are all of opinion that the plea is not good, as the plaintiff had a good cause of action; it can only be extinguished by a satisfaction, which he agrees to accept; and it is not his agreement alone that is sufficient, but it must appear to the Court to be a reasonable satisfaction. If 5*l.* be (as is admitted) no satisfaction for 15*l.*, why is a simple contract to pay 5*l.* a satisfaction for another simple contract of three times the value? In the case of a bond, another bond has never been allowed to be pleaded in satisfaction, without bettering the plaintiff's case, as by shortening the time of payment. Judgment affirmed. *See* 2 Keb. 804; Hob. 68; 2 Keb. 851; 1 Mod. 225; 1 Leon. 19; 4 Mod. 43; 1 Mod. 261; Raym. 150; 1 Rol. Ab. 122; 2 Brownl. 47, 71; 1 Atk. 12; 2 Stra. 783; and Lord Ellenborough's observations on *Cumber v. Wane*, in *Fitch v. Sutton*, 5 East, 232.

(B) Aliter *if Security negotiable.*

Sibree v. Tripp, 15 Mee. & W. 23; 15 L. J. Ex. 318.

But a negotiable security for a smaller sum may be taken in satisfaction of a larger.

Action for money had and received, and on account stated. *Plea*, as to 500*l.* parcel, &c., that after the said causes of action arose the plaintiff commenced an action against the defendant for the recovery of the said 500*l.*; that defendant disputed the said debt; and thereupon it was agreed that the said last-mentioned action should be settled by the defendant delivering to the plaintiff three promissory notes for 125*l.*, 125*l.*, and 50*l.* respectively to the plaintiff, and that the plaintiff should accept the same in full satisfaction of the said sum of 500*l.* and all damages and costs. Averment of delivery of the said notes and acceptance by the plaintiff. At the trial there was a verdict for the defendant. On a rule to show cause why there should not be judgment for the plaintiff *non obstante*, on the ground that the giving these notes could not, in point of law, be a satisfaction of a liquidated claim for a larger amount,—

Per Cur. If the case of *Cumber v. Wane* (*ante*, 99) were law, and a binding authority upon us, undoubtedly we could not come to a conclusion in favour of the defendant. That case was one of *assumpsit* for 15*l.*, to which the defendant pleaded that he gave the plaintiff a promissory note for 5*l.* in satisfaction, and that the plaintiff received it in satisfaction; and it was held, on writ of error, after judgment for the plaintiff, that the plea was ill. However, it does not appear from the report that the promissory note was *negotiable*, and therefore

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pactum. But if there be any benefit, or any legal possibility of benefit, to the creditor thrown in, the additional weight will turn the scale, and render the consideration sufficient to support the agreement. See *Steinman v. Magnus*, 2 Camp. 124; 11 East, 390. *Bradley v. Gregory*. 2 Camp. 383. *Wood v. Roberts*, 2 Stark. 417. *Boothby v. Sowden*, 3 Camp. 175. *See*, however, *Lewis v. Lyster*, 2 C., M. & R. 704, 706.

To an action for infringing a patent the defendant pleaded, that after the declaration it was agreed between the plaintiff and the defendant that the defendant should admit his liability to the action, as he then did admit; that the defendant should take, and plaintiff grant, a license for the use of the invention; that the defendant should hand a cheque for 75*l.* to a third person, to be held till grant of the license, and then handed by him to the plaintiff; that the plaintiff and the defendant should bear their own costs of the action; and that "this action, and the cause of action included in the same, should be settled, satisfied, discharged, and terminated by the arrangement and agreement before mentioned." *Averment*, that the defendant admitted his liability, drew and delivered the cheque, and had always been ready and willing to perform the agreement, take the license, and pay his own costs, of which the plaintiff had notice:—*Held*, on special demurrer, that the plea was bad; for if the agreement were construed as an accord in respect of the things to be done, there was no averment of satisfaction, the stipulation of the defendant not having been all performed; and if the making of the agreement itself was relied upon, there was no allegation, expressed or implied, that the agreement was accepted in satisfaction. *Hall v. Flockton*, 15 Jur. 600; S. C. 16 Q. B. 1039; S. C. 20 L. J. Q. B. 201, Ex. Ch.

that the plaintiff had any benefit from it. The marginal note of that case, "Giving a note for 5*l.* cannot be pleaded as a satisfaction for 15*l.*," was expressly denied by *Lord Ellenborough*, in argument in *Heathcote v. Crookshanks*, 2 T. R. 24; and *Buller, J.*, referred to a case of *Hardcastle v. Howard*, id. 28, in which it had been so denied to be law. But whether the case of *Cumber v. Wane* have been overruled or not, it appears to us that it cannot be sustained as an authority, that the acceptance of a negotiable security may not be a satisfaction of a claim to a larger amount. *Sard v. Rhodes*[1] is a distinct authority, that the acceptance of a negotiable security may be pleaded in satisfaction of a simple contract debt for a like amount; and the only question is, whether the same doctrine is applicable where the original claim was for a larger amount. We think it is.

(C) *Must be received in Satisfaction.*

DRAKE v. MITCHELL AND OTHERS, 3 East, 251.

But it must appear distinctly that such note was *accepted* in satisfaction, or has *actually* produced it.

In this case it appeared that the defendants had covenanted, in consideration of certain leases granted by the plaintiff to them, to pay the plaintiff a certain sum by instalments. On an action being brought for the recovery of one of the instalments, the defendants pleaded part payment; and as to the residue, that one of the defendants had given his promissory note for the *payment and in satisfaction thereof:* the plea then set out that a verdict had been since obtained on the note. *Replication*, taking issue on the part payment, and a general demurrer as to the payment of the residue by the note.

Per Cur. It should have been averred in the defendant's plea that the note was *accepted* in satisfaction, or that it had in fact produced satisfaction: neither of these facts are set forth, and it is clear, that a judgment recovered on the note is only a security for the original cause of action, until it be made productive to the party. Judgment for the plaintiff. *See* 2 Tidd. 1008; *Macdonald v. Bovington*, 4 T. R. 825. *Branthwait v. Cornwalleys*, cited and approved of in *Higgins's case*, 6 Co. 44 b; 45 b; 46 a. *Basset v. Wood*, Litt. Rep. 19; 6 Co. 46 a. *Ashbrooke v. Snape*, Cro. Eliz. 240. *Pudsey's case*, cited in *Hooper's case*, 2 Leon. 110. *Pyers v. Turner*, Cro. Eliz. 283. *Parker v. Amys*, 1 Lev. 261. *Brown v. Wootton*, Cro. Jac. 73; and Yelv. 67. *Curtis v. Rush*, 2 Ves. & B. 416.

(D) *And if so received, original Debt not revived on Maturity.*

SARD v. RHODES, 1 Mee. & W. 153; S. C. 1 Tyr. & G. 298; S. C. 4 Dowl. P. C. 743.

If such a security was taken in satisfaction, the original debt cannot be revived on the dishonour of the note.

Action by indorsee against defendant as acceptor of bill of exchange. Defendant pleaded, that after the said bill became due, and before the commencement of this suit, to wit, on &c., G. P. (the drawer) made his promissory note for 45*l.*, and delivered the said note to the plaintiff, in full satisfaction and discharge of the said bill, and the said cause of action in said first count mentioned; and the plaintiff then accepted and received the said note in full satisfaction and discharge of the said bill. *Replication*, that although the

[1] 1 M. & W. 153; 1 Tyr. & G. 298; 4 D. P. C. 743, *supra*.

To counts for 40*l.* for goods sold, and 40*l.* for money due on an account stated, the defendant pleaded except as to 10*l.* and 9*l.* 15*s.* 4*d.*, accrued to the plaintiff for clothes delivered to the defendant; and in consideration that the defendant would deliver to the plaintiff a blank acceptance of his for 25*l.*, the plaintiff would discharge the defendant from all claims for clothes if the acceptance should be paid in six months; and if it should not be paid within that time, the defendant should be liable to pay the plaintiff 10*l.* only. *Averment*, that the defendant delivered the acceptance, and that the same was not paid within six months, whereby the defendant became liable to pay 10*l.* only (which sum he paid into court):—*Held*, a good plea of accord and satisfaction. *Curlewis v. Clark*, 3 Ex. Rep. 375; S. C. L. J. Ex. 144; S. C. 6 D. & L. 455.

plaintiff accepted the said note in full satisfaction and discharge of the said bill, yet that the note was not paid when due, and still remains in the plaintiff's hands wholly unpaid and unsatisfied.

On demurrer the Court held, that as the plaintiff *admitted* he had taken the note in full discharge and *satisfaction* of the unpaid bill, the debt could not be revived by the dishonour of the note. In *Kearslake v. Morgan*, 5 T. R. 513, it was expressly averred that the new security was taken for the balance of the debt. *See* 2 Mee. & W. 20; 15 id. 23; 6 Man. & G. 40.

(E) *Bill or Note for smaller Sum on account no Satisfaction for larger.*

THOMAS v. HEATHORN, 2 B. & C. 477; S. C. 3 D. & R. 647.

A bill of exchange for a smaller sum taken *on account* of a larger debt is no satisfaction.

In an action of *assumpsit* by the plaintiffs, assignees of H., a bankrupt, the declaration alleged that the defendant was indebted to the bankrupt before his bankruptcy in the sum of 1000*l.* for goods sold, &c., which promise was stated to have been made before his bankruptcy. *Plea*, that after the making of the promises, and before H. became a bankrupt, and before the commencement of the suit upon an account stated between H. and the defendant of and concerning the sum in the declaration, the defendant was found to be indebted to H. in the sum of 400*l.*, for which said sum defendant gave the bankrupt a bill of exchange, which he accepted for and on account of the said several promises and undertakings in the said counts mentioned, and by reason whereof the defendant became liable to pay the bill: the plaintiff having replied over, and the defendant having demurred, it was holden to be an insufficient plea, because the mere acceptance of 400*l.* could not operate in point of law as an extinguishment of the debt of 1000*l.*

(F) *Taking a Bill or Note on account is* primâ facie *Satisfaction.*

KEARSLAKE v. MORGAN, K. B. 5 T. R. 513.

But the acceptance of a collateral security is, until that security be dishonoured, *primâ facie* a satisfaction.[1]

Assumpsit for goods sold and delivered, and for money lent. The defendant pleaded the general issue, and that as to 4*l.* 14*s.* 6*d.*, one W. P. made his promissory note for 10*l.* payable to the defendant, or order, at a time which had elapsed before the commencement of the suit, and that the defendant, before the note became due, endorsed it to the plaintiff, for and on account of the said sum of 4*l.* 14*s.* 6*d.*; and of the sum of 5*l.* 5*s.* 6*d.* paid by the plaintiff to the defendant, that the defendant accepted the note for and on account of those sums. To this plea there was a general demurrer; and it was urged, that the plea ought to have alleged that the note was received in satisfaction of the debt: but the Court, on argument, held the plea good, and advised the plaintiff to withdraw his demurrer, and reply, which he accordingly did. *See* And. 187; 2 Wils. 353; 2 Ld. Raym. 928; 2 B. & P. 518; 6 T. R. 139; 7 id. 64; 3 M. & S. 362; 4 Esp. 46; 3 Taunt. 130; 5 M. & S. 62; 1 D. & R. 359; *Griffiths v. Owen*, 13 Mee. & W. 58.

[1] This rule obtains even against prerogative process. The *King v. Dawson*, Wightw. 32.

The words "for and on account of, and in payment and discharge," do not amount to, and are not equivalent to, *satisfaction* in extinguishment of the debt. *McDowall v. Boyd*, 2 Q. B. Rep. 298; 6 D. & L. 149; 12 Jur. 980; 17 L. J. Q. B. 295. *Baillie v Moore*, 8 Q. B. 489; 10 Jur. 592; 15 L. J. Q. B. 169.

To an action of debt on simple contract the defendant pleaded that, after the accruing of the debts and causes of action, and before suit, the plaintiff drew a bill on one A. B., who accepted the bill, and delivered it to the plaintiff for and on account of the said debts and causes of action, and that the plaintiff received it from A. B. on such account: that the plaintiff before suit *endorsed* the bill to C. D., who was still the holder, and entitled to sue A. B. thereon:—*Held*, a good answer to the action. *Belshaw v. Bush*, 11 C. B. 131; S. C. 7 Jur. 67; 22 L. J. C. P. 24; and *supra*.

But a plea that A. was indebted to defendant in a larger sum, and that A. being in prison in Scotland as a debtor, defendant authorised plaintiff to receive from A. the sum so due to him from defendant; and that plaintiff, instead of receiving the sum from A., received from A. a bill of exchange "for and on account of the sum," and that he appro-

(G) *But the Bill or Note must be negotiable.*

JAMES v. WILLIAMS, 13 M. & W. 828.

Per Cur. The rule laid down in *Kearslake v. Morgan*, *ante*, 102, and which has been confirmed in modern cases in this Court, is, that when bills of exchange are stated to have been delivered for and on account of a promissory note, or any other sum in the declaration mentioned, then it is to be taken as a conditional payment; but this rule is confined to negotiable instruments alone, and it must appear on the face of the plea that the plaintiff took an interest in the negotiable instrument. *See* Byles on Bills, 202, 7th edit.

But such security must be negotiable.

(H) *May be given by a Stranger.*

BELSHAW v. BUSH, 11 C. B. 191; 22 L. J. C. P. 24.

Debt for goods sold, &c. *Plea*, that after the accruing, &c. the plaintiff drew a bill on one A. B., who accepted the same, and delivered it to the plaintiff for and on account of the said debt and causes of action, and that the plaintiff received it from the said A. B. on such account; that the plaintiff before suit indorsed the bill to C. D., who was still the holder.

And the plaintiff may receive such bill from a third person.[1]

Replication. That the said bill was overdue and unpaid before the commencement of the suit, and that no part of the money has ever been paid. Demurrer and joinder.

Per Cur. The question is, whether the plea be a good answer to the action. It cannot be questioned that it has been established by many decisions, that if the plea had alleged the bill to have been delivered to the plaintiff by the defendant, instead of by A. B., and had in all other respects been such as it now is, it would have been an answer to the action. The true principle of the cases seems to be that pointed out by *Pollock, C. B.*, in *Griffiths v. Owen*,[2] "in the case of a money demand, if the creditor accepts a promissory note, or an order for the payment of money on account[3] of the debt, that is a sort of qualified or conditional payment, and may be so pleaded;" and by *Alderson, B.*, in *James v. Williams*,[4] "when bills of exchange are stated to have been delivered for and on account of a promissory note, or any other sum in the declaration mentioned,

priated and retained the bill for and in liquidation and discharge of the debt, and that he discharged A. from the debt, according to the law of Scotland:—*Held*, that the plea did not import either satisfaction or payment. *Baillie v. Moore*, 8 Q. B. 489; S. C. 15 L. J. Q. B. 169; 10 Jur. 529.

So where it was averred in a plea to a count on an account stated, that a bill of exchange was given "for and on account, and in payment and discharge" of the debt; and the plea went on to state that the bill so given was afterwards altered by the plaintiff in a material part, so as to become ineffectual; the plaintiff replied touching the alteration of the note, upon which replication issue was joined, and at the trial the defendant had a verdict. Upon a motion for judgment *non obstante veredicto*, held, that the words "for and on account of, and in payment and discharge," are not equivalent, and do not amount to "satisfaction" in "extinguishment" of the debt, and that judgment *non obstante veredicto* must be awarded for plaintiff. *McDowall v. Boyd*, 2 C. B. 298; S. C. 12 Jur. 980; S. C. 17 L. J. Q. B. 295; S. C. 6 D. & L. 149.

[1] Where the creditor takes a bill or note *on account* of his debt, it is held to be taken by him as a qualified or conditional payment. *Griffiths v. Owen*, 13 M. & W. 58, 64. *James v. Williams*, 13 M. & W. 828, 833. *Belshaw v. Bush*, *supra*. And accordingly, during the currency thereof, the original remedy is suspended or in abeyance. *Sayer v. Wagstaff*, 5 Beav. 415. *Simon v. Lloyd*, 2 C., M. & R. 187. But the right to sue on the original demand revives on the dishonour of the bill or note. *Puckford v. Maxwell*, 6 T. R. 52. *Owenson v. Morse*, 7 T. R. 64. But where a debtor delivers a negotiable bill or note to his creditor, and the latter, at the time of receiving the same, agreed to take it *in payment or discharge* of the debt, and to take on himself the risk of the bill or note being paid, the effect will be to destroy the right of action for the debt, and to leave the creditor without remedy, except upon the instrument. *Sayer v. Wagstaff*, *supra*. *Sard v. Rhodes*, 1 M. & W. 153. *Brown v. Kewbey*, 2 B. & P. 518. *Ex parte Blackburn*, 10 Ves. 216. *Camidge v. Allenby*, 6 B. & C. 381, 382, 384; 9 D. & R. 391. *Bottomley v. Nuttall*, 28 L. J. C. P. 110.

[2] 13 M. & W. 58; 13 L. J. Ex. 345.

[3] Or the guarantee of a third party. *Alexander v. Strong*, 9 M. & W. 733; S. C. 2 D. P. C. N. S. 256; 11 L. J. Ex. 316, *post*, Div. xi. p. 105 n.

[4] 13 M. & W. 828; 14 L. J. Ex. 220.

then it is to be taken as a conditional payment." If a bill given by the defendant himself, on account of the debt, operate as a conditional payment, and so be of the same force as an absolute payment by the defendant, if the condition by which it is to be defeated has not arisen, there seems no reason why a bill, given by a stranger for and on account of the debt, should not operate as a conditional payment by the stranger. It appears to us, therefore, that the bill given by A. B. on account of the causes of action of the plaintiff against the defendant, must be taken to be a conditional payment on behalf of the defendant; that the condition to defeat it not having happened, it operates as an absolute payment; that it might be adopted, and has been adopted by the defendant, who relies on it in his plea, and, consequently, that it bars the action. See *Ford v. Beech*, 11 Q. B. Rep. 852; S. C. 17 L. J. Q. B. 114.

XI. How pleaded.

(A) *Must be specially pleaded,*[1] *and how.*

(B) *Cannot be pleaded to an Action on a Deed before Breach.*

Healey v. Spence, 8 Ex. 668; 22 L. J. Ex. 249; S. P. Snow v. Franklin, 1 Lutw. 358.

An accord and satisfaction cannot be set up at law to an action on a deed before breach.[2]

Declaration on a covenant to pay money upon a contingency. *Plea*, that before any breach of the said covenant the defendant satisfied and discharged the claim of the plaintiff, by delivering to him goods, machinery, &c. Demurrer and joinder.

Per Cur. An accord and satisfaction cannot be set up before breach. It makes no difference whether the covenant is to pay upon a contingency or not; the plea is clearly bad. *Qu.* Whether not good as an equitable defence? *Stears v. South Essex Gas Company*, M. T. C. P. 1860.

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[1] By pleading r. 8, H. T. 1853, in every species of action on contract, all matters in confession and avoidance, including not only those by way of discharge, &c. shall be specially pleaded.

[2] *See* also *Mayor of Berwick v. Oswald*, 1 E. & B. 295; 22 L. J. Q. B. 129; and the delivery of a bond in satisfaction before breach is no bar to an action on a covenant. *Kaye v. Waghorn*, 1 Taunt. 428.

Where to an action for use and occupation the defendant pleaded, first, that the plaintiff seized goods of the defendant sufficient to pay the rent and costs, and detained them for two years, and it was then agreed between them that the plaintiff should retain the goods in satisfaction of the debt, and that he did so accordingly. Secondly, that after a wrongful seizure by the plaintiff of goods of sufficient value, &c. the plaintiff and the defendant agreed that the plaintiff should retain the goods, and that they should relinquish their claims on each other. Thirdly, that they agreed that the plaintiff should retain the goods so seized, that they should relinquish their claims, and the defendant should give up possession. Replications traversing the seizure of goods of sufficient value, &c. On demurrer to the replications—*Held*, that the pleas were good, and that the replications were bad for putting in issue matter which was only inducement to the acceptance in satisfaction, such acceptance being the material part of the pleas. *Jones v. Sawkins*, 5 C. B. 142; S. C. 17 L. J. C. P. 92; S. C. 5 D. & L. 353.

To a declaration in *assumpsit*, containing a count on a bill of exchange, and a money count, the defendant pleaded payment of money into court on the first count, which the plaintiff accepted in satisfaction, and pleaded to the residue of the declaration as to 186*l.* parcel, &c., a plea which stated an agreement that defendant should pay plaintiff interest at 5*l.* per cent. on the 186*l.*, and repay the principal as soon as his means should enable him; and that, in consideration thereof, the plaintiff should give time to the defendant until his means should enable him to pay, and that the plaintiff accepted such promise by the defendant in satisfaction, and alleged performance by the defendant. There were two other pleas pleaded as to the same sum to the same effect, except that one stated the agreement to be that the defendant should pay 4*s.* a-week for interest on the 186*l.*, and should repay the principal when his means should allow him; and contained an averment that the interest so agreed to be paid exceeded 5*l.* per cent.; and the other stated the agreement to be, that defendant should pay interest at 5*l.* per cent., and repay the principal when his means should enable him, and in the meantime pay 4*s.* a week on account of interest:—*Held*, that the above pleas were issuable.

Semble. The plaintiff was not precluded from signing judgment on the second count, by having accepted in satisfaction the money paid into court on the first count. *Verbist v. De Keyser*, 3 D. & L. 392; S. C. 15 L. J. Q. B. 28.

A plea of satisfaction *puis darreign continu-*

(C) Aliter *if after Breach, and need not be under Seal.*

Smith v. Trowsdale and others, 23 L. J. Q. B. 107; 3 E. & B. 83; 18 Jur. 552.

The declaration stated a submission to arbitration under seal and an award, whereby the defendant was ordered to pay to the plaintiff 5000*l.* by four instalments, the first of which was to be paid on the 1st of January, and the last on the 1st of July, 1851, and alleged as a breach the non-payment of 500*l.* parcel of the 5000*l.* *Plea*, that after a breach of the award by non-payment of the first

But *aliter* if made after breach, and it seems there is no necessity for the agreement to be under seal.

ance must show grounds for the non-further continuance of the action. Hence the indorsee of a bill of exchange is entitled to proceed, in an action against the acceptor, for the recovery of costs, though, pending the action, payment in full satisfaction of the amount of the bill with interest, and all monies due thereon, be made by another party to the bill and accepted by the plaintiff. Where, therefore, to a declaration against the acceptor of a bill of exchange for 49*l.* 16*s.* indorsed by W. T. to the plaintiff, the defendant pleaded, first, *non accepit*; secondly (*puis darreign continuance*), that, after the pleading of the first plea, W. T. had paid to the plaintiff, then being the holder of the bill, and the plaintiff had accepted, 60*l.*, being the full amount of the bill, and all interest due thereon, in full satisfaction and discharge of the said bill, and of all monies due and payable on account and in respect thereof:—*Held*, on demurrer, that the plea was no bar to the further continuance of the action. *Goodwin v. Cremer*, 17 Jur. 2; 18 Q. B. 17; S. C. 17 Jur. 2; S. C. 22 L. J. Q. B. 30.

The taking a guarantee in satisfaction must be pleaded according to the fact. Hence, when the plaintiff (the acceptor of a bill) sent his son to the defendant (who represented himself to be the holder), with directions to pay the amount, and bring back the bill; the son paid the money, but defendant refused to give up the bill. The plaintiff again sent his son, with directions to bring back the bill or the money; the son returned without either. The plaintiff afterwards accepted the guarantee of a third person.

Held, in an action for money had and received, that the guarantee operated by way of accord and satisfaction, and ought to have been specially pleaded. *Alexander v. Strong*, 9 M. & W. 733; S. C. 2 D. C. P. N. S. 256; S. C. 11 L. J. Ex. 316.

As regards the allowance of cross demands, as a satisfaction, the following case has been decided:—To a declaration on three bills of exchange for 300*l.*, 334*l.*, and 278*l.*, with counts for goods sold and delivered, money paid and interest, and upon an account stated, the defendant pleaded that, after the accruing of these causes of action, and before action, the defendant and plaintiff accounted together of and concerning these causes of action, and of and concerning certain other claims and demands of the plaintiff against the defendant, and certain other claims and demands of the defendant against the plaintiff; and on that accounting 50*l.*, and no more, was found to be due from the defendant to the plaintiff, which sum the defendant, in consideration of the premises, promised the plaintiff to pay him on request, and that the defendant paid to the plaintiff, and the plaintiff accepted and received from the defendant, 50*l.* in satisfaction and discharge of such sum:—*Held*, on special demurrer, that the plea amounted to an allegation of the allowance of cross demands upon an account stated and payment of the balance, and afforded substantially a good defence to the action, and that it was unexceptionable in point of form. *Callandar v. Howard*, 10 C. B. 290; S. C. 14 Jur. 672; 19 L. J. C. P. 312.

To a declaration on two bills of exchange. *Plea*, that the plaintiff brought an action for the same identical promises in the declaration mentioned, and by his particulars of demand claimed to recover 301*l.* 9*s.* 2*d.*, and that an order was made by a judge, with the consent of the plaintiff and defendant; that upon payment of the debt for which that action was brought, together with 25*l.* costs, all further proceedings should be stayed, and unless the debt and costs should be paid the plaintiff should be at liberty to sign judgment; that the plaintiff accepted the order and the terms and stipulations therein contained, in accord and satisfaction; that the defendant had paid the 25*l.* and 100*l.*, parcel of the debt, and tendered the balance; and afterwards actually paid it. *Replication*, that the plaintiff delivered the particulars of demand under the mistaken belief, and by mistake in giving defendant credit that 301*l.* 9*s.* 2*d.* was all that was due to plaintiff, whereas defendant well knew that 323*l.* 7*s.* 5*d.* was really due to plaintiff upon the bills of exchange; and that defendant fraudulently permitted plaintiff, by his attorney, to give his consent to the making of the order, and fraudulently omitted to make any mention of it, and suppressed the fact that the said sum was so due; and that before the order had been fully performed by defendant, and before the tender of 201*l.* 9*s.* 2*d.*, and before payment of the same, plaintiff discovered his mistake, and before action gave defendant notice thereof, and applied to defendant to allow the particulars and order to be amended, which defendant refused, and that he received the 201*l.* 9*s.* 2*d.* under protest:—*Held*, that the plea stated a good accord and satisfaction, and that the replication did not show misrepresentation or fraud to avoid it. *Atherton v. Heard*, 8 Jur. Q. B. 753.

instalment, and before any further instalment had become due, it was agreed between the plaintiff and defendant, that the plaintiff should accept in satisfaction and discharge of the sum awarded, and of all causes of action in respect thereof, and of the said breach, 4000*l.*, to be paid in four instalments, the third of which, 1250*l.*, was to be paid on the 14th of April, 1851, and the last on the 14th of June, 1851; and that the plaintiff accepted the said agreement and performance thereof in satisfaction and discharge of the said sum awarded to him, and of all causes of action, &c. Averment of performance and issue thereon.

At the trial the jury found the plea proved. Upon these points it was (amongst other things) contended by the plaintiff, that as the submission was under seal, the parol agreement could be no discharge as to the non-payment of the instalments not due when it was entered into.

Sed per Cur. As to the point that the plea could not be proved without showing a substituted agreement under seal, nothing can be more certain than that, if an action is brought on a specialty, you cannot allege by way of discharge a parol agreement made before breach that the covenant shall not be performed. But after breach, a parol agreement may operate by way of accord and satisfaction. Here, however, the action is not brought directly on the deed of submission, but for a breach of duty in not performing the award—a duty which only arises after the arbitrator has exercised his functions by making his award. The defendants did not pay the first instalment due under the award, and there was, therefore, a breach; and after that a new agreement is come to, which embraces the first as well as all the subsequent instalments. Now, the gist of the declaration is the non-payment of the money due under the award. It is not specially brought for any particular instalment. The plea sets up the new agreement after the breach of duty arising out of the award, whereby, in consideration of the defendants paying a smaller sum at an earlier time, the parties agreed that this agreement, and the performance of it by the defendants, should be accepted by the plaintiff in satisfaction of all that was to be done under the award, and of all damages sustained by reason of the breach of it. This is substantially a plea of accord and satisfaction, and there was no necessity, according to any cases or dicta, to show that the agreement was under seal. See *Snow v. Franklin*, 1 Lutw. 126, and *ante*, 88 n.

(D) *One Promise may be pleaded in discharge of another Promise before Breach.*

MILWARD v. INGRAM, 2 Mod. 44; S. C. 1 Mod. 205; 1 Freem. 195.

One promise may be pleaded in discharge of another before breach, but after breach it cannot be discharged without a release or satisfaction.

Indebitatus assumpsit for fifty pounds, with *quantum meruit*. The defendant pleaded that after the promise, and before the commencement of the suit, the plaintiff and defendant came to an account concerning divers sums of money; and that he was found in arrear to the plaintiff 30*s.*; whereupon, in consideration of the defendant promising to pay him the 30*s.*, the plaintiff promised to release and acquit the defendant of all demands. Demurrer to plea.

On behalf of the plaintiff it was submitted, that though in some cases one promise might be discharged by another, yet where the demand is certain and specific it could not; and as the plea in this case was in the nature of an accord, which could not be good without an averment of satisfaction, it ought not to be allowed. (Bro. Accompt, 46, 48.) On the other side it was admitted, that where a matter is pleaded by way of accord, it must be averred to be executed in every respect; yet that that rule did not apply to the case under discussion; for the defendant having pleaded that he and the plaintiff had accounted together, the original contract was destroyed by the account; that the defendant had been discharged from fulfilling the contract by parol, and that fact had been admitted by the demurrer; and that it could not be denied but that a parol discharge of an *assumpsit* was good.

Per Cur. It has been always admitted, that if there be an *assumpsit* to do a particular act, and no breach of the promise has been committed, it may be

discharged by parol; but if it be once broken, then it cannot be discharged without release in writing. In this case there are two demands in the declaration, to which the defendant has pleaded an account stated; the plaintiff, therefore, can never after have recourse to the first contract, which is merged in the account. If A. sell his horse to B. for 10*l.*, and, there being divers other dealings between them, they come to an account upon the whole, and B. is found in arrear 5*l.*, A. must bring an action on the *insimul computasset*, for he can never recover upon an *indebitatus assumpsit*. See *post*, Account stated.

(E) *Plea in, indivisible.*

GABRIEL AND ANOTHER v. DRESSER, 24 L. J. C. P. 81.

The plea of accord and satisfaction is not distributable.

The declaration stated that the defendant agreed to deliver to the plaintiffs 600 loads of Dantzic timber, and although the defendant delivered, and the plaintiffs accepted, 143 loads of other timber as and for so much of the timber to be delivered, yet the defendant did not deliver the residue. *Plea*, that after the right of action, and before the suit, it was mutually agreed that the defendant should deliver certain timber, part of the cargo of the ship J., in the place of a like quantity by the contract to be delivered, and that the defendant should make up the balance by delivery of such quantity of suitable timber out of certain other ships; and that such delivery of the two parcels of timber should be accepted and received by the plaintiffs in full satisfaction and discharge of all causes of action upon the contract in the declaration.

Averment, that in part performance of the agreement in the plea the defendant delivered, and the plaintiffs accepted, 143 loads of timber from the ship J. in satisfaction of the causes of action as to that quantity in the contract; and that afterwards, and before suit, he duly tendered to the plaintiffs such quantity of suitable timber out of other ships to make up the residue in the contract mentioned, which the plaintiffs refused to accept: and the defendant was thenceforth ready and willing to deliver to the plaintiffs the last-mentioned timber. Demurrer and joinder.

Per Cur. The plea is to the whole cause of action; you cannot support such a plea when demurred to by saying, I have satisfied you as to part. There is no distributive accord here; the defendant could not call on the plaintiffs to accept part performance. In Com. Dig. Accord, B. 4, it is said, "So an accord must be executed, otherwise there will be no remedy for a non-performance; and therefore, an accord to pay money in satisfaction is not good if he shows only that he is ready to pay: but he ought to say that he has paid it." "So if he shows only a tender and refusal." Judgment for the plaintiffs.

XII. REPLICATION TO.

Joining Issue on the Plea denies its Substance.

By C. L. P. 15 & 16 Vic. c. 76, s. 79, a party may join issue on a plea, and such issue shall be deemed a denial of the substance of the plea.[1]

XIII. EVIDENCE OF, p. 90 n.

[1] If, therefore, the plaintiff denies any substantial averment in the plea, he has merely to join issue; but if he wishes to introduce some new fact he must reply specially. Where to an action for money received defendant pleaded that defendant delivered to plaintiff, and plaintiff accepted and received from defendant, in satisfaction and discharge of the action, a deed, by which an annuity was granted by defendant to the plaintiff; plaintiff replied that no memorial of the deed was enrolled according to 53 Geo. 3, c. 141, and that to an action brought by plaintiff on the deed to recover money due from defendant in respect of the annuity, defendant had pleaded that no memorial was enrolled, and that plaintiff, in consequence, elected that the deed should be null, and discontinued such action:—*Held*, on special demurrer, that the replication was good, and answered the apparent satisfaction shown in the plea. *Turner v. Browne*, 4 D. & L. 201; 3 C. B. 157; 10 Jur. 811; 15 L. J. C. P. 223.

ACCOUNT, Action of.[1] *See* Account stated; Bailment; Guarantee; Money had and received; Principal and Agent.

I. When maintainable, p. 108.
(A) *Will lie to recover Money had and received*, p. 108.
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(C) *But not on a running Account between two Tradesmen*, p. 109.
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II. Of Parties to the Action, p. 111.

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(A) *What it must state under* 4 *Anne*, c. 16, s. 27, p. 111.

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(A) *Judgment of* Quod computet *is essential*, p. 112.
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VIII. Execution, p. 116.
(A) *After final Judgment, Plaintiff may pray for Execution by* Elegit *or* Capias, p. 116.

IX. Action limited to Six Years, p. 126.

I. When maintainable.

(A) *Will lie to recover Money had and received.*

Anon. 11 Mod. 92; S. P. Key v. Gordon, 12 Mod. 521.

Action of account will lie to recover money had and received to defendant's use.

If money be given to another to buy goods, and he neglects to purchase them, for this breach of trust the plaintiff has an election to bring either debt or account. *Per Powell, J. See* 12 Mod. 509. *Wilkin v. Wilkin*, 1 Salk. 9; S. C. Carth. 89.

(B) *On a running Account between Merchant and Broker.*

Scott v. M'Intosh, 2 Camp. 238; S. P. Lincoln v. Parr, 2 Keb. 781.

And where there is a running

Indebitatus assumpsit for brokerage and commission, with the usual money counts and account stated. Plea, *non assumpsit*. It appeared that the action

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[1] The proceedings in an action of account being intricate, dilatory, and expensive, it is now almost obsolete, especially as a preference is given to the modern and more effective practice, either of supporting an action for money had and received, or, if the matter be of a complicated nature, by proceeding in a court of equity, or reference to a master.

had been brought to recover the balance of a long and complicated running account between the parties, a merchant and broker.

account between merchant and broker.

Per Lord Ellenborough. This is not the proper tribunal for investigating complicated mutual demands. The plaintiff should have brought an action of account, when auditors would have been appointed, who could have done justice to the parties.[1]

(C) *But not on a running Account between two Tradesmen.*

COTTAM v. PARTRIDGE, 4 Scott, N. R. 819; 4 M. & G. 271.

An open account between two tradesmen for goods sold by each to the other does not form the subject of an action of account, such action being founded on some trust on privity.

Per Cur. The cases show that the action of account is founded upon some trust or privity between the parties: as, for instance, there is a confidence or trust between the heir and his guardian; between the owner of land and his bailiff or receiver; and between merchant and merchant. Although account would lie where a merchant in this country consigns goods to a merchant or factor abroad, for sale on his account upon commission, it by no means follows that the action could be maintained in the simple case of mutual sales. The action of account is more like a bill in equity for enforcing the execution of a trust than an ordinary action. The first judgment is, that the defendant do account, which is commonly called a judgment *quod computet;* whereupon, the defendant offering to account, the Court assigns auditors to take and declare the account between the parties; and then the final judgment is, that the plaintiff do recover against the defendant so much as the latter is found to be in arrear. When this case is considered, it is nothing more than the ordinary one of two tradesmen selling goods to each other. There was nothing to prevent one party from suing the other for the whole of his account, and the other from bringing his cross action for his entire demand.

(D) *When given by Statute.*

Actions of account given by statute against executors and administrators of bailiffs, and against joint-tenants and tenants-in-common.[3]

By 4 Anne, c. 16, s. 27, "actions of account shall and may be brought and maintained against the executors and administrators of every guardian, bailiff, and receiver, and also by one joint-tenant and tenant-in-common, his executors and administrators, against the other as bailiff for receiving more than comes to his just share or proportion, and against the executor and administrator of such joint-tenant or tenant-in-common; and the auditors[2] appointed by the Court where such action shall be depending shall be, and are hereby empowered, to administer an oath and examine the parties touching the matters in question."

(E) *Remedy of Co-tenant-in-Common.*

THOMAS v. THOMAS, 5 Exch. 28; 1 Prac. R. 229; 14 Jur. 180; 19 L. J. Ex. 175.

One tenant-in-common of real property cannot maintain an action for money had and received against his co-tenant, his

Assumpsit for money had and received. Plea, *non assumpsit.* It appeared that the plaintiff and defendant were tenants-in-common of certain premises. The defendant, believing he was solely entitled, received the rents for some time, until the plaintiff discovering that, as tenant-in-common with the defendant, he was entitled to half the rent, brought this action to recover the same. At the trial it was submitted by the defendant that the action would not lie. The Judge gave leave to move to enter a nonsuit on the above point.

[1] The powers now given to the Judges to refer matters of account give all the benefit which formerly were only to be obtained by the action of account.

[2] After interlocutory judgment, the Court will appoint auditors to take the account—generally officers of the court; or on the circuit, two barristers. *Smith v. Smith,* 2 Chit. R. 10. *Archer v. Pritchard,* 3 D. & R. 596.

Godfrey v. Saunders, 3 Wils. 73. This statute is not repealed by 3 & 4 Wm. 4, c. 27. *Henderson v. Eason,* 10 Jur. 821; 15 L. J. Chan. 457; *post,* 110.

[3] Besides the above statute, the 13 Edw. 1, c. 23, gives an action of account to executors; the 25 Edw. 3. st. 5, c. 5, to executors of executors; and the 31 Edw. 3, c. 11, to administrators.

remedy being by an action of account under the 4 Anne, c. 16, s. 27.

Per Cur. It appears to us, on considering the authorities which are to be found in Co. Lit. 200 b. that it is clear that at common law one tenant-in-common can have no action for money had and received against the other. Now, it is said that, if there be two tenants-in-common of a chattel, that one cannot maintain an action against the other, but must take his opportunity to recover it from the other, unless the chattels be destroyed, and several other instances of the same kind are put; and that no action of account will lie at common law by one against the other, unless he was actually constituted bailiff or receiver. That was by common law, and was obviated by the statute of Anne, which gives the power to one tenant-in-common to bring an action of account against the other, considering him as bailiff or receiver. In the action of account, if one tenant-in-common is to be treated as receiver for the other, he would be entitled to all the indemnities of a receiver, he would not be responsible absolutely for the money when received, and he would be able to show that the money has been lost without default; whereas, in an action for money had and received, he would be liable altogether for the money. The statute of Anne, therefore, clearly does not give anything more than an action of account, in which the receiver would be entitled to all just allowances, but not in an action for money had and received. The only remedy in this case is an action of account. *See* also *Beer v. Beer*, 12 C. B. 60; 16 Jur. 223; 21 L. J. C. P. 124.[1]

(F) *But only for Money, &c. received by Co-tenant.*

Henderson v. Eason, 17 Q. B. 701, Ex. Cham.; 16 Jur. 518; 21 L. J. Q. B. 82, overruling; S. C. in Court below, 13 Jur. 150; 18 L. J. Q. B. 69; 12 Q. B. 987. In Chancery, 15 L. J. 457.

But this statute applies where rent or payment, in money or in kind, due in respect of the premises, is received from a third party by one co-tenant, who retains more than his just share.
It does not apply when one co-tenant, having had the sole enjoyment of the property, has by the employment of his industry or capital made a profit of such enjoyment, and taken the whole.

Per Cur. This was an action of account founded on the 4 Anne, c. 16, s. 27, by Robert Eason, against the executor of his co-tenant-in-common, Edward Eason. The declaration states the Easons were co-tenants-in-common, in fee, in equal undivided moieties of messuages and lands; that Edward Eason had managed the whole, and had received and taken the rents and profits thereof for the common profit of the plaintiff, and Edward Eason, deceased, and, as bailiff of the plaintiff, of what Edward Eason received more than his just share and proportion thereof, to render a reasonable account thereof to the plaintiff, and his said share thereof, according to the form of the statute. The second plea denied that Eason received more than his just share and proportion of the rents, issues, and profits. Issue being joined, evidence was given that the two Easons were tenants-in-common, in fee, of a messuage and farm from November 1833 to November 1839, during which time Edward Eason occupied the whole on his own account, the plaintiff occupying no part; that he cultivated the same on his own account solely, and appropriated the produce to his own use. On the trial, the plaintiff's counsel insisted that this was presumptive evidence on the second issue in favour of the plaintiff, and so the learned Judge held. Under the statute of Anne, a tenant-in-common is bailiff only by virtue of his receiving more than his just share, and as soon as he does so is answerable only for so much as he actually receives. What, then, is a receiving of more than comes to his just share, within the meaning of the provisions of the statute of Anne? It appears to us, that, construing the Act according to the ordinary meaning of the words, this provision of the statute applies only to cases where one tenant-in-common receives the money, or something else from another person, to which both co-tenants are entitled, simply by reason of their being tenants-in-common, and in proportion to their interest as such, and of

[1] The tenant-in-common, when sued as bailiff under this statute, is answerable only for so much as he has actually received more than his proportion, not for what he might with good management have made, and therefore the declaration must allege that he has received more than the just share of the profits. *Wheeler v. Horn*, Willes, 208. *Sturton v. Richardson*, 13 M. & W. 17. It seems that each of several tenants-in-common may have a separate action under the statute. Ibid.

which the one receives and keeps more than his just share according to that proportion. The statute, therefore, includes all cases where two are tenants of land leased to a third party at a rent payable to each, or where there is a rent-charge, or any money payment or payment in kind due to them from another person, and where one receives the whole or more than his proportionate share, according to his interest in the subject of the tenancy. But when we seek to extend the meaning of the statute beyond the ordinary meaning of its words, and to apply it to cases in which one has enjoyed more of the benefit of the subject, or made more by its occupation, than the others, we have insuperable difficulties to encounter. It appears impossible to hold such a case to be within the statute.

II. Of Parties to the Action.

Godfrey v. Saunders, 3 Wils. 73.

Joint-factors or bailiffs may be sued jointly, though only one be the actual defaulter.

Per Cur. Joint-factors or co-bailiffs are like co-obligors, and are answerable for one another for the whole; for if only the factor who actually embezzles the effects was answerable, it would be the same as if that one were only entrusted; hence a plea before auditors, that the defendant was joint-bailiff with A., and that with the consent of the plaintiff he delivered over to A. all the effects, is bad, because, by making them joint-bailiffs, the plaintiff gave such consent originally; and consenting to the transfer is nothing, unless the plaintiff had also discharged him of the account. Every consignment to two factors jointly imports a consent by the consignor for them to trust one another, but both are answerable and accountable for the whole, though they have a right by the contract to deliver over to one another. See *Goore v. Danberry*, 2 Leon. 75, 76; *Waugh v. Carver*, 2 H. B. 235; Bro. Charge, pl. 49; Cowp. 814, *in notis*; 7 Taunt. 403; 2 Marsh, 437. *See* Partners.

III. Of the Declaration.

(A) *What it must state under Stat. Anne.*

Wheeler v. Horne, C. P. Willes, 208.

In an action of account by one tenant-in-common against another, upon the 4 Anne, c. 16, s. 27, the plaintiff must state in his declaration that he and defendant were tenants-in-common, and that defendant has received more than his just share. It is not sufficient to charge defendant merely as bailiff.[1]

In an action of account the plaintiff declared that defendant was bailiff to him of one-twelfth part of two messuages and one hundred acres of land, and had received the annual rents and profits, to render an account when he should be required. Defendant pleaded that he never was bailiff or receiver to the plaintiff, to render an account in manner and form as the plaintiff had described.

At the trial it appeared in evidence that the defendant never was in fact appointed bailiff or receiver, but that plaintiff and defendant were tenants-in-common of the premises, and that defendant received the rent and profits during the time laid in the declaration. A case was made for the opinion of the Court.

Per Cur. The plaintiff in this case is not entitled to recover; for the defendant never having been duly appointed bailiff, the plaintiff should have charged him specially as tenant-in-common: the verdict must therefore be set aside.

As no action lay between tenant-in-common, &c. at common law, it must be brought, if at all, upon the statute 4 Anne, c. 16. Now, though the statute gives such an action by one against the other as bailiff, yet it differs much from an action of account at common law, in which a bailiff was liable for what he might have received generally. Whereas a tenant-in-common, &c. by this Act is (4 Anne, c. 16), made answerable only for what he has received more than his just share and proportion; besides, at common law the auditors could not examine upon oath, as they may in the action given by the statute. Now, as the judg-

[1] The time for which a defendant is charged in the declaration, as bailiff or receiver, is not traversable. *Brown v. Johnson*, 2 Mod. 145.

ment is the same in both actions, *quod computet*, these material differences will be lost, and the auditors not know how to proceed; it ought, therefore, to appear upon the face of the record; and the constant practice is to set forth that the parties are tenants-in-common, &c., and then to declare against defendant as bailiff to the plaintiff according to the statute. Nor can the want of this description of the relative situation of the parties be aided by entering a suggestion, nor would it be proper; for that the use of that is to bring matter upon the record which could not appear upon the pleadings. Verdict set aside with costs. See *Sturton v. Richardson*, 13 Mee. & W. 17; Co. Lit. 172 a; 4 and 5 Anne, c. 16; 1 Selw. N. P. 3 n.

IV. Of Pleas in Bar to the Account.

Taylor and another, Churchwardens of Dowham, v. their Predecessors, 1 Mod. 65; S. C. 2 Keb. 675, 404; S. C. 1 Vent. 88; S. C. 1 Danv. 223.

The defendant may plead any matter in bar which tends to show that he ought not to account.[1]

This was on action against churchwardens to compel them to account for a bell; they pleaded in bar that the bell was not in their possession, as they had delivered it to a bell-founder to be repaired, and that it was still in his hands. *Demurrer*, that the plea was no bar to the action.

Per Cur. This plea is good, for wherever the matter or cause of the account is taken off, the plea is good in bar. *See* 10 Mod. 22; 1 Roll. Abr. 118; 1 Stra. 680.

Baxter v. Hozier, 5 Bing. N. S. 288; S. C. 7 Scott, 233.

In an action of account against a tenant-in-common, to support the plea of *plene computavit* the evidence must show how the balance was ascertained.

In an action of account against a co-partner and bailiff, upon a plea amounting to that of *plene computavit*, the evidence did not show that the result of the account so rendered was a balance ascertained and agreed upon between the parties; but the plaintiff insisted that, in the account, defendant should be charged as factor only for a moiety, and as a partner for the other, and liable to losses.

The Court held the evidence not sufficient to sustain the plea, and that the plaintiff was entitled to judgment *quod computat* generally upon the whole declaration; and that the account should be taken according to the real relation between the parties.

V. Of the Judgment to account, and putting in Bail thereon.

Hughes v. Burgess, Ca. Temp. Hard. 394; S. C. Andr. 19.

The judgment of *quod computet*[2] is

The defendant pleaded that he had fully accounted; and issue being joined thereon, the jury found for the plaintiff, and assessed damages and costs; and

[1] Thus, he may plead infancy (Bac. Ab. Accompt, E.; Com. Dig. Accompt, E. 5); and when sued as bailiff or receiver in fact, he may plead that he was not bailiff or receiver (*Cocket v. Robert*, Cro. Eliz. 82); but when sued as tenant-in-common under the statute 4 & 5 Anne, c. 16, s. 27, a plea that the defendant is not bailiff or receiver would be insufficient (Willes, 208), or defendant may traverse the tenancy in common. The defendant may also plead that he hath accounted, or a release, arbitrament, bond given in satisfaction, and the statute of limitations. (Bac. Ab. Accompt, E.; Com. Dig. Accompt, E. 4–6.) But other matters, which admit that the defendant was once chargeable and accountable, cannot in general be pleaded in bar to the action, but must be pleaded before the auditors. (3 Wils. 78. *See* also *Ricketts v. Loftus*, 14 Q. B. 482; 14 Jur. 389.) A plea stating that the defendant was not receiver *from* a particular day, excludes the day. 1 Dougl. 53.

[2] The following was the form of the judgment in the celebrated case of *Godfrey v. Saunders*, 3 Wils. 88:—"Therefore it is considered that the said T. S. account with the said T. G. of the time aforesaid in which he and the said S. S. were the bailiffs of him the said T. G., and had the care and administration of the aforesaid goods and merchandizes, &c. to be merchandized and made profit of for the said T. G. and the said T. S. in mercy, because he hath not before accounted, &c." And *see* Co. Ent. 46 b; Ra. Ent. 17.

judgment was entered accordingly, and execution issued. The Court, on motion, set aside the judgment and execution, observing that the judgment was wrong, for it ought to have been only a preliminary judgment to account; and they compared the irregularity in this case to the irregularity of signing final before interlocutory judgment. *See* Cro. Eliz. 19; Winch. 5; *Metcalfe's case*, 11 Co. Rep. 38 a.

essential though only interlocutory, and must be duly entered.

REEVES v. GIBSON, 1 Lev. 300; S. P. LEWIS v. BAYLEY, cited in REEVES v. GIBSON.

In this case the plaintiff insisted upon special bail, because the defendant intended going beyond sea; but it was denied by the Court; for in account no special bail is to be found until judgment *quod computet;* and in Noy. 28, it was said by all the prothonotaries of the Court of Common Pleas, that the defendant upon the first writ should not be held to special bail; yet in peculiar cases, by the discretion of the Court, he shall find bail.

After judgment to account, special bail must be found.

CHESTER v. HUNT, cited 1 Selw. 6, 5th ed.

If the defendant, after the judgment to account, does not personally appear in Court to give bail to account, there may issue a *capias ad computandum* for the purpose of bringing him into Court.

Or a writ of *Capias ad computandum* may be issued to bring the defendant into court.[1]

VI. OF THE APPOINTMENT AND AUTHORITY OF THE AUDITORS.

SMITH v. SMITH, 2 Chit. Rep. 10.

After judgment *quod computet*, a motion was made for the appointment of auditors. The Court, after inspecting the precedents produced by its officers, directed two of the principal officers to be auditors.

Two of the principal officers of the Court appointed as auditors.[2]

ARCHER v. PRITCHARD, 3 D. & R. 596.

On an application being made to the Court to appoint auditors, a question arose, whether the rule was only *nisi*, or *absolute* in the first instance. The Court, upon the authority of the preceding case of *Smith v. Smith*, were of opinion that it should be *absolute* in the first instance.

A rule for the appointment of auditors is absolute in the first instance.

WILLIAMS v. LEE, 1 Mod. 42.

A motion was made for leave to enlarge the time for investigating the account before auditors.

Per Cur. The power of giving further time is vested in the auditors; they are the proper judges whether the parties have been guilty of delay or not. If they find them remiss or negligent, the auditors must certify to the Court that they will not account. *See* 3 Black. Com. 163; 1 Brownl. 24; F. N. B. 116; Co. Lit. 90; 2 Inst. 380.

The auditors, without application to the Court, may enlarge the time for investigating the account.[3]

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[1] This process is not affected by the 1 & 2 Vic. c. 110. *Pryor v. Pettingell*, 2 Dowl. N. S. 755; 7 Jur. 132; 12 L. J. Ex. 219.

[2] In *Godfrey v. Saunders*, 3 Wils. 73, three prothonotaries of the Court of Common Pleas were appointed auditors, and the entry on the record was as follows:—"And thereupon the said T. S. freely offered himself to account with the said J. G. for the goods and merchandizes aforesaid, whereupon, by the consent of the said J. G. and T. S., W. M. Esq., L. J. Esq., and A. D., Esq., prothonotaries of the said Court here, are by the said Court here assigned auditors, to take and declare the said account between the said T. G. and T. S." 3 Wils. 88, 89.

[3] By stat. 4 Ann. c. 16, s. 27, the auditors are empowered to administer an oath, and examine the parties touching the matters in question; and, for the trouble in auditing and taking such account, shall have such allowance as the Court shall judge reasonable, to be paid by the party on whose side the balance of account shall be.

VII. Of the Proceedings before the Auditors.

Anon. 2 Mod. 100.

Qu. If a plea before auditors need be verified by oath?

It was moved by the plaintiff in this case that the plea put in before the auditors ought to have been verified by oath.

No opinion was delivered on this point, but the Chief Justice (*Sir Francis North*) said that the plaintiff ought to have required the plea to be upon oath, otherwise it was unnecessary.

Bishop v. Eagle, 10 Mod. 23.

The defendant in his plea before auditors may admit the receipt of the money, and allege that he paid it over to the rightful owner.[1]

In an action of account by the present against the former churchwardens, they pleaded that the plaintiffs were not churchwardens; on which issue was joined, and a verdict given for the plaintiffs, and judgment *quod computent.*

The defendants before the auditors pleaded, that they received a certain sum of money as churchwardens through mistake, when none was really due to the parish; and perceiving their error, they refunded the money to the rightful owner. To this plea the plaintiffs demurred.

Per Cur. Admitting this to be a good plea before the auditors, it will be necessary for the defendants to plead such plea as shows them to be honest men; viz. that they not only received the money by mistake, but also that they repaid it. Whereas if it was taken the other way, and to be a good plea in bar, a receipt by mistake will be no receipt at all, and it will not be necessary to show the repayment, but only that the money did not belong to the parish: therefore we are inclined to support the defendant's plea as far as possible. Besides, had the defendants paid the money to the parish before the knowledge of the mistake, the parish would have been chargeable with the amount; repayment was therefore an act done in discharge of the parish, and consequently a proper plea before the auditors. *See* 11 Mod. 186.

Goswill v. Dunkley, 1 Stra. 680.

A discharge to a common intent is sufficient.

The defendant pleaded that he carried the goods entrusted to him by the plaintiff to P. B.; and in order to keep them safe till he had a convenient opportunity to sell them, put them into a warehouse, and that the warehouse was broken open by enemies, and that part of the goods were taken away and lost, and the other part had likewise been taken away, unless an Englishman had claimed them as his; and that the defendant was forced to come away before he met with the Englishman to obtain them again. Demurrer, and joinder in demurrer.

Per Cur. This is *primâ facie* a good account; if the warehouse was not a place of safe custody, that should have been replied: a robbery there is the same as if from his own person; for a bailiff *ad merchandizandum* is not obliged to keep the goods always about him. Judgment for defendant.

Godfrey v. Saunders, 3 Wils. 94.

In the case of joint-factors or bailees both may be declared against, though only one be the actual defaulter.

The plaintiff, being a merchant in L., and possessed of a quantity of coral beads, shipped them on board vessels employed by the East India Company, to be exported from England to Fort Saint George; by the usage of the trade, every person exporting coral beads from England to Fort Saint George is obliged to make the returns for the same in diamonds, and to consign them to the governor of that fort for the time being, and to any other person the exporter shall think fit to intrust on his behalf. The defendant Saunders being

[1] The defendant cannot, in this action, pay money into Court. *Per Willes, C. J.* T. T. 27 Geo. 2, cited Buller, N. P. 128.

governor, the plaintiff consigned his coral beads to him and S. S., to be by them received and disposed of, for the best advantage, at Fort Saint George, and to send to him the account of the sales, and to make him returns in diamonds best adapted for the market at L. The plaintiff in a writ of account declared that the defendant and S. S. from the 1st day of June, 1754, until the 1st day of May, 1755, were the bailiffs of the plaintiff at London, and during that time had the care and administration of divers goods of the plaintiff, viz. twelve chests of coral beads, containing (to wit) 3000 pounds weight (to wit) of the value of 12,000*l.* to be merchandised and made profit of for the plaintiff, when they, T. S. and S. S., should be thereto required. Yet T. S. and S. S. in the lifetime of S. S., or T. S. since the death of S. S., have not, nor hath either of them, rendered an account of the same to the plaintiff; but both of them have refused, and the defendant Saunders still doth refuse, so to do, to the plaintiff's damage of 12,000*l.* The defendant pleaded several pleas in bar to the action; and upon the trial, the jury found for the plaintiff that the defendant Saunders and S. S. were the bailiffs of the plaintiff, and had the care and administration of the goods and merchandise of the plaintiff in the declaration mentioned, to be merchandised and made profit of for him, and to render account when they should be thereto required; that all concern of the defendants as to and in the care, trust, and management of the said goods and merchandises, or the produce thereof, or the returns thereof to be made in diamonds to the plaintiff, did not cease, nor was at an end, as the defendant in pleading had alleged, *i. e.* when defendant ceased to be governor of Fort Saint George.

The defendant, upon this finding, was adjudged to account, and auditors duly assigned.

Before the auditors defendant Saunders pleaded as to the goods and merchandises whereof he is adjudged to render account to the plaintiff, for the time in which he the defendant and S. S. were bailiffs of the plaintiff, he the defendant prays an allowance of all the profit and produce of the said goods and merchandises, and says he ought to be discharged thereof, because he says that before and during part of the time in which he had been bailiff for the plaintiff, the defendant was governor of Fort Saint George, and S. S. during all that time was a merchant factor, a correspondent of the plaintiff, and well skilled in the trade; and, further, that according to the usage and custom of the trade, and the rules and orders of the E. I. Company, still in force, and observed by them, every person exporting coral beads to Fort Saint George ought to make the returns in diamonds, and to consign the coral beads to the governor of the fort, and to any other person the exporter shall think fit, and that plaintiff exported 2311 lbs. 10 oz. 13 dwts. and 18 grains of coral beads, and consigned the same to the defendant and Salomons, which were received by them both; and that on 13th Oct. 1754, they sold part thereof for 5385*l.* 4*s.* 0$\frac{3}{4}$*d.*; and on the 13th Jan. 1755, they sold the residue for 4175*l.* 8*s.* 6$\frac{1}{4}$*d.*; and that S. sent an account thereof to the plaintiff; and that the defendant, on the 14th Jan. 1755, quitted the East Indies and all his concerns there, and returned to England, where he has ever since resided; and that when he left the East Indies, he, with the consent of the plaintiff, delivered over to S. the whole money and produce then received, and all the securities for the further produce to be received for the said coral beads, to make returns thereof in diamonds to the plaintiff; and this defendant is ready to verify: wherefore he prays allowance of all the profit and produce of the said goods and merchandises, and that he may be wholly discharged thereof. Demurrer to this plea.

The Court on these pleadings propounded the following general principles:—

That whatever matter can be pleaded in bar to the action, must be so pleaded; and whatever matter may be pleaded in bar, cannot afterwards be pleaded before auditors. The reason of this rule is to avoid unnecessary trouble and expense to the litigating parties, which would be created by permitting the

Matter pleadable in bar cannot be pleaded before the auditors.

party to lie by and "plead before auditors what you might have pleaded in bar."

Except in the case of a release or *plene computavit.*

That if the party is once chargeable and accountable, he cannot plead in bar, but must plead before the auditors, except in the case of a release or *plene computavit.*[1] These exceptions are admitted because a plea of release, or of having fully accounted, are total extinctions of the right of action, of which the Court is to judge; and even in these two cases they must be pleaded specially, and cannot be given in evidence on the plea of *ne unques* receiver.

Nothing can be pleaded before auditors contrary to the previous finding of the jury.

That nothing can be pleaded before auditors contrary to what has been before pleaded, and found by verdict: because it would introduce either contrary verdicts, which would perplex the Court; or two verdicts of identically the same kind, which would be nugatory and absurd.

That if a defendant has paid over as a trustee, he has executed his trust; and then it is a bar to the action, he never was accountable.

The defendant may plead that he delivered over the effects.

Or it may be pleaded before the auditors, that the defendant, by the command of the plaintiffs, delivered over to a stranger the effects, because such a delivery is tantamount, in contemplation of law, to accounting with the plaintiff himself.[2]

VIII. Execution.

Andrews v. Robsert, 1 Lutw. 21.

After final judgment, the plaintiff should pray that the body of the accountant be committed in execution, or he may pray an *elegit.*

A motion was made by the plaintiff's counsel, that the defendant might be committed in discharge of his bail. The Court, after directing judgment to be entered, inquired if the plaintiff would have the defendant's body; when he prayed an *elegit*, which the Court said he was entitled to, if he preferred it to the security of the defendant's body. A *capias*, however, was afterwards issued.

ACCOUNT[3] Current.[4]

ACCOUNT Stated.

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[1] When this course is pursued, and the matter pleaded in discharge is denied by the plaintiff, so that the parties are at issue, the auditors must certify the record to the Court, who will thereupon award a *venire facias* to try it; and if on such trial the plaintiff make a default, he shall be non-suited: but after that he may bring a *scire facias* upon the first judgment. Bull. N. P. 128.

[2] *Wilmot, C. J.*, concluded the judgment of the Court with expressions of his own approbation to see the ancient mode of proceeding revived.

[3] The word *account* has been said to have no definite *legal* meaning. 5 Cowen's Am. R. 593.

[4] A running or open account. In the American Courts it has been held that an account of this description sent by a foreign merchant to a correspondent, not objected to for two years, is deemed an account stated, and throws the burden of proof upon him who received and kept it without objection. 7 Cranch, 147, cited 1 Burr. 23; and see 128 n.

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I. Legal Definition.[1]

Hughes v. Thorpe, 1839, 5 Mee. & W. 667.

Per Parke, B. "In order to constitute an account stated, there must be a statement of some certain amount of money being due, which must be made either to the party or to some agent of his."

An account stated is an acknowledgment of money being due to the creditor himself or an agent of his.

II. Requisites of.

(A) *Must be absolute.*[2]

[1] It imports an account balanced and rendered with an assent to such balance, express or implied. Acquiescence may be inferred from circumstances, but an account closed by the cessation of dealings between the parties is not an account stated. *See* Am. Cases, 1 Burr. 23. To be valid, it should be made with reference to former transactions and a preceding debt (*Clarke v. Webb*, 1 C., M. & R. 29), and entered into *before* action (*Spencer v. Parry*, 3 Ad. & E. 331; *Allen v. Cooke*, 2 D. P. C. 546); and for payment of money, *Smith v. Winter*, 19 L. T.; 111 C. B.; and not in goods, *Wray v. Milestone*, 5 M. & W. 21; and to be paid absolutely and not on a contingency, *Baker v. Heard*, 20 L. J. Ex. 44 a. In *O'Sullivan v. O'Callagan*, 2 Ir. Jur. 14, it is said that an account may be stated with respect to a sum agreed to be paid in consideration of a future marriage, and that the fact of the terms of such contract not being reduced to writing does not invalidate the consideration for such statement of account. Whether on a given state of facts the transaction constitutes a stated account is a question of law. 1 Kernon, A. R. 170, and other cases cited 1 Burr. 23; and Lord Lyndhurst so treated it in 1 C., M. & R. 30.

[2] The acknowledgment must be without qualification or condition; for where the plaintiff, in a conversation with the defendant, said, "Pay me the 10*l.* you owe me," the defendant said he would, provided the plaintiff had not moved the grates, which he considered as fixtures; the plaintiff, in reply, denied that they were fixtures, and told the defendant that if he would not pay him he would sue him:—*Held*, not sufficient. *Evans v. Verity*, 1825, R. & M. N. P. 239. Nor an offer of a sum certain to purchase peace. *Wayman v. Hilliard*, 4 Moore & P. 729; S. C. 7 Bing. 101. Nor is the offer to give a *cognovit*. *Spencer v. Parry*, 3 Ad. & E. 331. *See* 3 Mee. & W. 607, and *Burgh v. Legge*, 5 Mee. & W. 418. The admission must also be voluntary, and therefore it is not sufficient when made on a compulsory examination before Commissioners in Bankruptcy. *Tucker v. Barrow*, 7 B. & C. 623; 1 M. & R. 518; 1 M. & M. 137. But where on a settlement of accounts between the plaintiff and the defendant a balance was struck, which the defendant agreed was correct, adding, however, that when he had done certain things there would not be much, if anything, between them; it was held that this was good evidence of an account stated. *Rigby v. Jeffrys*, 7 Dowl. 561; and so where the defendant, on being shown the plaintiff's account by the clerk of the latter, objected to one item, but made no remark as to the others, and promised to send corn for the balance; this was held sufficient evidence of an account stated. *Chisman v. Caunt*, 2 Man. & G. 307; 2 Scott, N. R. 567. *Sed vide* note [1].

(B) *Must be founded on an existing admitted Debt due from the Defendant.*

LUBBOCK AND OTHERS v. TRIBE, 3 Mee. & W. 607.

It must be founded on an existing and admitted debt.[1]

Assumpsit for money paid, and on an account stated.

Plea, *non assumpsit.*

The plaintiffs being bankers of K., received on his account a cheque for 100*l.*, drawn by the defendant, which was lost by the plaintiffs. Defendant, at the request of the plaintiffs, wrote to the bank requesting them not to pay it if presented. Plaintiffs then requested the defendant to give them another cheque for the same amount upon receiving an indemnity, which defendant promised to do in the following letter:—"I am leaving home to-day for a short time, and send my book to the bank to be made up; on my return I shall have pleasure in handing you a fresh draft on the terms contained in your letter." The indemnity was accordingly sent, but the defendant neglected to send the cheque.

The Court held, that, as there was no antecedent debt shown to have existed between the parties, the count upon an account stated could not be sustained; and that although an acknowledgment of a sum due from A. to B. is some evidence of an account stated between them, and if uncontradicted may go to the jury as an admission of that balance, and of an implied promise to pay it; but it extended no further, and might be explained. See *Tucker v. Barrow*, 7 B. & C. 624. *Whitehouse v. Howard*, 5 Moore, 105. *Green v. Davies*, 4 B. & C. 235, 242; S. C. 6 D. & R. 306. *Wharton v. Walker*, 4 B. & C. 163; 6 D. & R. 288. *Burge v. Legge*, 5 M. & W. 418. *Clarke v. Webb*, 1 C., M. & R. 29; 4 Tyrw. 673; 2 D. P. C. 671.

(C) *Must mention a fixed Amount.*

TEALL v. AUTY, 4 Moore, 543; S. C. 2 B. & B. 99.

It must mention a fixed

Action of *assumpsit* to recover the balance of an account for timber or trees;

[1] There must be evidence of some distinct acknowledgment of the debt by the defendant. *Calvert v. Baker*, 4 Mee. & W. 417. *Bates v. Townley*, 2 Exch. 152; 12 Jur. 603; 19 L. J. Ex. 399. *Brettel v. Williams*, 4 Exch. 623; 19 L. J. Ex. 123. And the debt must be due from the defendant. Thus, where defendant, a widow, being pressed to pay M. a debt owing from her deceased husband to the deceased husband of M., signed and gave to M.'s attorney the following note, addressed to the attorney:—"I beg you will not proceed against me for M. for the sum of 100*l.* and interest which I owe her; I will pay the interest, amounting to 9*l.*, due on the 23d Dec. next, and the principal as soon as I am able." *Held*, that this did not support a count for money found to be due from the defendant to M. on an account stated between them, as the money was not due from the defendant in her own right. *Petch v. Lyon*, 9 Q. B. 147; 15 L. J. Q. B. 393. *See* also *French v. French*, 3 Scott, N. R. 121; 2 Man. & G. 644; 5 Jur. 410. *Drue v. Thorne Aleyn*, 72; recognised in *Mitchinson v. Hewson*, 7 T. R. 348. *See* also *Morris v. Norfolk*, 1 Taunt. 212; 1 B. & C. 248. But where a company having contracted a debt with the plaintiff, and the debt not being paid, he laid an attachment on money of theirs in the hands of bankers; and while the attachment was in force the defendant, representing himself to be a director of the company, called on the plaintiff's attorney for the purpose of making an arrangement about the debt, when it was agreed that the following letter should be written by the defendant to the plaintiff, which was accordingly done:—"As director of the B. W. Company, I have to request you will accept the sum of 50*l.* on account of your claim of 116*l.* 19*s.* 7*d.* against the company; and in consideration of your withdrawing the attachment against the funds of the company, I agree on the part of myself, and on behalf of the other directors, to pay you the balance of 66*l.* 19*s.* 7*d.* &c. on the 27th August next:"—*Held*, that this letter, coupled with the facts, was evidence of an account stated, and that it was no answer to show that the defendant was not a member of the company when the original debt was contracted. *Barker v. Birt*, 10 M. & W. 61; 6 Jur. 736.

As the debt must be due, an account cannot be stated in respect of one payable on a contingency. *Baker v. Heard*, 5 Exch. 959, 966.

the declaration contained counts for goods sold, money, and account stated. *Plea*, general issue, *non assumpsit*. and definite sum.[1]

At the trial it appeared in evidence, that at the time of the sale of the timber a memorandum was made of the bargain, but it was neither stamped nor signed by either of the parties. A witness proved that the defendant had admitted there was a balance due to the plaintiff, but was unable to say with precision the amount.

Per Cur. If it had been proved that a certain sum was agreed to be paid by the defendant as the balance due to the plaintiff, the case of *Knowles v. Michel*[2] would be expressly in point; but there the defendant admitted a precise sum to be due: that case, therefore, does not meet the present, in which the difficulty is to ascertain what is due, no promise having been proved by the defendant to pay a definitive and certain sum, but merely the balance due from him to the plaintiff.

LANE v. HILL, 21 L. J. Q. B. 318.

Action on account stated. Plea, *non assumpsit*. The plaintiff relied on the following letter :—"I must request you to oblige me by holding my cheque till Monday, and in the interim I will send you the amount in cash. I made a mistake in dating it to-day, as I did not expect to be in funds till Friday or Saturday." For the defendant it was objected that this letter did not state any specific amount. A verdict was taken under the direction of the Judge for the plaintiff for nominal damages, leave being reserved to move to enter a nonsuit. A rule was accordingly obtained and made absolute; and, *per Wightman, J.*, "An account stated *ex vi termini* implies that the parties have entered into and settled some account. Here the only evidence is the letter; and it is quite consistent with it that the account may be for 1000*l.* or 50*l.*, or for the sum for which the verdict is recovered. It is, therefore, clearly not evidence to support a count on an account stated." For an account stated *ex vi termini*, implies a settled account.

(D) *Must be made to the Plaintiff or his Agent.*

BRECKON v. SMITH, 1834, 1 Ad. & E. 488.

In an action for goods sold and account stated, the proof to establish the account stated was, that the plaintiff admitted, in a conversation with a third person, not shown to be an agent of the plaintiff, that he owed the latter 15*l.* 10*s.* Upon this evidence the plaintiff was nonsuited. On motion to set the nonsuit aside,— The admission must be made to the plaintiff or his agent.

Per Cur. The evidence is not sufficient; no privity between the plaintiff and the party to whom the acknowledgment was made is shown. *See* also B. N. P. 129; 4 Price, 214; 5 B. & C. 196. *Tarbuck v. Bispham*, 2 Mee. & W. 2. *Eicke v. Nokes*, M. & R. 359.

III. NOT GENERALLY CONCLUSIVE, BUT MAY BE RE-OPENED.

THOMAS v. HAWKES, 8 Mee. & W. 140; 9 Dowl. P. C. 802. S. P. TRUEMAN v. HURST, 1 T. 40.

Assumpsit on accounts stated. Plea, *non assumpsit*. The plaintiff put in evidence certain accounts, and proved an admission on the part of the defendant of their correctness. The defendant proposed to show, in answer to this evidence, that mistakes to his prejudice existed in the accounts. The Judge The statement of an account is not absolutely conclusive, but

[1] *See* also *Hughes v. Thorpe*, 5 Mee. & W. 656; *see* also 2 Stark. 277.
[2] 13 East, 249; *post*, 122 n.

only so presumptively. An error in it may be shown under the general issue.[1]

rejected the evidence on the ground that, under the plea of *non assumpsit*, the only question was, whether an account had in fact been stated or not, and that fraud or mistake should have been specially pleaded. A rule was obtained for a new trial on the ground that the evidence had been wrongly excluded.

Per Cur. The rule must be made absolute. The averment in the declaration is, not merely that an account was stated, but that the defendants were indebted upon it. They were entitled, therefore, under the general issue, to show that the account did not show them to be indebted, because it was not correct.

PERRY v. ATTWOOD AND ANOTHER, 25 L. J. Q. B. 408. S. P. SMITH v. PAGE, 15 Mee. & W. 683.

And where an account, in which all the items are on one side, has been stated, the balance agreed to and the money paid, an action may be brought to recover items ignorantly omitted in such account.

Declaration on a covenant in a lease of mines for non-payment of certain tonnage-rents, and not keeping books of account. *Plea* that during eight years, ending March 1854, the defendant did keep such books containing an account of all ore gotten, which accounts were submitted to the plaintiff, and that the plaintiff and defendants in each of those years stated an account of all the ore gotten by the defendants in the preceding year, and the tonnage-rents payable in respect of the same, and that in each of such accounts a certain sum was agreed upon between the plaintiff and the defendants to be the balance due; which sum was paid by the defendants to the plaintiff, and accepted by him, in full satisfaction and discharge of the said tonnage-rents during that period. *Replication*, that the said accountings were not true and correct accountings within the meaning of the deed, but were erroneous in this, that divers tons of ore which ought to have been included in the said accounts, and divers quantities of tonnage-rent payable in respect thereof, were, by mistake and ignorance of the facts on the part of the plaintiff, omitted from the said accounts, and that the balances were erroneously agreed to be the balances due from the defendants to the plaintiff under the said deed. There was also a demurrer to the plea, and the defendants demurred to the replication. It was contended on the part of the plaintiff (amongst other things) that the replication showed that there was a mistake in settling the account, by reason of certain quantities of ore being omitted; and it cannot be that there is any rule of law by which a party agreeing to a balance cannot re-open it if it turn out to be founded in error. On the other hand it was contended, that in the absence of fraud the settlement was conclusive at law, though in equity the accounts might be re-opened.

Per Cur. The plea does not give a *primâ facie* answer to the declaration, or if it does, it receives itself an answer from the replication. The plea alleges that the parties met and agreed that a certain sum should be taken to be the balance due from the defendants to the plaintiff, and that this sum was paid by the defendants to the plaintiff. Then the replication adds the fact, that there was a mistake in arriving at that balance. It would be a very bad state of the law if, a day after an account is gone through on one side, and where there is no

[1] *See* also *Rose v. Savory*, 2 Scott, 199, 203; and generally as to the right of a party to explain or qualify an admission, *Baildon v. Walton*, 1 Exch. 617. It may be shown that an item in the account was not intended to be included in it. *Pierce v. Evans*, 2 C. M. & R. 294. It may also be proved on the general issue, that the consideration in respect of which the account was stated has failed, as for part of a deposit on a sale which has gone off for want of title. *Wilson v. Wilson*, 14 C. B. 616; S. C. 23 L. J. C. P. 137; and see *Berry v. Storey*, in C. P. 2 Com. Law R., 815; or that it was made by executors on a supposed debt, which in fact was not due. *Gough v. Tindon*, 7 Exch. 48; 21 L. J. Ex. 58. But where account for goods sold is settled, and the vendor gives a bill of exchange for the amount, but which bill is not paid, he cannot, on an action being brought thereon, go into evidence to impeach the charges in the first account which has been settled. *Knox v. Whalley*, 1 Esp. 159. *See* also *Dawson v. Remnant*, 6 Esp. 24. *Spurraway v. Rogers*, 12 Mod. 517. And a party after long acquiescence in an account rendered, or after giving a party credit for sums received, and inducing him to act upon that belief, cannot dispute the correctness of the account or the receipt of the money. *Skyring v. Greenwood*, 4 B. & C. 281; 6 D. & R. 401; 1 C. & P. 519. *Shaw v. Picton*, 4 B. & C. 715; 7 D. & R. 201. *See* Acquiescence.

mutual consideration, it being found that some error in fact has occurred, the settlement of the parties should be concluded in point of law. *See* Cases in Chancery, 29 L. J. Ch. 587; Smith's *Equity*, 215.

STEVENS v. WILLINGALE, 7 C. & P. 702.

Declaration in *assumpsit* for money lent and on an account stated, and the particulars contained only one item for money lent, and it appeared that the debt arose out of a bet:—*Held*, by that, on the plea of *non assumpsit*, the question of illegality did not arise, and that the plaintiff might consistently recover on the latter count.

But the defendant cannot, under that plea, show that the items are illegal;[1]

FIDGETT v. PENNY, 1 C. M. & R. 108; S. C. 4 Tyr. 650; S. C. 2 Dowl. P. C. 714, *semb.* S. P. SINCLAIR v. BAGGALEY, 4 Mee. & W. 312.

Declaration in *assumpsit* on an account stated. The plaintiff, in February, delivered in an account, which was settled in favour of plaintiff; afterwards, in March, a second account was stated in the defendant's favour. The plaintiff, having brought an action on the first account, the Court held that the defendant could not, under the general issue, avail himself of the second account, either as a payment or a set-off; for he ought to have pleaded the former: or if the items in the first account formed no part of the second, they would constitute a distinct demand, of which the defendant might have availed himself, if he had pleaded it as a counterclaim.

and a subsequent account stated must be specially pleaded.[2]

IV. ADMITS CHARACTER AND TITLE OF PARTY WITH WHOM STATED.

PEACOCK v. HARRIS, 10 East, 104. S. P. RADFORD v. M'INTOSH, 3 T. R. 632.

Declaration in *assumpsit* by the plaintiff, as collector or renter of turnpike tolls, with a count on an account stated. *Plea*, general issue. At the trial it appeared in evidence, that the plaintiff had made out an account of what was due to him from the defendant, and that such bill had been duly delivered to the defendant, and on the receipt of it he had remitted a sum of money in part payment, and had promised to pay the *remainder* in the ensuing week. It was urged, on the part of the defendant, that the appointment of the plaintiff had, in several respects, been irregular, and inconsistent with the local act by which the tolls were granted, and that some of the charges were unauthorised by the legislature. A verdict was found for the plaintiff, with liberty to move to enter a nonsuit; but after a rule had been granted, and cause shown, it was held,—

A defendant, after accounting with the plaintiff, as invested with a particular character, and receiving credit from him in that capacity, is estopped from disputing his title to the particular character.

Per Cur. The evidence of an account having been stated between these parties is amply sufficient to warrant the opinion we have formed. The letter in which part of the money was enclosed states that the plaintiff shall have the *remainder next week;* these words manifestly had reference to some account previously adjusted and settled. It was for the jury to determine whether the letter did or did not allude to the account delivered by the plaintiff; they have found that it did. On this conclusion another point, as a necessary corollary, is established; that as neither the trustees nor the creditors of the turnpike have taken any objection to the plaintiff's bill, the defendant, a third person, cannot be permitted to do so after having treated with him as a person legally entitled to receive tolls, and having actually settled an account with him for the amount. This recognition of the plaintiff's right to the character he has assumed is conclusive against the defendant. Rule discharged.

[1] Stating an account, however, does not preclude the parties from objecting to illegal items if properly pleaded. *Rose v. Savory*, 2 Bing. N. C. 145; 2 Scott, 199. *Randle v. Blackburne*, 5 Taunt. 245; 6 Esp. 24.

[2] But otherwise if the second accounting was a mere correction of the first. *Thomas v. Hawkes*, 8 Mee. & W. 140.

SALMON v. WATSON, 4 Moore, 73.

And the title of the party to receive the money.

The statement of account with a person admits the *title* of the party with whom it is stated to receive the money.

V. MAY BE VERBAL.

PINCHON v. CHILCOTT, 1827, N. P. 3 Car. & P. 236.

An oral admission of a debt due is sufficient.[1]

Action for goods sold, and on an account stated. A verbal agreement was proved to have been made for the purchase of some turnips growing in a field. After the purchaser had removed the principal part the seller said to him, "You owe me 3*l.*;" to which he replied, "I will send it before I draw any more turnips." He afterwards drew all the turnips, but did not send the 3*l.*

Best, C. J., said that the conversation was sufficient evidence to support the account stated.

NEWHALL v. HOLT, 6 Mee. & W. 662.

And this, although the debt arise out of a written contract.[2]

Action for goods sold and delivered, and on an account stated. *Plea*, never indebted. The plaintiff proved a conversation between him and the defendant, in which the defendant had admitted that he owed the plaintiff 9*l.* 17*s.* 6*d.* for lead. The witness, however, admitted, on cross-examination, that there was an agreement in writing respecting the lead. It was objected for the defendant that the written agreement ought to be produced.

Sed per Cur. "An account stated may be proved by a parol admission, although the account itself may consist of many writings. If a party states a sum to be due from him, although the debt arise out of a written agreement, it is evidence against him."

ASHBY v. ASHBY, 3 M. & P. 186.

Or although a bill not duly stamped has been given for the amount.

A memorandum had been given to the plaintiff on a receipt stamp in these terms: "Received of E. A. 150*l.*, which we promise to pay," &c.; and the Court held it was not receivable in evidence for want of a promissory-note stamp: there was no count for goods sold, which had been the consideration; but as the defendant had acknowledged that he owed the testatrix 150*l.*, without referring to the note, the plaintiff might recover on the count for an account stated.

SEAGO v. DEANE, 1828, 4 Bing. 459; S. C. 1 M. & P. 227; 3 C. & P. 170.

So even in connexion with an agreement for the conveyance of an interest in land.

It appeared that the defendant had granted the plaintiff a lease of premises, with the usual covenants. The agreement (a verbal one) was proved by the plaintiff's daughter; who also proved that when the plaintiff paid the first quarter's rent she asked for the 20*l.* which the defendant had promised to allow her for the repairs which she had done, and that he said it was not convenient for him to pay it then, but he would at the next quarter. The learned judge thought, that as the defendant had agreed to allow the plaintiff 20*l.* to do repairs, and as she had done them, and he had afterwards promised to pay, the plaintiff was entitled to a verdict on the account stated; and on a motion for a new trial the Court approved of the ruling at Nisi Prius, observing that, although the original contract was not binding on the defendant, yet his subsequent acknowledgment and promise were clearly admissible in evidence to support the account stated. *See* also *Cocking v. Ward*, 1 C. B. 858; 15 L. J. C. P. 246. *Arthur v. Dartch*, 9 Jur. 118, Exch.

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[1] *Knowles v. Michel*, 13 East, 249. *Elmes v. Wills*, 1 H. Bl. 64. *Prouting v. Hammond*, 8 Taunt. 688. *Clarke v. Glennie*, 3 Stark. 10. *Slatterie v. Pooley*, 6 M. & W. 664.

[2] *See* also *Singleton v. Barnett*, 2 C. & J. 368. But if an account is stated of the balance due on a deed or bond, the action must be on the specialty, for it continues a specialty debt. *Middleditch v. Ellis*, 2 Exch. 623.

VI. Component Items need not be proved.

Bartlett v. Emery, 1 T. R. 42 n.

In arguing this case upon a writ of error out of the Court of Lichfield, *Raymond, C. J.*, *Page* and *Reynolds, J.J.* agreed, that on an *insimul computasset* the plaintiff is not obliged to give evidence of the several items constituting the account, but it is sufficient if he prove the account stated, for that it is the cause of the action. *See* Bull. N. P. 129.

The plaintiff will not be obliged, in support of the count on an account stated, to give evidence of the several items constituting the account.

VII. May be stated as to one Item alone.

Highmore v. Primrose, 5 M. & S. 65.

Per Cur. There seems to us to be no reason why an account should not be stated, consisting of one item only, as well as of plurality.

May be stated as to one item only.

VIII. By Infant, or Lunatic.

(A) *Cannot be stated by.*

Trueman v. Hurst, 1 T. R. 40.

Declaration in *assumpsit* on an account stated. *Plea*, infancy. *Replication*, for necessaries. Demurrer thereto, and joinder in demurrer. It was contended for the defendant, that an infant is not liable on an account stated.

An account stated cannot be supported against an infant even for necessaries.[1]

Per Cur. This action cannot be sustained. What is an account stated? It is an agreement by both parties that all the articles are true. This was formerly considered conclusive; but a greater latitude has of late prevailed, in order to remedy the errors which may have crept into the account in surcharging the items. But an infant cannot bind himself by stating an account. Judgment for the defendant; but the plaintiff had liberty to amend on payment of costs. *See* 2 Stark. 36; 2 Roll. Rep. 271; 5 Mod. 368; 2 Saund. 124; Carth. 160; Moore, 679; 1 Lev. 86; Cro. Jac. 494; 1 Roll. Ab. 729; 1 Lutw. 169; Noy. 87; Palmer, 528; Bull. N. P. 129; 1 Campb. 552; Cro. Eliz. 920; 12 Mod. 517; 6 Esp. 24.

(B) *But may be ratified when of full age.*

Williams v. Moor, 11 Mee. & W. 256.

Debt for work, goods sold, and on an account stated. *Plea*, infancy. *Replication*, that the defendant, after he attained the age of twenty-one years, ratified and confirmed the said contract. Demurrer and joinder.

But it may be ratified by him after he comes of age.

Per Cur. It is clear that, on a declaration for goods sold and delivered only, without any count on an account stated, the ratification by the defendant after he becomes of age will entitle the plaintiff to recover. We can see no sound or sensible distinction in this respect between the liability of an infant on an account stated and his liability for goods sold and delivered. The principle on which the law allows a party who has attained his age of twenty-one years to give validity to contracts entered into during his infancy is, that he is supposed to have acquired the power of deciding for himself whether the transaction in question is one of a meritorious character, by which in good conscience he ought to be bound; and there seems nothing in the liability on an account stated to take that out of this general principle. It was, indeed, argued for

[1] As a count upon an account stated cannot be supported against an infant, even for necessaries, a *nolle prosequi* should be entered as to that count, when the defendant pleads his minority. *Trueman v. Hurst*, 1 T. R. 40. *Hedgley v. Holt*, 4 C. & P. 104. *Oliver v. Woodroffe*, 4 Mee. & W. 650. Nor against a lunatic. *Tarbuck v. Bispham*, 2 Mee. & W. 2.

the defendant, that on an account stated an infant derives no benefit; that he does not, as on a purchase of goods, get anything valuable; that he has no *quid pro quo*. But this is a fallacy; an infant stating an account gets precisely the same benefit as an adult gets on a similar transaction. He makes certain the previously uncertain state of the transaction between himself and the person with whom he is stating accounts, and he gets rid of the necessity of preserving vouchers. This, in the case of an adult, is a sufficient consideration to create a debt; and we can discover no reason why it should not have the same effect in the case of an infant, supposing him to adopt and ratify it after he comes of age.

IX. Trustee, when liable on.

Roper v. Holland, 1835, 4 Nev. & M. 668.

A trustee admitting a balance is liable on an account stated.

The defendant, the trustee of the plaintiff's wife, was to pay her 100*l.* per annum, charged on a house and farm, after deducting the necessary repairs, &c. The defendant received 77*l.* for rent, and paid the plaintiff 50*l.*; and having paid for some repairs, he paid 10*l.* into a bank, with directions to the clerk to pay it to the plaintiff upon her giving a receipt for 27*l.*

In an action upon an account stated, it was contended that the evidence did not amount to an account stated.

Sed per Cur. It is clear, if a trustee sends an account, and admits a balance, he is liable to be sued at law. This defendant has admitted a balance. He stated, in effect, that he had paid 17*l.* for repairs, and would pay over the remainder to the plaintiff. See *Howard v. Brownhill*, 23 L. J. Q. B. 23.

X. Partner, when liable on.[1]

XI. Must be stated before Action.

Allen v. Cook, 1834, 2 Dowl. P. C. 546.

The account must be stated before the commencement of the action.

Action by indorsee against acceptor of a bill of exchange, and on an account stated. The bill had no stamp; the plaintiff resorted to the count in the declaration on the stated account, and proved that when the defendant, on being served with the writ, saw the amount of 19*l.* indorsed on it, said: "I have paid 7*l.*, and therefore only 12*l.* remains due." The jury found a verdict for the plaintiff, but *Taunton, J.*, made a rule absolute for setting it aside, observing, that there was no prior debt. There was nothing to which the acknowledgment could apply, except the demand indorsed on the writ. There was, therefore, no evidence sought to be given on the account stated, except the one acknowledgment, which was not evidence of any debt prior to the action being brought. That acknowledgment being after the writ was sued out, it could not be given in evidence in support of the count on the account stated. *See* 13 East, 249; 5 M. & S. 65. *Spencer v. Parry*, 3 Ad. & E. 331.

XII. Promise implied on, is to pay on Request.

Hopkins and Wife v. Logan, 1839, 5 Mee. & W. 241.

On an account stated, the implication of law is that

In *assumpsit* by H. and E. his wife, the declaration alleged that after the intermarriage of H. and E. an account was stated by H. for and on behalf of himself and E. on the one part, and the defendant on the other, concerning

[1] When a partnership has been dissolved and a balance struck, it may be recovered under this count even as between partners (*Foster v. Allanson*, 2 T. R. 479. *Brierly v. Cripps*, 7 C. & P. 709); and this without any express promise to pay (*Wray v. Milestone*, 5 Mee. & W. 21): but it will only lie on a final balance, and not during a continuance of the partnership. *Fromont v. Coupland*, 2 Bing. 170. *Goddard v. Hodges*, 1 C. & M. 37. *Wilson v. Cutting*, 10 Bing. 436.

certain monies, to wit, 1000*l.* by E., when she was unmarried, lent to defendant, and remaining unpaid at and after the time of such intermarriage; and concerning certain other monies, to wit, 555*l.*, by the defendant, before the statement of the said account, paid to H., and which H. borrowed on behalf of himself and E. at the time of the said account, and, at the request of the defendant, agreed should be taken and considered as satisfying so much of the first-mentioned sum of money; and upon the account so stated, the defendant was found to be, and then was, in arrear and indebted to the plaintiff in the sum of 445*l.*, residue of the first-mentioned sum of money; and being so found in arrear, &c. the defendant promised to pay the last-mentioned sum of money on the 10th of October then next ensuing, which period had elapsed before the commencement of this suit. *Breach*, non-payment.

the debtor is to pay on request, and not on a future day,

On demurrer to plea, the Court held the declaration bad; for where the law implies a promise to pay *in præsenti*, a promise to pay at a future day cannot be supported without some new consideration.

XIII. Form of Declaration.

The C. L. P. 16 & 17 Vic. c. 76, Schedule B., gives the form of an account stated thus:—"For money found to be due from the defendant to the plaintiff on accounts stated between them." *See* 3 Mee. & W. 128; 4 id. 579.

Form of account stated.[1]

XIV. Pleas to.[2]

XV. What Evidence of.[3]

ACCOUNTABLE Receipt. *See* Forgery.

ACCOUNTANT. In Scotland, the Lord Ordinary or the Court often remits to an accountant to take an account, and prepare a scheme of division. Pater. *Comp.* 479. In England, accounts at common law are referred to one of the Masters at Common Law, or to an arbitrator, and to the chief clerks in Chancery. *See* Crown Debts; Extent.

ACCOUNTANT-GENERAL. *See* 1 Geo. 4, c. 35, and 8 Price, 493.

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[1] This count should be referred to in the particulars of demand. *Higgins v. Nicholls*, 7 Dowl. P. C. 551. *Fisher v. Wainwright*, 1 Mee. & W. 480.

[2] It is a good plea that the account was stated for work done as an attorney, and that no signed bill was delivered. *Scadding v. Eyles*, 9 Q. B. 858. And if an attorney fail on the count for work and labour on account of no signed bill, he cannot recover on the account stated, though he prove that the defendant assented to his charges. *Brooks v. Bocket*, 9 Q. B. 847; 11 Jur. 284; 16 L. J. Q. B. 173. To a declaration on a promissory note and an account stated, it is a good plea to state facts, avoiding the note, and to add that the making of the note is the account stated in the last count. *Hammond v. Dayson*, 15 M. & W. 373; 15 L. J. Ex. 278. *See* also *Callandar v. Howard*, 10 C. & B. 290; 19 L. J. C. P. 312; 14 Jur. 672.

[3] A parol admission of the existence of the debt is receivable in evidence, although the particulars of demand describe the claim as on an account stated, "as appears by a memorandum under the hand of the defendant." *Singleton v. Barrett*, 2 C. & B. 368. See *Slatterie v. Pooley*, 6 M. & W. 664. *Newhall v. Holt*, id. 662; 10 L. J. C. P. 245; 25 id. Exch. 227. "If the plaintiff in his particulars states that he proceeds on an account stated on a named day, showing a balance in his favour, the defendant cannot under *non assumpsit* avail himself of a subsequent account showing a different result. In law, the second account must be taken to be either a payment or a set off." *Per Alderson, B.*, id.

The following documents and admissions have been held to be evidence of an account stated. An I. O. U. in defendant's writing, not addressed, but produced by the plaintiff. *Douglas v. Holme*, 4 Per. & D. 685; 12 Ad. & E. 641. But otherwise, if it be shown to have been given for a debt, on which the defendant was not primarily liable. *Gould v. Coombs*, 1 C. B. 543; 9 Jur. 494; 14 L. J. C. P. 175. A promissory note for "23*l.* 2*s.* 8*d.* being the amount of interest due on a promissory note for 117*l.* 4*s.*, dated, &c. up to July 6th, 1844." *Held*, evidence of an account stated of a debt for 117*l.* 4*s.* *Perry v. Slade*, 8 Q. B. 115; 10 Jur. 31; 15 L. J. Q. B. 10. So a letter from the defendant, as follows: "As director of the company, I have to request you will accept the sum of 50*l.* on account of your claim of

ACCOUNTING.[1]

ACCOUNTING, Action for not.[2] *See* Auction and Auctioneer; Principal and Agent.

Spurraway v. Rogers, 12 Mod. 517.

An action of *assumpsit* lies against a bailee to whom merchandise has been delivered, for not rendering a due account of the proceeds.[3]

In an action of *assumpsit*, on a promise to account, it appeared that the plaintiff had delivered merchandise and money to the defendant, who had engaged to return him the value in India produce.

Per Holt, C. J. If a person receives goods of another, and expressly promises to be accountable for them, or to render an account, an action of *assumpsit* will lie for a non-performance of the promise. *See* Carth. 89; S. C. 1 Salk. 9; 2 B. & P. 36; 1 Saund. 50; 1 Taunt. 572; 2 Camp. 238; 5 Taunt. 431; S. C. 1 Marsh, 115, 6. *Crosskey v. Mills*, 1 C., M. & R. 298.

I. Action limited to Six Years.

Action of account or for not accounting between merchant and merchant limited to six years.

The Mercantile Law Amendment Act, 1856, 20 & 21 Vic. c. 14, s. 9, enacts, that "all actions of account or for not accounting, and suits for such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants, shall be commenced and sued within six years after the cause of such actions or suits, or when such cause has already arisen, then within six years after the passing of this act; and no claim in respect of a matter which arose more than six years before the commencement of such action or suit shall be enforceable by action or suit by reason only of some other matter of claim comprised in the same account having arisen within six years next before the commencement of such action or suit."

ACCOUNTS of Constables. *See* Constable.

ACCOUNTS of Overseers. *See* Overseers.

116*l.* 19*s.* 7*d.* against the company; and in consideration of your withdrawing the attachment I agree, on the part of myself and the other directors, to pay you the balance of 66*l.* 19*s.* 7*d.* on the 27th August next." *Barker v. Birt*, 10 Mee. & W. 61; 6 Jur. 736. In an action by executors of the payee of a note, the indorsement upon it signed by defendant:—"Hull, 1838. Memorandum, that the sum of 1*l.* 7*s.* 6*d.*, one quarter's interest, was paid on the within note:"—*Held*, evidence of account stated with the executors. *Purdon v. Purdon*, 10 Mee. & W. 562; 12 L. J. Ex. 3.

An award is no evidence of an account stated. *Bates v. Townley*, 19 L. J. Ex. 399; S. C. 2 Exch. Rep. 152. Arbitrators are not agents to state an account, but judges to decide. Where, however, there were no bonds, Ld. Ellenborough once admitted it as proof of the statement of an account. *Keen v. Bateshore*, 1 Esp. 194; and an award ascertaining the value of goods adopted and acted upon by the defendant was held evidence of an account stated. *Salmon v. Watson*, 4 Moore, 73. As to stamping, *see* 2 Selw. N. P. 917, 7th ed.; *Hawkins v. Warre*, 3 B. & C. 690.

[1] The word may, in a legal sense, mean "satisfy." See *Farr v. Hollis*, 9 B. & C. 330.

[2] An action lies against every description of agent for not rendering a due account to his principal. *Spurraway v. Rogers, supra. See* 2 Camp. 238; 1 Marsh, 115; S. C. 5 Taunt. 431; for an agent is *at all times* bound to be prepared to render a clear and faithful account of all his transactions to his employer, 1 J. & W. 135; 14 Ves. 500, 510; 4 Madd. Rep. 373. But before suing in this form of action a demand of an account must be made. *Topham v. Braddick*, 1 Taunt. 572. In such an action it is no defence that the goods were exported without paying the duties, unless this evasion of the revenue formed part of the original contract. *Catlin v. Bell*, 4 Campb. 183. See this principle recognised in *Gross v. La Page*, Holt, N. P. C. 105. *Wilkinson v. Loudensack*, 3 M. & S. 117; and *see* 1 B. & P. 3; id. 296. In general, the employer cannot compel his agent to deliver over the proceeds of a contract till the latter has actually received them. *Varden v. Parker*, 2 Esp. 710; but as soon as the latter is in cash by any sale or contract, he must account and take care of the produce, and keep or dispose of it according to the principal's orders. *Lucas v. Groning*, 1 Stark. 392; 4 Madd. Rep. 3; 5 id. 47. Sale and receipt may be presumed if the agent, after a reasonable time, refuse to account. 1 Stark. 224; Peake, 56.

[3] But not until demand made of an account. *Topham v. Braddick*, 1 Taunt. 572.

ACCRESCE. Sc. L. As to a *pro indiviso* right, equivalent to a survivorship among joint-tenants.

ACCRESCERE. Lat. From *ad*, to, and *crescere*, to *grow;* L. Fr. *accresser*. In the old English law, to grow to, to pass to, and become united with; as soil to land *per alluvionem*. In Scotch law, literally translated, "to accresce." 1 Kames' *Equity*, 247. *Jus accrescendi*, the right of accretion or accruer, the right by which a thing passes or accrues from one to another. *Pars decedentis accrescere debet superstitibus, per jus accrescendi*, the portion of the deceased ought to accrue to the survivors by the right of accruer or survivorship. Bract. fol. 28. *See* id. fol. 77 b; 262 b; 1 Burr. D. 23.

ACCRETION. Most commonly applied to the gradual and imperceptible accumulation and formation of soil, or land, out of the sea or a river. 3 Kent's *Com.* 428; Schmidt, *Civ. Law*, 49. *See* Alluvion; and Hall, *On the Sea-shores of the Realm*, 123 *et seq.*

ACCRUER, Clause of. In a marriage settlement there is sometimes a clause providing that, "in case any of the younger sons shall become an eldest or only son," his portion shall accrue to the other children. And by force of this clause a younger son may lose his portion on becoming an eldest or only son, although he may not have succeeded to the property of his elder brother. *See* observations in *Peacock v. Pares*, 2 Keen, 689; and Smith, *R. & P. Property*, 751, 2d ed.

ACCUMULATION, Trusts for. *See* Thellusson's Act, 39 & 40 Geo. 3, c. 98. *See* Hargrave's Tract, and Chitty's Stat. by Welsby and Beavan, for cases and construction.

ACCUMULATIVE. *See* Cumulative Remedies; Fines and Forfeitures; Indictment; Legacy; Penal Action; Penalty.

ACCUSARE nemo se debet nisi coram Deo. *No man is bound to accuse himself unless before God.* Hardr. 139.

ACCUSATOR post rationabile tempus non est audiendus nisi se bene de omissione excusaverit. *An accuser is not to be heard after a reasonable time, unless he excuse himself satisfactorily for the omission. Sir Anthony Ashley's case*, Moore's Rep. 817.

ACCUSTOMABLY demised may have two senses: the one signifying the frequent or repeated act of leasing; the other, the common continuance of land in lease, though it has not been more than once demised; as in the case of lands leased for five hundred years long since. And this is the more common acceptation of the words, "usually demised," though, in a literal sense, land once let is not land usually demised. Land twice demised is clearly included in that term; though lands let by virtue of a contract from year to year for three years cannot be said to be usually demised, because it is but one lease, though renewable every year. 1 Platt on Leases, 412.

ACCUSTOMED Rent. *See* Lease; Powers; Trusts. 1 Platt on Leases, 414.

AC ETIAM.[1]

[1] Anterior to the stat. 13 Car. 2 stat. 2, s. 2, a defendant might have been arrested for any sum of money upon a bill of Middlesex, or *latitat*, &c., not expressing the particular cause of action. To remedy this mischief, the statute enacts that no person arrested by any sheriff, by force or colour of any bailable writ, bill, or process, issuing out

ACKNOWLEDGMENT by Married Women. *See* Husband and Wife.

ACKNOWLEDGMENT of Debt or Liability. *See* Admission; Bankrupt; Infant; Insolvent; I. O. U.; Limitation, Statute of; Receipt; Recital; Stamp.

ACKNOWLEDGMENT of Deed. *See* Deed; Husband and Wife; Infant; Lease.

ACKNOWLEDGMENT of Title. *See* Adverse Possession; Distress; Landlord and Tenant; Rent.

ACQUIESCENCE.[1] *See* Admission; Condition; Covenant; Forfeiture; Landlord and Tenant; Lights; Waiver; Watercourse; Ways.

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of the King's Bench, wherein the certainty and true cause of action is not expressed, shall be compelled to give security for his appearance in any penalty or sum exceeding 40*l*. This act, says Mr. Justice Blackstone (without any such intention in the makers), had like to have ousted the King's Bench of all its jurisdiction over civil injuries without force, for, as the bill of Middlesex was framed only for actions of trespass, a defendant could not be arrested thereupon for breaches of civil contracts. But, notwithstanding, the defendant might still be arrested upon a common bill of Middlesex, or *latitat*, &c. for any sum not exceeding 40*l*.; and where it was for a larger amount, a method was devised to preserve the jurisdiction of the Court, and at the same time to authorise an arrest, by inserting in the process an *ac etiam*, or special clause, beginning with these words; shortly describing the true cause of action in addition to the general complaint of trespass. It was abolished by 2 Wm. 4, c. 39, and writs of summons substituted for the former processes by 15 & 16 Vic. c. 76, s. 2; 23 & 24 Vic. c. 126, s. 25.

[1] Acquiescence, to have the effect of an admission, must exhibit mental cognizance, and be indicated by demeanour, or conduct from which assent may be inferred. *Allen v. M'Kean*, 1 Sumn. 314, A. R. And whether it is in the conduct or in the language of others, it must unequivocally appear that such conduct was fully known, or the language fully understood by the party, before any implication can be drawn from passiveness or silence. *Ess v. Truscott*, 2 Mee. & W. 385. The circumstances, too, must be not only such as afforded an opportunity to act or to speak, but such also as would properly and naturally call for some action and reply from men similarly situated. To affect a party with the statements of others, on the ground of his implied acknowledgment of their truth by remaining silent, it is not enough that they were made in his presence; for if they were given in evidence in a judicial proceeding, he is not at liberty to interpose, though a party, and therefore is not concluded. *Melen v. Andrews*, 1 M. & M. 336. Questions often arise as to how far a person is to be affected in actions for false imprisonment or malicious prosecution, by what the judge, jury, or magistrate may have said at the investigation. The usual, and it would be the proper course, is to reject such evidence. *Per Alderson, B.*, in *Short v. Story*, cited Roscoe's *Ev.* 53, 9th ed.; Crompton, Js. 28 L. J. Q. B. 158. *Simpson v. Robinson*, 12 Q. B. 811. Nor can any conclusions be fairly drawn from the mere omission of a party to reply to a letter, unless sent under circumstances which entitle the writer to an answer. *Edwards v. Towels*, 5 Man. & G. 624. Where a landlord quietly suffers a tenant to expend money in alterations and improvements on the premises, it is evidence of his consent to the alterations. *Doe v. Allen*, 3 Taunt. 78, 80. *Doe d. Pye*, 1 Esp. 366. *Neale v. Parkin*, 1 Esp. 229. *See* also *Stanley v. White*, 14 East, 332. *Doe v. Moore*, 1 Ad. & E. 363.

A party who negligently or culpably stands by and allows another to contract on the faith and understanding of a fact which he can contradict, cannot afterwards dispute this fact in an action against the person whom he has himself assisted in deceiving. *Per Ld. Denman*, in *Gregg v. Wells*, 10 Ad. & E. 98. S. P. *Pickard v. Sears*, 6 id. 469. *Freeman v. Cooke*, 2 Exch. R. 654. A tenant who personally receives a notice to quit at a particular day, without objection, impliedly admits that his tenancy expires on that day. *Doe v. Biggs*, 2 Taunt. 109. *Thomas v. Thomas*, 2 Camph. 647. *Doe v. Foster*, 13 East, 405. *Oakapple v. Copons*, 4 T. R. 361. *Doe v. Woombwell*, 2 Campb. 559. Thus also among merchants it is regarded as the allowance of an account rendered, if it is not objected to, without unnecessary delay. See *Sherman v. Sherman*, 2 Vern. 276. It was intimated, "a second or third post," as the ultimate period of objection. But *Ld. Hardwicke* said, that if the person to whom it was sent kept the account "for any length of time without any objection," it became a stated account. *Willis v. Jernegan*, 2 Atk. 252. *Tickle v. Short*, 2 Ves. sen. 239. Daily entries in a book constantly open to the party's inspection, are admissions against him of the matters therein stated. *Alderson v. Clay*, 1 Stark. R. 405. A trader being inquired for, and hearing himself denied, may thereby commit an act of bankruptcy. *Key v. Shaw*,

ACQUITTAL. *See* Assault and Battery; *Auter fois Acquit;* Burglary; Conspiracy; Highway; Indictment; Information; Malicious Prosecution; Perjury; Post Office.

ACQUITTANCE. *See* Bill of Exchange; Composition with Creditors; Forgery; Payment; Receipt; Release.

ACRE.[1]

Rex v. Everard, 1 Salk. 195; S. C. 1 Lord Raym. 638; Holt, 173.

On a presentment at a court-leet for erecting a cottage, &c. contrary to 31 Eliz. c. 7, s. 1, being removed into the Court of King's Bench by *certiorari*, it was contended, on the authority of *Stowe's case*, Cro. Jac. 603, that the 33d

The 33 Ed. 1, 16, prescribing the quantity of

8 Bing. 320. And, generally, where one knowingly avails himself of another's acts, done for his benefit, this will be held an admission of his obligation to pay a reasonable compensation. *Morris v. Burdett*, 1 Camp. 218. *See* 5 Taunt. 302.

As to what will amount to acquiescence in breach of covenant, see *Doe v. Brindly*, 12 Moore, 37; and *Tucker v. Sawyer*, 13 Price, 9.

The Prescription Act, 3 & 4 Wm. 4, c. 27, s. 27, expressly provides that nothing contained therein shall be deemed to interfere with any rule or jurisdiction of courts of equity in refusing relief on the ground of acquiescence, or otherwise, to any person whose right to bring a suit may not be barred by virtue of that act.

In equity, acquiescence may have the same effect as an original agreement, and bar the right to relief, but it must be distinctly shown that the party knew the fact upon which the acquiescence is founded. The doctrine is inapplicable to instances of error or mistake. 2 Mer. 362. Every presumption will be made against an unexplained remote demand. *Pickering v. Stamford*, 2 Ves. jun. 583. Acquiescence of nearly fifty years in a mortgage transaction liable to be impeached will be a bar to equitable interference. *Hicks v. Cooke*, 4 Dow, 17. So length of time may be a bar to setting aside a lease upon the ground of fraud or mistake (*Selsey v. Rhodes*, 2 S. & S. 41); or twenty years' acquiescence in a will (*Tucker v. Sanger*, M'Clel. 424); or a wife not dissenting from her husband's declaration of the user of a fine till 15 years after his death. *Swanton v. Raven*, 3 Atk. 105.

As regards a trustee purchasing the trust property, the question of acquiescence cannot arise until it is previously ascertained that the *cestui que trust* knew that his trustee had become the purchaser, for while the *cestui que trust* continues ignorant of that fact there can be no *laches* in not impeaching the sale upon that ground. *Randall v. Errington*, 10 Ves. 427, 428. In *Morse v. Royal*, 12 Ves. 335, *Lord Chancellor Eldon* said, "It is established by all the cases, that if the *cestui que trust* join with the trustees in that which is a breach of trust, knowing the circumstances, such a *cestui que trust* can never complain of such a breach of trust; and either concurrence in the act, or acquiescence without original concurrence, will release the trustees. Where the shareholders of a canal had acquiesced for forty-seven years in an agreement for letting tolls not warranted by Act of Parliament, it was held that it was not competent for the shareholders to impeach such agreement in respect of the public interest. *Gray v. Chaplin*, 2 Russ. 126. Acquiescence will not be held to have taken place so long as the same circumstances of undue influence on one side, and distress on the other, in which the oppression commenced, continue to operate. *Purcell v. Macnamara*, 14 Ves. 106, 121, 122.

[1] From the German word *acker*, i. e. *ager*. This word, on its first introduction, signified any open ground or field, as *castle* acre or *west* acre, &c., and not a fixed or measured quantity of land. It afterwards indicated a measured portion of land, but the quantity varied, and was not fixed until the 33 Edw. I, according to which an acre contains 160 square perches, so that every acre is a superficies of forty perches long and four broad, or in that proportion, be the length or breadth more or less. The length of the perch was, previously to the statute of Edward, fixed at five yards and a half, or sixteen feet and a half by the statute called *Compositio ulnarum et perticarum;* and the Act of Edward must of course be construed with reference to this standard. *See* Co. Litt. 56; 4 Inst. 274; 6 Rep. 67 a; 4 Mod. 183; Cro. Eliz. 476. The act for establishing uniformity in weights and measures, 5 Geo. 4, c. 74, s. 2, provides that an acre of land shall contain 4840 square yards, being 160 square perches, poles, or rods. *See* 5 & 6 Wm. 4, c. 65, and Weights and Measures. The Scottish acre is larger than the English, 48 Scottish acres being equal to 61 English acres. The Irish acre is also larger than the English, 121 Irish acres being equal to 196 English acres. There are also *local* acres in various parts of England, such as the Cheshire acre, of eight yards to the pole. The English statute acre is used in the United States of America. In New York it is declared to be equal to a rectangle of six perches in length and ten in breadth, making the same area. *See* 18 & 19 Vic. c. 72; 22 & 23 id. 56.

land in an acre, is a statute, and not an ordinance.

Edw. 1, c. 6, was not a statute, but only an ordinance. The proposition, however, was denied by the Court. *See* 33 Edw. 1; 24 Hen. 8, c. 4; 2 Inst. 737; Co. Litt. 69 a; Spelm. *Gloss. v. Acra;* Cow. *Interp. v. Acre.*

WADDY v. NEWTON, K. B. 8 Mod. 275.

Where the word acre, by the consent of the parties, is inserted in a fine or recovery, it is taken according to the customary and usual measure of the country, and not according to the statute.[1]

On a special verdict in ejectment it appeared that a tenant in tail had covenanted to levy a fine and suffer a common recovery of the lands in question, and also of a fishery; and that he had accordingly levied the fine, describing the parcels as 120 acres of land in Stockwell Hall, in the county of, &c. and ten acres of land, covered with water; and declared the use thereof to himself and heirs. But there being more than 140 acres statute measure (but only that number according to the local mode of admeasurement), the defendant, who was heir in tail, defended the action for all the land beyond the 140 acres. The jury found that the fine had been levied, and the recovery duly suffered, by the name of 120 acres of land, and of ten acres of running water, and that the whole estate entailed was computed in the county to be 140 acres of land.

Per Cur. It has been admitted by the defendant's counsel, that if the fine had been levied, and recovery suffered, in pursuance of a prior agreement or covenant for a valuable consideration, and if it had appeared to be the intent of the parties to pass the whole estate by the name of 140 acres, in such case the whole would pass. Now here the jury have found that the whole estate entailed was computed in the county to be 140 acres; and it will be difficult to comprehend a difference between a covenant for a valuable consideration and a voluntary covenant: for it cannot reasonably be said that the same words shall pass all the lands in one case, and shall not pass the whole in the other, especially when the tenant had it in his power to express his intention in any language he pleased.

NOBLE v. DURELL, 3 T. R. 274.

Semb. Custom cannot control the quantity of land included in the word acre.

Per Lord Kenyon. It is impossible to contend that a custom could prevail in a particular place; that a less number of days than seven should constitute a week; or that a less space of ground than an acre should be called an acre. *See* Plowd. 169; 4 T. R. 750; 6 T. R. 338; 11 East, 312.

ACT Book.[2]

ACT in Pais. *An Act in the Country.* An act which is not a matter of record or done in a court of record. 2 Bl. Com. 294. *See* Estoppel.

ACT of Bankruptcy. *See* Bankrupt; Covenant; Forfeiture; Insolvent; Lease.

ACT of Contravention. In Sc. L. the act of breaking through any restraint imposed by deed, by covenant, or by a court. Kame's *Equity*, Pref. 1.

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[1] In adverse suits the word acre is construed according to the statute measure, and not regulated by the measure of any particular or local custom. Thus in *Andrews's case*, cited Cro. Eliz. 476, it was adjudged, that if one brings an *ejectione firmæ*, or a *præcipe* of 100 acres, it shall be according to the statute measure; but if he bargains and sells 100 acres of land, that shall not be according to the statute measure, but according to the local mode of computation. *Sed vide* 5 & 6 W. 4, *supra;* 10 B. & C. 446.

[2] The book kept by the Ecclesiastical Court, containing entries of the wills proved and probates granted. This original Book of Acts, directing letters of administration to be granted, is evidence of the title of the party to whom administration is directed to be granted without producing the letters of administration themselves. *Elden v. Keddell*, 8 East, 189. *Cox v. Allingham*, Jacob, 514. An examined copy of this book is also evidence, under 14 & 15 Vic. c. 99, s. 14; *Dorrett v. Meux*, 23 L. J. C. B. 221; 2 C. L. R. 807; 15 C. B. 142; as it was before the passing of that statute. *Davis v. Williams*, 13 East, 231. *Ray v. Clerke*, ib. 238.

In Sc. L. the minute-book of a court.

ACT of Curatory. In Sc. L. the act extracted by the clerk upon any one's acceptance of being curator. Forbes' *Inst.* part 1, b. 1, ch. 2, tit. 2; 2 Kame's *Equity*, 291. Identical with the order for the appointment of a guardian in England.

ACT of God.[1] L. *Actus Dei;* F. *Dieu son acte.* See *Actus Dei nemini facit injuriam;* Abatement by Death; Accident; Appeal; Apportionment of Rent; Apprendre; Bailment; Bond; Building Act; Carrier; Conditions; Coroner; Covenant; Fire; Prescription; Sea Walls; Sewers.

ACT of Parliament. *See* Statute.

ACT of Settlement. The stat. 12 & 13 Wm. 3, c. 2, limits the crown of Great Britain to the present Royal Family.

ACT of Uniformity. 13 & 14 Car. 2, c. 11, s. 4, enacts that the Book of Common Prayer, as then recently revised, should be used in every parish church and other places of public worship, and otherwise ordaining a uniformity in religious services, &c. *See* 3 Steph. *Com.* 104; Ld. Stowell's judgment in 1 Hag. Con. 428–9; 1 Phil. 282; and earlier statutes, 2 & 3 Edw. 1, c. 1; 1 Eliz. c. 2; Roger's *Ecc. L.* 73, 763. Steer's *Parish Law*, 64.

ACTIO. In the old law an action was sometimes termed *placitum* or *loquela.*

ACTIO ex Contractu. An action of contract; an action arising out of, or founded on, contract. Bract. fol. 102; 3 Bl. Com. 117.

ACTIO ex Delicto. An action of *tort;* an action arising out of fault, misconduct, or malfeasance. 3 Bl. Com. 117.

ACTIO in Personam. An action against the person; a personal action; an action founded on some personal liability, arising either out of contract (*ex contractu*), or malfeasance (*ex delicto*), as distinguished from an *actio in rem*, or one brought for the recovery of a thing, independently of any personal obligation. *Inst.* 4, 6, 1.

ACTIO in Rem. An action directed against a thing, out of which the party bringing it seeks to obtain satisfaction, instead of proceeding against the person. Thus, in the Courts of Admiralty, where a vessel is libelled for the purpose of obtaining satisfaction of some claim, or on the ground of forfeiture, it is said to be a proceeding *in rem*, not touching the person. 1 Kent's *Com.* 373; id. 367 n.; 3 id. 196. *See* Admiralty; Customs; Excise; Extent; Prize.

ACTIO non accrevit infra Sex Annos. Prior to the 16 & 17 Vic. c. 76, there were two modes of pleading the Statute of Limitations to an action on simple or unsealed contracts; one designated by the name in this title, the other, *Non assumpsit infra Sex Annos:* but the latter could only have been adopted where there was an immediate cause of action. 1 Saund. 33, n. 2; 16 East, 421; 3 Chit. Pl. 126. This distinction is now abolished, and a form prescribed by the statute, "that the alleged cause of action did not accrue within six years [in other actions state the period of limitation applicable to the case] before this suit." *See* Limitations, Statute of.

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[1] This signifies any inevitable accident occurring without human intervention. It not unfrequently imports something in opposition to the agency of man, as, the resistless effects of the elements. 1 Rep. 97; Bac. *Max.* reg. 1. *Keighley's case*, 10 Rep. 139. *Forward v. Pittard*, 1 T. R. 33. *Trent Navigation v. Wood*, 3 Esp. 127. *See* also 8 T. R. 312; 1 B. & C. 477; 10 Ad. & E. 398. The phrase has been objected to as irreverent, and Sir Wm. Jones suggests the substitution of the expression "inevitable accident." *Treatise on Bailment*, 104.

ACTIO Personalis moritur cum Persona.[1] *See* Abatement; Accident; Campbell's (Lord) Act; Executor and Administrator; Negligence.

ACTION.[2]

[1] It was a principle of the common law, that if an injury was done either to the person or property of another for which damages only could be recovered in satisfaction, the action died with the person to whom the wrong was done. But this rule has received considerable modification. By the statute 4 Edw. 3, c. 7, *De Bonis asportatis in Vita Testatoris*, reciting that, in times past, executors have not had actions for a trespass done to their testators, as of the goods and chattels of the said testators carried away in their life; and so, as such trespasses have remained unpunished, enacts that the executor in such cases shall have an action against the trespassers, and recover their damages in like manner as they whose executors they be should have had if they were living. And this remedy was extended to executors of executors, by statute 15 Edw. 3. c. 5; and to administrators, by an equitable construction of the former statute. Cro. Eliz. 314. The act 4 Edw. 3, being a remedial law, has always been expounded largely; and though it makes use of the word "trespasses" only, has been extended to other cases within the meaning and intent of the statute (1 Vent. 187; W. Jones, 174): but the act does not extend to injuries done to the person or to the freehold of the testator (1 Saund. Rep. 217 a, n. 1); nor for a breach of a promise of marriage to the deceased, where no special damage to the personal estate can be stated on the record. 2 M. & S. 408. But now, by the 3 & 4 Will. 4, c. 42, s. 14, it is enacted, "that an action of *debt on simple contract* shall be maintainable in any court of common law, against any executor or administrator;" and, by the second section of the same act, after reciting "that there is no remedy provided by law for injuries to the real estate of any person deceased, committed in his lifetime, nor for certain wrongs done by a person deceased, in his lifetime, to and in respect of his property, real or personal, for remedy thereof," it is enacted, "that an action of *trespass, or trespass on the case, as the case may be*, may be maintained by the executors or administrators of any person deceased for any injury to the *real estate* of such person, committed in his lifetime, for which an action might have been maintained by such person, so as such injury shall have been committed within six calendar months before the death of such deceased person, and provided such action shall be brought within one year after the death of such person; and the damages, when recovered, shall be part of the personal estate of such person; and further, that an action of trespass, or trespass on the case, as the case may be, may be maintained against the executors or administrators of any person deceased for any wrong committed by him in his lifetime to another in respect of his property, real or personal, so as such injury shall have been committed within six calendar months before such person's death, and so as such action shall be brought within six calendar months after such executors or administrators shall have taken upon themselves the administration of the estate and effects of such person; and the damages to be recovered in such action shall be payable in like order of administration as the simple contract debts of such person. See *Chamberlain v. Williamson*, 2 M. & S. 408. *Raymond v. Fitch*, 2 C., M. & R. 588. And now, by 9 & 10 Vic. c. 93, ss. 1 & 2, whenever the death of a person is caused by some wrongful act, neglect, or default, which would (if death had not ensued) have entitled the injured party to an action, then the person who would have been liable, if death had not ensued, shall be liable for damages, though the death was caused by an act amounting to felony; and the action shall lie for the benefit of the wife, husband, parent, and child of the deceased, and in the name of the executor or administrator. *See* Campbell's (Lord) Act. *Blake v. Midland Railway Co.* 18 Q. B. 93. *Patterson v. Wallace*, 1 Macq. Ho. of L. 748. And see, as to what cause of action is so far personal, as that it will not pass to the assignee if the party injured become bankrupt, *Drake v. Beckham*, 11 Mee. & W. 315. *Rogers v. Spence*, 13 Mee. & W. 571.

[2] An action obviously partakes of the double character of a *remedial instrument* of justice, or, as described by Blackstone (3 *Com.* 3), as an established *formula of litigation*, as it is considered by the civil-law writers. It is essentially a proceeding *in judicio*, that is, before a *court* and between *parties*. It is the seeking of each to obtain a judgment in his favour; it is not simply (though it is primarily) a procedure for the recovery of a right, but it is equally, after its institution, a proceeding for and an instrument of defeating an unfounded claim. It consists of a series of acts done by the parties and the Court, embracing (Bracton, fol. 106 a) the threefold act of three persons—the judge, the plaintiff, and the defendant. *See* Ersk. *Inst.* c. 6, tit. 1. It is a composite or complex procedure. Primarily a presentation of a case to a Court for its decision, and the decision of the Court thereon. To accomplish the first the parties must properly *appear* in court, and the case itself must be *presented* in the proper *form;* and to attain the last effectually, the case presented must be *made out* by proof or argument, and the judgment of the Court be carried into execution. Hence an action, when it takes its regular course, always consists of the following successive proceedings:—*Process*, by which the party com-

I. Of the Parties to in general, p. 136. *See* also Parties to Actions.

(A) *By and against whom to be brought, with reference to the Subject-matter.*

See Abstract
Accident
Account, Action of
Advertisement
Advowson
Agistment
Agreement
Ambassador
Animals, Injuries to & by
Annuity
Apprentice
Arbitration
Assault and Battery
Assumpsit
Bail
Bailment
Bank of England
Bank Note
Bankrupt
Barrister
Bastardy Bond
Benefit Club
Bill of Lading
Bills of Exchange & Promissory Notes
Bond
Bottomry
Bribery
Bricks
Building Act
Bye-Law
Calls
Caricature
Cemetery
Charter Party
Cheque
Church
Club
Common
Composition with Creditors
Condition
Contract
Contribution
Copyhold
Copyright
Costs
Covenant
Damage feasant
Defeazance
Debt
Debtor and Creditor
Deceit
Decoy
Demurrage
Detinue
Distress
Divorce
Dower
Driving
Easement
East India Company
Ejectment

plained of is brought before the Court; *pleadings*, by which the nature of the demand and the defence is exhibited to the Court by the respective litigants; *trial* or *hearing* by the Court of the case so presented; *judgment* or *decree*, by which the Court awards or denies the remedy sought by the action; and *execution*, by which the judgment is actually and specifically enforced. These proceedings are again each composed of a variety of acts, having each its proper rule and form; besides which there are numerous others of an incidental or occasional kind, growing out of the various circumstances attending the action, and by which its progress is modified, more or less interrupted, and sometimes prematurely terminated. There are also other judicial proceedings conducted in an analogous manner to actions, and often ancillary to them; as, writs of error, *scire facias*, *mandamus*, *quo warranto*, *certiorari*, *habeas corpus*, and the like. Originally, indeed, the terms *writ* and *action* were nearly synonymous. Steph. Pl. 8; Gilb. C. P. 4. In Co. Litt. 291 a, it is said that every writ to which the defendant may plead, be it original or judicial, is in law an action. But practically it is now exclusively appropriated to those forms of judicial procedure which are classed under the triple distribution of *real*, *personal*, and *mixed actions*.

An action lies for every infraction of a party's legal right, whether arising out of breach of contract or occasioned by a tortious wrong, provided the civil remedy be not suspended or merged in the higher claim of the public, to have the law itself vindicated by the punishment of the offender. It is therefore of importance to ascertain whether redress is to be sought through the agency of a civil suit or a criminal prosecution. Thus, if an injury be merely public, the remedy can only be public, and, as a rule, no particular individual can proceed for private compensation for the supposed wrong he has individually sustained. 2 T. R. 667; Willes, 71. So in cases of felony, the remedy by action for the private wrong is *suspended* until the party particularly injured has fulfilled *his duty* to society by prosecuting the offender. 2 C. P. 41; 13 Mee. & W. 603; 19 L. J. Q. B. 447. For homicide, all civil remedy is entirely merged in the felony. Hence we have seen, before the 9 & 10 Vic. c. 93, which gives an action to the representatives of a deceased person, for the benefit of the wife, husband, parent, or child, whenever the death has been caused by some wrongful act or neglect which would have entitled the injured party to an action if death had not ensued, no action was sustainable for injury to husband or parent, whereby death ensued. Styles, 647. The civil remedies (Yelv. 89) being suspended in consequence of the felony, there is no redress against the offender before convicting him, at law or in equity (17 Ves. 331); but after conviction and punishment, on an indictment of the party for stealing, the person robbed may support trespass or trover against the accused; and after an acquittal of the defendant, upon an indictment for a felonious assault and stabbing, the prosecutor may maintain trespass to recover compensation for the civil injury, if it be not shown that he colluded

Elections
Entry
Escape
Exchange
Excise
Execution
Extent
Extortion
Fairs and Markets
False Imprisonment
„ Return
Farrier
Fences
Ferry
Fish and Fishery
Fixtures
Forcible Entry
Franchises
Frauds, Statute of
Freight
Game
Gaming
Gift
Goods bargained and sold
„ sold and delivered
Guarantee
Herald
Heriot
Highway
Hue and Cry
Husband and Wife
Hustings
Impressment
Imprisonment
Insurance, Marine
„ on Lives
„ from Fire
„ „ Accidents
Interest
Judgment
Judicial Process
Landlord and Tenant
Lease
Legacy
Libel
Lien
Malicious Arrest
„ Prosecution
Market
Marriage, Promise of
Mesne Profits
Mill
Money lent
„ paid
„ had and received
Mortgage
Naval Stores
Negligence
Nuisance
Offices
Parent and Child
Parliament
Party Wall
Pardon
Patent
Peer
Penal Statute
Perjury
Pew
Physician
Post-horse Act
Post Office
Prize and Prize Money
Property Tax
Rent

in procuring the acquittal. 12 East, 409. In some cases of misdemeanours, and other particular offences, there are express enactments that the civil remedy shall not be affected by the criminal.

In the case of a public nuisance, which is merely a misdemeanour, if a particular individual has sustained actual and particular material damage or inconvenience in consequence of the offence; as if, in throwing a log into a public highway, it hurt an individual, or afterwards occasion his horse to fall; or if a public road, which a private individual was bound to repair, be so impassable as to delay another a long time on his journey, or compel him to take a circuitous route, then the latter may sustain an action for such particular damage (3 B. & Adol. 77; Willes, *Rep.* 71); and he may, at the same time, prosecute the offender, by indictment, for the public nuisance. So, some injuries are in their nature as well private as public, as assaults and batteries, libels on individuals, and forcible entries; and the party particularly injured may proceed by action; or he, or any other person, may indict the wrong-doer for breach of the peace; and, in general, the civil remedy for a private injury, also constituting a public misdemeanour, is not, as in cases of felony, suspended.

A party cannot abate a private nuisance and also sue for damages, *ante*, p. 6, n. *Baten's case*, 9 Rep. 55; 3 Black. Com. 219, 220. *Sed vide* 1 Rol. Ab. 5, pl. 1; *Baldwin v. Cole*, 6 Mod. 212. But it is no objection to an action that an injunction has been obtained to prevent further injury (*Attorney-General v. Nichol*, 3 Mer. 687), though the rule is otherwise with respect to bills for specific performance; for although a vendor and vendee, respectively, have the option of proceeding at law or in equity (Sugd. V. & P. 205), he cannot at both; and after a decree for a specific performance against a defendant, the plaintiff cannot proceed by action at law on the contract for damages; and such action might be restrained by injunction. 6 Madd. Eq. 290. But if a purchaser, after a bill filed for a specific performance, pay the purchase-money without putting in his answer, and afterwards discover a fraud in the sale, he is not precluded from bringing an action for damages, if he come recently after discovering the deception. *Jendwine v. Slade*, 2 Esp. N. P. 572.

To a right of action it is essential that the damage sustained be the necessary consequence of the defendant's misconduct, and not the effect of the plaintiff's own negligence (*Flower v. Adam*, 2 Taunt. 314), or produced by the wrongful act of another, not the defendant. *Vicars v. Wilcocks*, 8 East, 1. Nor can an action arising out of a breach of duty be sustained (*Pitcher v. Bailey*, 8 East, 171; S. P. 1 C., M. & R. 73; 2 Bing. N. C. 634); nor is it maintainable when the plaintiff has no interest which the law can recognise. *Lapierre v. M'Intosh*, 9 Ad. & E. 857. *See* Damages, *post*.

It is, however, no objection to an action, that it be new in the *instance*, if it be not new in its *principle*. *Pasley v. Freeman*, 3 T. R. 63. *Chamberlain v. Williamson*, 2 M. & S. 415. A statute giving damages does not necessarily confer a right of action. 28 L. J. M. C. 7.

Replevin
Reservoirs
Reward
Right, Writ of
River
Sale, Bill of
Salvage
School and Schoolmaster
Seduction
Ship and Shipping
Simony
Slander
Smuggling
Stamps
Stock
Sunday
Taxes
Theatre
Tithes
Tolls
Tombs
Trade
Trespass
Trover
Turnpikes
Vicar and Vicarage
Universities
Use and Occupation
Usury
Wager
Warrants
Waste
Watercourse
Way.

(B) *By and against whom to be brought, with reference to the particular Character or Capacity of the Party.*

See Administrator
Alien
Ambassador
Apothecary
Assignee
Attorney
Auction and Auctioneer
Bail
Banker
Bankrupt
Bishop
Broker
Carrier
Churchwarden
Colonel
Constable
Coroner
Corporation
Custom-house Officers
Dean and Chapter
Denizen
Executor and Administrator
Farrier
Guardian
Heir
Hundred
Husband and Wife
Infant
Innkeeper
Insolvent Debtor
Joint-stock Companies
Judge
Justice of the Peace
Landlord and Tenant
Lunatic
Master and Servant
Overseer of the Poor
Papist
Parent and Child
Partners and Partnership
Pauper
Pawnbroker
Peer
Pilot
Principal and Agent
„ „ Surety
Printer
Prochein Amy
Proctor
Public Officer
Railway Companies
Receiver-General
Sheriff
Slave
South-Sea Company
Surgeon
Trustee
Vendors and Purchasers
Wharfinger
Witness
West India Company.

II. Of the Forms of Action, p. 137. *See* also Account, Action on; Annuity; Assumpsit; Case; Covenant; Dower; Detinue; Ejectment; *Quare impedit;* Replevin; *Scire facias;* Trespass; Trover.

(A) *Different Forms of*, p. 137.
(B) *Whether Real or Personal*, p. 137.
(C) „ *Assumpsit or Account*, p. 138.
(D) „ *Contract or Tort*, p. 139.
(E) „ *Assumpsit or Covenant*, p. 142.
(F) „ *Assumpsit or Debt*, p. 142.
(G) „ *Debt or Covenant.* *See* Covenant; Debt.
(H) „ *Replevin or Detinue*, p. 138 n., and Detinue.
(I) „ *Trespass or Case*, p. 143.
(*a*) *General Rule*, p. 143.
(*b*) *Injuries to Real Property*, p. 144.
(*c*) „ *to Personal Property*, p. 146.
(*d*) „ *to the Person*, p. 149.

(*e*) *Injuries to relative Rights*, p. 150.
(*f*) „ *occasioned by Persons in Defendant's Employ*, p. 151.
(*g*) *Penal Actions.* *See* Penal Actions.
(*h*) *Actions in Rem.* *See* Detinue; Extent; Prize.

III. Of joining distinct and different Causes of Action. *See* Joinder.

IV. Of joining distinct and different Rights and Interests. *See* Bankrupt; Baron and Feme; Executor and Administrator; Joinder; Partner.

V. Of Circuity of Action, p. 152.

VI. Of splitting Actions, p. 157.

VII. Of bringing two Actions for the same Cause. *See* Consolidating Actions; Staying Proceedings.

VIII. Of Cross Actions. *See* Cross Action.

IX. Of a former Recovery for the same Cause. *See* Judgment recovered.

X. Of Notice of Action. *See* Notice of Action.

XI. Of bringing an Action before the right to sue has legally accrued, p. 158.

XII. Action, Notice of. *See* Notice of Action.

I. Of the Parties to in general. *See* Parties to.[1]

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[1] Under this division, only those cases are abridged and referred to which could not be conveniently introduced under some specific alphabetical title. The following are the general rules upon the subject of parties to suit:—

1. As regards who are to be plaintiffs in actions on *contract*. The action on a contract, whether express or implied, or whether by parol or under seal, or of record, must be brought in the name of the party in whom the legal interest in such contract is vested. 1 East, 497; 8 T. R. 332; 1 Saund. 153, n. 1; 7 Mod. 116; 2 Saund. on Uses and Trusts, 222; 2 T. R. 693; 7 T. R. 667; and *see* 2 Bing. 20; Broom, 2.

Courts of common law have no cognisance of equitable rights, as contra-distinguished from the strict legal title, so as to invest the equitable or beneficial claimant with the ability to adopt legal proceedings in his own name, although the equitable right may embrace the whole beneficial interest to be derived from the contract or subject-matter of litigation. And this rule still holds as to plaintiffs in bringing actions, although by C. L. P. Act, 1854, 17 & 18 Vic. c. 125, s. 83, a defendant may plead facts which would entitle him to defend on equitable grounds, and although by sec. 86 the plaintiff may reply any facts which avoid on equitable grounds any plea pleaded by the defendant. *See* 30 L. J. Q. B. 3. And although in the case of a deed *inter partes*, an individual not named as a party cannot sue thereon, notwithstanding it contain a covenant with him and for his benefit, yet this rule does not protect from liability a party who executes such a deed containing a covenant by him, although he is not described as a party thereto. And a party who expressly contracts and permits credit to be given to him is liable, although he were not the strict legal owner of the property, in respect of which the promise is made.

2. As regards who are to be plaintiffs for wrongs or *torts*. The action for a *tort* must be brought in the name of the person whose legal right has been prejudiced, and who was legally interested in the property at the time of the injury committed. A *cestui que trust*, or other person having only an equitable interest, cannot sustain an action against his trustee or against a third person, unless where the action is against a mere wrong-doer, and for an injury to the actual possession of the *cestui que trust*. 1 East, Rep. 244; 2 Saund. 47 a; Broom, 198.

3. As regards who are to be defendants in actions on *contracts*. The action upon an express contract, whether it be by deed, or merely in writing, or by parol, must, in general, be brought against the party who made it (Broom, 108), or his representatives.

4. As regards defendants in actions for wrongs or *torts*. In personal or mixed actions in form *ex delicto*, the person committing the injury, either by himself or his agent, is to be made the defendant. All persons are liable to be sued for their own tortious acts, unconnected with or in disaffirmance of a contract. Therefore, although

II. Of the Forms of Action.

(A) *Different Forms of.*

(B) *Whether Real*[1] *or Personal.*[2]

Eaton v. Southby, Willes, 134.

Per Cur. A replevin, it is said, is to be considered either as a real or personal action, according as the defendant shall happen to avow; this is laid down in Finch's *Law*, 316, but we think it is a distinction that will appear on examination to be without foundation. For an action is either real or personal according as the thing to be recovered by that action is either real or personal; and as nothing that is real can be recovered by an action of replevin, be the recovery what it will, it cannot be considered as a real action. If the nature of the defence would make a difference, actions of trespass, wherein the title of land is brought in question by the plea, and actions of debt for rent, wherein the title of the land may come in question, nay, even actions of debt on a bond, against an heir, where *riens per descent* is pleaded, must be considered as real actions, which yet would be most absurd. *See* F. N. B. 155; Bract. 102; Wm. Jones, 214; *post*, Annuity; and B. & B. 133; 4 M. & S. 113.

Whether an action be real or personal depends on the thing to be recovered by it, and not on the nature of the defence; therefore a replevin is a personal action, though the title to land be brought in question.

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an infant cannot in general be made a party in an action in form *ex contractu*, except for necessaries, he is liable for all *torts* committed by him, as for slander, assaults, and batteries, &c., and also in detinue for goods delivered to him for a purpose which he has failed to perform, and which goods he refuses to return. But a plaintiff cannot, in general, by changing his form of action, charge an infant for a breach of contract, as for the negligent or immoderate use of a horse, &c.; nor can he be a trespasser by prior or subsequent assent, but only by his own act. A married woman is liable for *torts* actually committed by her, although she cannot be a trespasser by prior or subsequent assent. And although a lunatic is not punishable criminally, he is liable to a civil action for any tort he may commit. With regard to the liability of corporations, it is a clear general rule that they are liable to be sued as such, in case or trover, for any *torts* they may cause to be committed. And the same as to public bodies, *quasi* corporations. *Kendall and others v. King*, 25 L. J. C. P. 132; 27 id. Q. B. 229; 28 id. 41; 29 id. C. P. 13. A cause must always be decided as if the parties on the record were the persons really interested. *Caldwell v. Ball*, 1 T. R. 205. *Doe d. Byne v. Brewer*, 4 M. & S. 300.

[1] By the 3 & 4 Wm. 4, c. 27, s. 36, they were all abolished, except four, namely, the actions of writ of right of dower, dower, *quare impedit*, and ejectment; the first two of which are brought by a widow to compel the due assignment of her dower—the difference between the two actions being that the latter is for the specific recovery of the whole of her dower, while the former is for the specific recovery of the residue after she has received part from the tenant; the third, by a person who complains that he has been improperly deprived of his ecclesiastical patronage; and the last by persons claiming land which they contend is wrongfully withheld from them. This action, which has been so materially altered by the C. L. P. Act, 15 & 16 Vic., will be explained under a separate title. *See* Ejectment.

Until recently the actions just mentioned continued to be commenced by original writ, or by serving a copy of the declaration according to the ancient practice. But a different mode of commencement has now been provided by the 15 & 16 Vic. c. 76, and 23 & 24 Vic. c. 126, s. 26, which enacts that "no writ of right of dower, or writ of dower *unde nihil habet*, and no plaint for free bench or dower in the nature of any such writ, and no *quare impedit*, shall be brought after the commencement of this act in any court whatsoever; but where any such writ, action, or plaint would now lie, either in a superior or in any other court, an action may be commenced by writ of summons issuing out of the Court of Common Pleas, in the same manner and form as the writ of summons in an ordinary action."

The general form of such writ of summons is as follows:—

Writ of Summons in Real Actions.

Victoria, *by the grace of God, &c.* to C. D. of, &c., in the county of

We command you, that within eight days after the service of this writ on you, inclusive of the day of such service, you do cause an appearance to be entered for you in our Court of Common Pleas, at the suit of A. B.; and take notice, in in default of your so doing the said A. B. may proceed therein to judgment and execution. Witness, &c.

[2] Although the 15 & 16 Vic. c. 76, abolishes the technicalities of pleading, and dispenses with any specification of the form of action in

(C) *Whether of Assumpsit or Account.* *See* Account, Action of, p. 108.

the writ or declaration, and allows different forms of action to be joined, and has extinguished special demurrers, the form of action is now far less material than formerly, still the different *forms*, or, more accurately, the various *classes* of actions, remain unchanged, and the periods within which a remedy is to be sought, the costs of the proceeding, the amount of damage, the jurisdiction of the County Courts, as well as other incidental matters, are necessarily determined by reference to these respective classes. Indeed, it may be said the act has made no essential change in the forms of action. The recent cases of *Bracegirdle v. Hinks*, 9 Exch. 361, and *Nargatt v. Nias*, 28 L. J. Q. B. N. S. 143, show that it is still dangerous to depart from the appropriate form of action applicable to each particular case.

Actions are divided into real, personal, and mixed. Real actions are those brought for specific recovery of lands, tenements, or hereditaments. Personal, are those brought for specific recovery of goods and chattels, or for damages, or other redress, for breach of contract, or other injuries, of whatever description—the specific recovery of lands, tenements, and hereditaments, only excepted. Mixed, are such as appertain in some degree to both, *are* properly reducible to neither of them, being brought both for specific recovery of lands, tenements, or hereditaments, and for damages for injury sustained in respect of such property.

The only real and mixed actions now in force are the four following:—*Writ of right of Dower*, *Dower*, *Quare impedit*, and *Ejectment*, these being excepted from the general abolition of real actions by the 3 & 4 Wm. 4, c. 27, s. 36, but the mode of procedure is altered by 23 & 24 Vic. c. 126.

Writ of right of dower applies only where a widow claims the specific recovery of the residue of her dower, having received part, consisting of lands in the same town in which she claims the residue. Glan. lib. vi. c. 4; Booth, 166; Roscoe on Real Actions.

Writ of dower (or *dower unde nihil habet*), lies for a widow claiming her dower, no part having been assigned to her. Booth, 166; Glan. lib. vi. c. 15; Steph. Pl. 4, ed. 10.

Quare impedit lies where the right of a party to a benefice is obstructed. Booth, 223.

Ejectment lies for the specific recovery of land, and its proceedings are regulated by C. L. P. Act, 1852, 15 & 16 Vic. c. 76.

The personal actions are *Assumpsit*, Debt, *Detinue*, Covenant, Trespass, Case, or Trespass on the Case, and Replevin.

Assumpsit lies to recover damages for breach of a simple contract, express or implied.

Debt lies to recover a *debt*, or a liquidated or certain sum of money due on some contract, express or implied, and whether under seal or otherwise. This in the old law was called *debt* in the *debet*.

Detinue (or in the old law, *debt* in the *detinet*) lies to recover specific goods improperly detained.

Covenant lies to recover damages for the breach of a covenant in a deed or an instrument under seal.

Trespass lies to recover damages for an injury committed with violence, actual or implied. Of *actual* violence, an assault and battery is an instance; of *implied*, a peaceable but wrongful entry upon another's land. Steph. Pl. 4, ed. 17.

Case lies to recover damages for any *tortious* injury to which trespass will not apply. This form of action was originated by the Statute of Westminster 2, which gave power to the clerks in Chancery to frame new writs *in consimili casu* with writs already known. Although these writs were thus invented *pro re natâ* in various forms, according to the nature of the wrongs which called them forth, they at length began to be looked on as constituting collectively a new *form of action*, under the name of Trespass on the Case. Trover, which lies for the recovery of damages for the improper conversion or detention of goods, is a species of this action.

Replevin lies where a party whose goods have been distrained makes plaint to the sheriff to have them restored to him, or replevied, upon giving security to prosecute an action against the distrainer, for the purpose of trying the legality of the distress, and if unsuccessful to return the goods. Wilkinson on Replevin; Gilb. id. Formerly replevin could only be entertained in the superior courts on removal from an inferior by writs of *re. fa. lo.* or *accedas ad curiam*; but now, by 19 & 20 Vic. c. 108, ss. 65, 67, it may be commenced within one week of the date of the replevin bond, in a superior court by the ordinary writ of summons; and if commenced in a county it can only be removed by *certiorari*.

With the single exception of ejectment, for which a special writ is provided by the C. L. P. Act, 1852, 15 & 16 Vict. c. 76, ss. 168, 169, every action brought in the superior courts must now be commenced by writ of summons, in which it is not necessary to insert any form of action; though, in the case of a real action, there shall be an indorsement thereon of the form in which the plaintiff intends to declare (C. L. P. Act, 1852, 15 & 16 Vic. c. 76, ss. 2, 3, 18, 19; C. L. P. Act, 1860, 23 & 24 Vic. c. 126, s. 26); and causes of action other than ejectment and replevin, of whatever kind, provided they be by and against the same parties, and in the same rights, may be joined in the same suit (C. L. P. Act, 15 & 16 Vic. c. 76, s. 41); and claims in a husband's own right may be joined in actions by husband and wife. C. L. P. Act, 15 & 16 Vic. c. 76, s. 40. But *quære*, whether a personal action can be joined with a real?

(D) *Whether Contract or Tort.*

Dickson v. Clifton, 2 Wils. 321.

Per Cur. If a shepherd be entrusted with sheep, and he puts his own dog among them, which occasions damage, this would be a *tort*, although there may have been an express contract with him to take care of the sheep; and he might be charged upon the contract, or as a wrong-doer.

Where the breach of an express contract amounts to a *tort*, the party injured may at his election bring either *assumpsit* or trespass.

Mast v. Goodson, 3 Wils. 348; S. C. 2 Bl. 848.

In this case the plaintiff declared, in the first count, that the defendant did, by himself and servants, wrongfully and injuriously obstruct and hinder the plaintiff from landing divers large quantities of his goods upon a wharf, contrary to a written agreement between him and the plaintiff. The second count was in trover for coals and other goods detained by the plaintiff. On not guilty pleaded, and issue joined thereon, the jury found a general verdict for the plaintiff, with 48*l.* damages; and it was moved to arrest the judgment, on the ground that the damages were joint, and that case and trover could not be joined in one declaration.

Hence obstructing the plaintiff in landing his goods on a wharf contrary to an agreement, may be declared on as in *tort*.

By the Court. This is certainly a misfeasance, and sounds wholly in *tort*, force and wrong, and not in contract; for the agreement, or contract executed both by the plaintiff and the defendant, is only introductory to show the *tort* or wrong done by the defendant to the plaintiff in hindering him from the benefit of his easement, which he had an undoubted right to enjoy; therefore we are all clearly of opinion that the first count in the declaration under review is founded upon *tort*, and not upon contract, and that trover may be well joined with it.—Judgment for the plaintiff.

Boorman and others v. Brown, 3 Q. B. 511; S. C. Per. & D. 401; 6 Jur. 141.

Declaration, in case, stated that defendant was an oil broker, and that plaintiffs, linseed crushers, retained him, as such broker, to sell and deliver for them thirty tons of linseed oil, according to the contracts of sale, to such persons as should purchase, for commission and reward to defendant in that behalf; which retainer he accepted. That he, as such broker, in pursuance of the retainer, made a contract between plaintiffs and P., by which plaintiffs sold to P., and he bought of them, the thirty tons, at the price, &c., to be delivered by parcels at a place and times named in the declaration, *each parcel to be paid for in ready money*. That plaintiffs consigned two of the parcels to defendant, and he delivered them to P. on payment; and that after the making of the contract, and in pursuance thereof, and of the retainer, plaintiffs consigned to defendant, as such broker, the residue of the thirty tons, to be delivered by him to P. on payment; that the oil arrived, &c., of which defendant had notice, and took upon himself the delivery according to the contract; and thereupon it became, and was defendant's duty, as such broker as aforesaid, to use all reasonable care that the oil should not be delivered to P. or any other person without the price being paid to defendant according to the contract: yet defendant negligently delivered the oil without the price being paid by P., whereby plaintiffs lost the same, &c. *Pleas.* 1. Not guilty. 2. Denial of defendant taking upon himself the delivery of the oil. 3. Denial of the retainer and employment.

A contract creates a duty, and a neglect to perform that duty or a non-feasance is ground of action as upon a *tort*.[1]

At the trial the plaintiffs had a verdict, but a rule was afterwards obtained in arrest of judgment.

The Court of Queen's Bench decided, that to support an action of *tort* there must be a violation of some duty. That the duty here is asserted as resulting from defendant's character as broker; but as the duties of a broker are defined by statutes and by common law, and embrace none to the effect alleged, no ground of complaint appears on the record. Rule absolute accordingly.

[1] See also *Wood v. Finnis*, 7 Ex. 363; 16 Jur. 936; 21 L. J. Ex. 138.

The plaintiffs brought error, and the result was that the decision of the Q. B. was overruled, and,—

Per Cur. Coupling together the terms of the particular contract made by the defendant, with the terms of the defendant's retainer by the plaintiffs, we think it amounts to an express contract on the part of the defendant to deliver what he sold on the payment of ready money only; and that the duty of the broker arose from this express contract so stated in the declaration, and not simply from his character of broker, which the Court of Queen's Bench appears to have considered to be the meaning of the declaration. Judgment reversed.

COURTENAY v. EARLE, 10 C. B. 73; 20 L. J. C. P. 7; 15 Jur. 15.

But this is only the case when there is a common-law duty[1] imposed upon the party to do what he has made the subject of a particular agreement.[2]

The third and fourth counts of the declaration set forth certain promises of the defendant to indemnify the plaintiff, and provide for the payment of part of a certain acceptance of the plaintiff, and then alleged a breach of duty in the defendant, consisting solely in not indemnifying and providing as agreed. There was also a count in trover. Demurrer for misjoinder of counts. It was contended on the part of the plaintiff, that since the decision in *Boorman v. Brown*,[3] every action of breach of contract is to be considered as one of *tort*.

Per Cur. That case decides, that when there is a duty arising from a general employment an action may be brought in *tort*, although the breach of such duty may consist in doing something contrary to an agreement made in the course of such duty by the party on whom such general duty is imposed. The violation of a bare promise, without any such general duty, is not the subject of an action of *tort;* it does not decide that you may bring an action of *tort* for violating a promise to go to York for 10*l.*

LAMINE v. DORRELL, 2 Ld. Raym. 1216; S. P. HOWARD v. WOOD, 2 Lev. 245.

Or where there is an express or implied contract, the *tort* may be waived and the plaintiff may proceed on the former.[4]

In an action of *indebitatus assumpsit* for money had and received to the use of the plaintiff as administrator of J. S. Plea, *non assumpsit.* It appeared on the trial that J. S. had died intestate, possessed of several Irish debentures; and the defendant, pretending to be entitled to be administrator, obtained letters of administration, and acquired possession of the debentures, and disposed of them. The defendant's letters of administration were afterwards repealed, and letters

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[1] And an action will still lie on this common-law duty, even if the contract be under seal. *Nurse v. Craig*, 2 N. R. 148; 6 Moore, 415; 3 B. & B. 171.

[2] Actions against agents or attornies for neglect or misconduct may, in general, be brought either in the form of a breach of contract, or as for a wrong. *See post*, Carriers. *Samuel v. Judin*, 6 East, 333; *Boorman v. Brown*, 3 Q. B. 511; 11 Clark & Fin. 1; *Corbett v. Packington*, 6 B. & C. 268; *Courtenay v. Earle*, 10 C. B. 73.

[3] 3 Q. B. 511; 11 Clark & Fin. 1.

[4] *Assumpsit* also lies to recover the price of goods delivered by a bankrupt by way of fraudulent preference (4 T. R. 211; 2 D. & R. 568; 1 B. & C. 418, S. C.); and there are many other instances in which a party may waive the *tort*, and sue for money had and received (4 B. & C. 211; 6 D. & R. 265; 5 B. & Adol. 808). In some cases, also, where money has been extorted by duress of goods, it may be recovered back in *assumpsit* (*Pratt v. Visard*, 5 B. & Adol. 808; 2 Stra. 915; 4 T. R. 485; Bull. N. P. 132; 5 Bing. 37; 7 B. & C. 73; 9 D. & R. 889; S. C.; 1 Whitw. 22. But *assumpsit* cannot be supported to recover back money paid for the release of cattle distrained *damage feasant;* but the party must replevy, or proceed in trespass or trover. *Lindon v. Hooper*, Cowp. 414. In cases where the plaintiff may sue either in *assumpsit* or for the *tort*, the latter is sometimes the more advisable course in order to avoid a plea of set-off (6 T. R. 683); and where a statute gives a remedy for the recovery of calls, "by action of debt or on the case," an action of *tort* or *assumpsit* is maintainable, though the defendant be thereby deprived of the benefit of a set-off (*Huddersfield Canal Co. v. Buckley*, 7 T. R. 36; *Corbett v. Carpmael*, 2 Nev. & M. 834). But when the ground of action is *assumpsit*, declaring in *tort* will not make a party liable who would not have been so on his promise. 2 Marsh, 485; 3 B. & B. 62; 1 B. & C. 94; 2 D. & R. 198, as to charge an infant or a married woman.

subsequently granted to the plaintiff, who brought the present action for the recovery of the sum for which the debentures had been sold. It was contended at the trial that the action could not be sustained in the present form, the defendant having sold the debentures as one claiming a title and interest in them, and could not therefore be charged as having received the money for the use of the plaintiff, when he received it for his own use. The remedy ought to have been trover or detinue. The point was reserved, and afterwards moved.

Sed per Cur. It is clear that the plaintiff might have maintained detinue or trover for the debentures; and although it is sometimes difficult to convert acts of a tortious nature into a contract, yet in this case the plaintiff may well dispense with the wrong, and bring an action for the proceeds of these securities. Should an action of trover be afterwards brought, the judgment on the *indebitatus assumpsit* may be pleaded in bar, as it would be good evidence under the plea of not guilty, because, by instituting this action, the plaintiff has ratified and confirmed the sale, and admitted it to be no conversion.

On the principal point, see 2 Mod. 260; 3 Wils. 309; 2 Bl. Rep. 827; 1 T. R. 62, 403; 2 T. R. 145; 4 T. R. 211; 6 T. R. 681; 1 Taunt. 112; 1 Stark. 134; 10 East, 378, 418; 16 id. 130; 3 M. & S. 191; 1 T. R. 387.

Lightly v. Clouston, 1 Taunt. 112; S. P. Foster v. Stewart, 3 M. & S. 191.

This was an action of *indebitatus assumpsit* for work and labour of the plaintiff's apprentice. On the trial it appeared that the defendant had seduced the apprentice from the plaintiff's ship, and had employed him in navigating his own. It was objected that the action was misconceived, as it ought to have been in *tort*.

The master of a servant who has been seduced from his service, may sue the seducer for the loss of service, by action either *ex delicto* for the seduction, or *ex contractu*, as having hired the servant.

Sed per Cur. It has long been settled that in cases of sales the plaintiff may sue for the produce and abandon the *tort;* the present case is within that rule, and must be decided upon analogous principles: for although the defendant has wrongfully acquired the labour of the apprentice, the master may waive his right to recover damages for the *tort*, and may say that he is entitled to the value of his labour. See *Eades v. Vanderput*, 5 East, 39 n; Cowp. 419; Bull. N. P. 133; 2 Bl. Rep. 827; 2 T. R. 144; 2 Stra. 915, 1239.

Lumley v. Gye, 2 E. & B. 216; 17 Jur. 827; 22 L. J. Q. B. 463.

And this principle applies to a case where the defendant maliciously procures a party, who is under a valid contract, to give her exclusive personal services to the plaintiff for a specified time, to refuse to give such service.

Declaration by the lessee of a theatre, charged in the first and second counts that one T. W. had contracted with the plaintiff to sing at his theatre, and not elsewhere, during a certain term, without the plaintiff's consent, and that the defendant had, during the term, maliciously enticed and procured T. W. to depart from her said contract against the will of the plaintiff, whereby T. W. refused to sing for the plaintiff at his theatre during the whole of the term. The third count alleged that T. W. had been hired by the plaintiff as, and was, his dramatic artiste, for a certain term, and that the defendant had maliciously enticed and procured her to depart from her said employment during the said term. All the counts alleged special damage. On demurrer to the declaration it was held (*Coleridge, J. dissentiente*) that the action was maintainable at common law, as the maliciously procuring T. W. to break her contract was a wrongful act, from which damage accrued to the plaintiff; that the rule of law giving a remedy for enticing away servants is not confined to menial servants, or to such as fall within the Statute of Labourers (23 Edw. 3), but extends to all cases where there is an unlawful or malicious enticing away of a person employed to give his exclusive personal service for a given time under the direction of an employer, who is injured by the wrongful act; and that the action for maliciously persuading a servant to quit his service is maintainable wherever

there is at the time of the persuading a binding contract of hiring and service existing between the parties, whether the service be then actually subsisting or not.[1]

(E) *Whether Assumpsit or Covenant.*[2]

(F) „ *Assumpsit or Debt.*[3]

[1] And tort may lie arising out of a breach of contract by an individual not a party to the contract, but acquainted with its contents (*Langridge v. Levy*, Ex. 2 Mee. & W. 519); or an action, as before stated, as upon contract, may arise out of a *tort*. *Powell v. Rees*, 7 Ad. & E. 426; S. C. 2 N. & P. 571.

Assumpsit or trover lies against a sheriff who seizes the property of a third person. *Oughton v. Seppings*, 1 B. & Adol. 241.

Case or assumpsit lies against the assignee of a lease by the assignor, on the implied obligation to indemnify him from non-performance of the covenants. *Burnett v. Lynch*, K. B. 5 B. & C. 589.

Assumpsit will lie for goods as sold to a defendant who by fraud procures the plaintiff to sell them to an insolvent, and afterwards obtains possession of them himself. *Hill v. Perrott*, 3 Taunt. 274.

But where goods are sold "*without recourse on the buyer* in case *of non-payment*" of a bill which the vendee knows to be worth nothing, the vendor cannot maintain *assumpsit* for the value of the goods, but must sue in *tort*. *Read v. Hutchinson*, 3 Camp. 352.

[2] *Assumpsit* will not lie where a remedy by instrument under seal exists. *East India Company v. Lewis*, 3 Car. & P. 359; S. P. *English v. Blundell*, 8 Car. & P. 332.

Where a party has a contract under seal, he must sue thereon in debt or covenant.* *Bulstrode v. Gilburn*, 2 Stra. 1027. *Filmer v. Burnby*, 2 Man. & G. 529. 2 Scott, N. R. 689; 9 Dowl. P. C. 466. *Edwards v. Bates*, 2 D. & L. 299. 8 Scott, N. R. 406; 7 Man. & G. 590; Q. B. Moore, 411; even though the debtor, after making the contract, expressly promised to perform it. *Anonymous*, Cowp. 128 (Sed qu. *Tanner v. Hague*, 7 T. R. 420; and 2 B. & P. 440; 2 East, 243; and *post*, Execution; and 1 M. & S. 573; 3 Camp. 549, n. a.); or where the *covenant* between the parties is only to be implied from the deed. *Barber v. Harris*, 9 Ad. & E. 532; S. C. 1 Per. and D. 360.

Unless in respect of a new consideration, creating a new contract; as when an heir, in consideration of forbearance, promises to pay the debt of his ancestor (*Barber v. Fox*, 1 Vent. 159; S. P. *Hunt v. Swain*, T. Raym. 127). Or if the deed be only executed by the plaintiff, and not by the defendant, the action should be *assumpsit* (*Sutherland v. Lishman*, 3 Esp. N. P. 42). Or if the deed be void, as where a *feme covert* has, without authority from her husband, contracted with a servant by deed, the latter must sue the master in *assumpsit*.† *White v. Cuyler*, 6 T. R. 176; S. C. 1 Esp. N. P. C. 200.

Or there is a paramount common-law obligation, as where, on the separation of husband and wife, he covenanted by deed with a trustee to pay an allowance for her separate maintenance, but made default, and the trustee provided the wife with necessaries (*Nurse v. Craig*, 2 N. R. 148). Or where parties who have, by deed, covenanted to account with each other, and to pay over what shall appear to be due; if they state an account, and one expressly promise to pay the balance, *assumpsit* may be supported notwithstanding the deed (*Foster v. Allanson*, 2 T. R. 479; S. P. *Moravia v. Levy*, 2 T. R. 483, n. See *Schaek . Anthony*, 1 M. & S. 573; *Gow on Partnership*, 97, 99; *Churchill v. Day*, 3 M. & R. 71; *Wray v. Milestone*, 5 Mee. & W. 21). Or where the terms of a contract under seal are varied by a simple contract, the remedy on the substituted agreement is *assumpsit*, and not covenant. *Heard v. Wadham*, 1 East, 619; S. P. *Sturdy v. Arnaud*, K. B. 3 T. R. 599.

[3] *Assumpsit* and *debt* are concurrent and, in fact, identical remedies on all causes of action which may be recovered under the common *indebitatus* counts. Since the C. L. P. Act, 1852, 15 & 16 Vic. c. 76, by s. 89 the form of the count is always the same; and by ss. 93, 94, 95, the same formula as to final judgment and assessment of damages are extended to all causes of action to which they can be applied. As to those causes of action, however, which cannot be made the subject of the common *indebitatus* counts, there is still a distinction between these two forms of action. If the cause of action be a debt due under a record, covenant, bond, &c., the form of action is *debt*, the declaration being framed specially on the instrument, and *assumpsit* will not lie. If the contract broken be a simple contract or promise to do anything else

* If the cause of action is a debt, the form of action is *debt*, but the declaration must be framed specially on the record, covenant, bond, &c. in respect of which it is due. If the contract is by deed, and the covenant is to do anything else than to pay a sum of money, the action will be in *covenant*. B. & L. Pl. 33 n. b.

† And the grantee of a void annuity deed may recover back the consideration in *assumpsit*. *Scurfield v. Gowland*, 6 East, 241; 3 Taunt. 56. *See* Annuity; Money had and received; *Kerrison v. Cole*, 8 East, 231.

Crawford v. Whittal, 1 Dougl. 4, n. 1. S. P. Sinclair v. Fraser; cited in *Duchess of Kingston's case*, 11 Harg. *St. Tr.* 122. Plaistow v. Van Uxem; cited 1 Dougl. 4, n. 1. Russell v. Smith, 9 Mee. & W. 819.

Per Ashhurst, J. "I have never seen this doubted. I have often known *assumpsit* brought on judgments in foreign courts; the judgment is a sufficient consideration to support the implied promise. Judgment for the plaintiff." *See* 11 East, 124; 1 Camp. 63; 6 Q. B. 298; *post*, Judgments.

Assumpsit will lie upon a judgment in a foreign court.[1]

Smith v. Allport, 2 B. & P. 482.

This was a special case, which stated, that a suit being pending in the Court of Chancery between the parties, it had been mutually agreed between them that they should do certain acts connected with the process in that suit. That the agreement was afterwards made a rule of court; and in pursuance thereof several orders of the Court were made with reference to the matter comprised in the agreement, which the defendant had refused to obey. The question for the opinion of the Court was, whether an action at law on the contract could be maintained? For the defendant it was argued that the agreement, on which the action was brought being merely a proceeding in the course of a suit in Chancery, an infraction of it was rather a contempt of the Court of Equity than a proper object of a suit at law.

Or upon an order of an inferior court of justice, if there be an express agreement to perform it.

Sed per Cur. Though the rule is clear that in general an order of another court is not a ground of action, yet in the case before us the defendants have by the terms of their agreement raised a sufficient foundation to enable the plaintiff to maintain an action of *assumpsit* against them. See *Tremenhere v. Tresillian*, 1 Sid. 452; *Emerson v. Lashley*, 2 H. Black. 248; *Carpenter v. Thornton*, 3 B. & A. 52; *Fry v. Malcolm*, 4 Taunt. 705; *Anon.* Lofft, 305; *Sadler v. Robins*, 1 Camp. 253; *Moore v. The Bank of England*, 4 Bro. P. C. 287.

Collins v. Mathew, 5 East, 473.

On the argument of a demurrer to a plea to action of debt on a judgment recovered in the Court of Exchequer in Ireland, the Court expressed a clear opinion, that since the union of that country with Great Britain the judgments of the Irish courts are properly pleadable as *records*. *See* 1 Dougl. 1, 5, 6.

But not on Irish judgments since the union.[2]

(G) *Whether Debt or Covenant.* *See* Covenant; Debt.[3]

(I) „ *Trespass or Case.*

(*a*) *General Rule.*

Reynolds v. Clarke, 2 Ld. Raym. 1399; S. C. 1 Stra. 634; S. C. 8 Mod. 272; Forts. 212. S. P. Haward v. Bankes, 2 Burr. 1113.

Trespass was brought for entering the plaintiff's yard and fixing a spout

Where an injury is occa-

than to pay money, or if, by reason of the contract remaining unperformed, &c., the common *indebitatus* count is inapplicable, the action will be in *assumpsit*, setting out the special facts, and debt will not lie. It has been seen, however, that in some cases arising out of contracts, when the relation existing between the parties is one which involves a common-law duty, the same act on default may be considered either as a breach of the promise, and be sued for in *assumpsit*, or as a breach of the duty, and be made the subject of an action on the case. *See ante*, p. 139.

[1] *Assumpsit* will also lie on a statute for money due under it. *Bell v. Burrows*, Bull. N. P. 129 a.

[2] Or on a judgment in the County Court (*Austin v. Miller*, 22 L. T. 171; or judge's order (*Dent v. Bartrain*, 9 Ex. R. 469; 23 L. J. Ex. 161), though made by consent, 23 L. J. Ex. 267; 9 Ex. R. 24.

[3] If the cause of action be a debt founded on a record, covenant, bond, &c., the form of action is debt, the declaration being framed specially on the instrument under which it is due. If the contract be by *deed*, and the covenant is to do anything else than to pay money, the action will be in covenant. B. & L. P. 33 n.

sioned by the act of the defendant at the time, or the defendant is the immediate cause of the injury, *trespass vi et armis*[1] is the proper remedy; but where the injury is not direct and immediate on the act done, but consequential only, then the remedy is by action on the case.

there; *per quod* the water came into the yard and did damage. The defendant justified, that before the trespass J. F. was seised in fee of plaintiff's house and yard, and two other houses adjoining; and demised plaintiff's house and yard to one T., except the free use of the yard and privy for the tenants of the other two houses, jointly with the tenant of the plaintiff's house. The plea then showed how one of the other two houses came to the defendant, and that he entered the yard and fixed the spout for his necessary use to carry off the rain, *ei bene licuit.* Demurrer to plea. For the defendant it was argued, that the exception amounted to a license of the party, and therefore that an action of trespass would not lie; but if the spout were a prejudice, the plaintiff must bring an action on the case. After an *ulterius concilium* the Court gave judgment for the defendant, saying that they must keep up the boundaries of actions. If the act in the first instance be unlawful, trespass will lie; but if it be *primâ facie* lawful, and the prejudice arising from the act be not immediate, but consequential, it must be case. The defendant having a right to enter the yard, and do the first act which is here complained of, trespass will not lie; for it is not pretended that the bare fixing the spout was the cause of action, without the falling of any water: therefore it should have been an action on the case. *See* 11 Hen. 4, c. 23; 2 Edw. 4, c. 4; 12 Edw. 4, c. 80; 13 Edw. 4, c. 10; 9 Hen. 7, c. 8; 19 Hen. 6, c. 34; 21 Hen. 6, c. 15; 40 Edw. 3, c. 10; Hob. 180; F. N. B. 217, 220. *Morgan v. Hughes*, 2 T. R. 231. *Day v. Edwards*, 5 T. R. 649. *Ogle v. Barnes*, 8 T. R. 190, 191; 1 Ch. P. 166; 1 Selw. N. P. 432.

(*b*) *Injuries to Real Property.* *See* Nuisance.

Shapcott v. Mugford, 1 Ld. Raym. 187.

When the injury committed to land is immediate, and the land in possession of the plaintiff, the remedy is trespass; but when it arises out of a nonfeasance, as for not carrying away tithes, it is case.[2]

This was an action on the *case* against the proprietor of tithes, for not taking the tithes off the plaintiff's land within a reasonable time after request, but, on the contrary, for suffering them to continue there for a long time, to wit, nine months; *per quod totum tempus prædictum*, the plaintiff lost the benefit of the land. The defendant pleaded not guilty. Verdict for the plaintiff.

A motion was made in arrest of judgment, on the ground that the action would not lie, as the plaintiff might have abated the nuisance, or might have distrained the tithes *damage feasant*, or should have brought an action of trespass. But the Court were of opinion that the remedy adopted was the most appropriate one the plaintiff could have pursued; for he could not have sustained trespass, *quare vi et armis*, as the non-removal of the corn was a mere nonfeasance, though it was admitted that where a party commits a direct injury to real property, as digging in pits, &c. trespass would lie. *See* 1 Ld. Raym. 188.

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[1] The statement of acts of trespass being committed *With force and arms*, and against the peace of our Lady the Queen, is no longer necessary in a declaration of trespass. C. L. P. 15 & 16 Vic. c. 76, s. 49.

A trespass to land, or to an *exclusive* corporeal right, is an entry or direct act of interference with the possession or enjoyment of the land, &c. In order to maintain an action for this wrong the plaintiff must have a possessory title. The owner legally entitled cannot maintain an action of trespass before entry. *Litchfield v. Ready*, 5 Ex. 939. *Turner v. Cameron Coal Co.* 5 Ex. 932. An actual entry will relate back to the time of the legal right to enter, so as to support an action for a preceding trespass (*Barnett v. Guildford*, 11 Ex. 19); and upon entry the rightful owner may maintain the action against a party previously in possession. *Butcher v. Butcher*, 7 B. & C. 399. As actual possession is presumptive proof of property, and is sufficient evidence against a mere wrong-doer who cannot show any better title or authority. *Graham v. Peat*, 1 East, 243. *Punnell v. Young*, 3 Mee. & W. 288. *Pugh v. Roberts*, 3 id, 458. *Matson v. Cook*, 4 Bing. N. C. 392. *Browne v. Dawson*, 12 Ad. & E. 624. And it is not open to the defendant to set up a *jus tertii* to rebut the mere possessory title of the plaintiff, unless he acted under the authority of such right. The possession of a servant or agent is the possession of the owner. *Bertie v. Beaumont*, 16 East, 33; B. & L. Pl. 243. A reversioner not having the right of possession cannot bring this action, but must sue for any injury to his reversion in case. Broom, 214.

[2] Or where the injury is not immediate but

HARKER AND ANOTHER v. BIRKBECK AND ANOTHER, 3 Burr. 1556; 1 Blac. 482, S. C.

Trespass lies for encroaching on a lead mine.

In an action upon the case, the plaintiffs declared that they had the sole liberty and privilege of digging for, getting, and raising, lead ore, and taking the benefit thereof, in a certain place; but that the defendants, to deprive them thereof, did sink for, raise, and get, within the same place, a great quantity of ore, and convert the same to their own use.

Per Cur. It appears that the plaintiffs were in possession of the mine, and the injury done a clear and manifest trespass; hence the plaintiff has misconceived his form of action. Whoever is in possession of a mine may maintain an action of trespass for a wrong done to his possession; we are, therefore, of opinion, that the action ought to have been trespass, and the *postea* must be delivered to the defendants. *See* Co. Lit. 164.

REED v. HARRISON, 2 Blac. 1218.

An officer continuing in possession of a house for an unreasonable time under a *fieri facias* is liable in trespass.[1]

In trespass for breaking and entering the plaintiff's house, and taking his cattle and goods, the defendant pleaded a justification under an attachment issued against the plaintiff's goods, to compel him to appear and put in good bail to answer a plaint levied in the court at N. or to surrender his body in discharge of his goods; by virtue of which attachment, the officers continued in possession of the plaintiff's premises for safe custody of the goods attached, according to the custom of the Court, from the 17th of July, 1775, to the 1st of January, 1776, when the plaintiff in that action having recovered final judgment, a precept in the nature of a *fieri facias* was issued, and on the 17th of January executed; after which there was another precept, in the nature of a *venditioni exponas*, under which the goods were ultimately sold. To this plea the plaintiff demurred; and on argument it was contended, 1st. That the defendant could not justify continuing in possession of the plaintiff's premises from July to January. 2dly. That the goods attached ought to have been removed, and not kept on the premises by the officer. That in a distress for rent they could not be lawfully kept there above five days: and staying longer made the distrainer a trespasser *ab initio*. Stra. 717. And though the practice is now altered by the 2 Geo. 2, with respect to distresses, yet the common law remains unaltered in regard to attachments. The counsel for the defendant thought these objections too cogent to be invalidated. Judgment entered for the plaintiff, without opposition. See *Six Carpenters' case*, 1 Smith, L. C. 62, 65.

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consequential; as for placing a spout near the plaintiff's land, so that the water afterwards ran thereon. *Reynolds v. Clarke*, 1 Stra. 634; 2 Ld. Raym. 1399; 8 Mod. 272; Forts. 212. But see *Courtney v. Collet*, 1 Ld. Raym. 272; S. C. Carth. 436; S. C. 12 Mod. 164.

For immediate injuries to exclusive rights, trespass is the proper remedy.* *Wilson v. Mackreth*, 3 Burr. 1824.

[1] In *Ladd v. Thomas*, 12 Ad. & E. 117, it was held that trespass was the right form of action for continuing on plaintiff's premises to keep possession of goods distrained after the distress has ceased to be lawful. *Winterbourne v. Morgan*, 11 East, 395; 1 id. 139. But a second distress upon goods seized and held under a former distress is not the subject of an action of trespass. *Lear v. Caldecott*, 4 Q. B. 123; 3 Gale & D. 491; 7 Jur. 277.

Case, not trespass, lies for firing guns near the plaintiff's decoy-pond. *Keeble v. Hickeringill*, 11 East, 574, from Holt's MS.; Holt, Rep. 14; 11 Mod. 74, 130; 3 Salk. 9. See *Carrington v. Taylor*, 11 East, 571; 2 Camp. 258; S. C. Peake, N. P.; Precedents, Petersdorff's *Index*, 118.

Semb. Case, and not trespass, is the proper remedy for continuing holdfasts in the plaintiff's wall after he has recovered in trespass for the original act. *Lawrence v. Obee*, 1 Stark. 22.

Putting out a board which overhangs the plaintiff's land will not entitle him to an action of trespass. *Pickering v. Rudd*, 1 Stark. 56; S. C. 4 Camp. 219. *See* 11 Mod. 74, 130; S. C. 3 Salk. 9; Holt, 14, 17, 19.

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* But for injuries to incorporeal rights, as obstruction of a right to light, or common, or way, or other easement, case is the proper remedy. Chitty, jun. Pl. 763.

FAY v. PRENTICE AND ANOTHER, 1 C. B. 829; 9 Jur. 877; 14 L. J. C. P. 298.

The rule *cujus est solum ejus est ad cœlum* does not apply in all cases.

Declaration in case stated that the defendants being possessed of a messuage adjoining a garden and messuage of the plaintiff, placed a cornice upon his messuage, projecting over the plaintiff's garden, by means whereof quantities of rain flowed from the cornice on to the garden, and did damage, and by reason of the premises the plaintiff had been greatly annoyed and incommoded in the use, possession, and enjoyment of his garden and messuage, and the same were damaged and deteriorated in value. *It was held*, that the projection in itself was a nuisance from which the law inferred a damage, and that the rule *cujus est solum ejus est ad cœlum* by no means exists in all cases. There are many instances in which that maxim does not apply; for example, in the cases of chambers in the Inns of Court. Here the plaintiff does not say the defendant has broken my garden, but that he has made a projection over my garden. That does not necessarily import a trespass.

(*c*) *Injuries to Personal Property.*[1]

PITTS v. GAINCE, 1 Salk. 10; S. C. 1 Lord Raym. 558; S. C. by the name of MIKES v. CALY, 12 Mod. 381; Holt, 467.

Where a ship has been detained by the defendant, the master may bring either trespass or case at his election.

In an action on the case the declaration stated, that the plaintiff was master of a ship which was laden with corn ready to sail, and that the defendant seized the ship, and detained her *per quod impeditus et obstructus fuit in viagio.* An exception was taken to the action on the ground that it should have been trespass *vi et armis;* and 4 Edw. 3, c. 4; 13 Hen. 7, c. 26; and Palm. 47, were cited. *Holt, C. J.*, observed, that in the cases cited the plaintiff had a property in the thing taken, but here the ship was not the master's, but the owner's. The master declared only as a particular officer, and could recover for his particular loss. He admitted, however, that the master might have brought trespass, and declared upon his possession, which was sufficient to maintain that action. *See* 3 Camp. 187, 188.

OXLEY v. WATTS, 1 T. R. 12.

Trespass lies for working an estray, although the original taking be admitted to be lawful.

In an action of trespass for taking a horse, the defendant justified, stating that the animal was an estray. *Replication*, that the defendant, after the taking, had worked the horse. It was objected that, as the original taking was admitted to have been lawful, the action should have been case, not trespass.

Sed per Cur. The working of the estray renders the defendant a trespasser *ab initio. See* 1 T. R. 536. *Taylor v. Cole*, 3 T. R. 292; Cro. Jac. 147; Yelv. 96, 97; 1 Salk. 221; 2 Wils. 313; 3 id. 20; Bull. N. P. 82.

WARD v. MACAULEY AND ANOTHER, 4 T. R. 489.

Where goods are leased to a tenant, the landlord's remedy against the sheriff for wrongfully seizing them is case.

In this action the plaintiff was the landlord of a house, which he had let ready furnished, and the lease contained a schedule of the furniture. An execution was issued against the tenant, under which the defendants, as sheriff, seized part of the furniture, although notice was given to the officer that it was the property of the plaintiff. The plaintiff having brought an action of trespass, the judge who tried the cause thought that trespass would not lie;

[1] Trespass to goods differs from a conversion in this, that the former includes every direct forcible injury or act disturbing the possession, without the consent of the owner, however slight or temporary the act may be; but an act of conversion must amount to a deprivation of the possession to such an extent as to be inconsistent with the right of the owner, and evidence an intention to deprive him of that right. *Fouldes v. Willoughby*, 8 Mee. & W. 540. *Smith v. Goodwin*, 4 B. & Adol. 413. 29 L. J. Ex. 185.

however, a verdict was taken for the plaintiff, with liberty for the defendants to move to enter a nonsuit.

Per Cur. The distinction between trespass and trover is well settled; the former is founded on possession, the latter on property. Here the plaintiff had no possession. His remedy was by an action of trover, founded on his property in the goods taken. Rule absolute. *See* 1 T. R. 480; 1 Car. & P. 347; 6 Mee. & W. 36; 9 Q. B. 592.

Tancred v. Allgood, 28 L. J. Ex. 362.

But no action will lie against a sheriff for selling the goods of the plaintiff in the possession of an execution debtor under a contract for hire, unless actual damage has been sustained.

The declaration alleged that the plaintiff was the owner of goods let to hire to T., and that the defendant took them out of T.'s possession, and absolutely sold and disposed of them so as to prevent their being followed, whereby the plaintiff was injured in her reversionary estate. *Plea*, that the defendant sold the goods as sheriff under a *fi. fa.*, and not in market overt, and that the plaintiff had not, and would not, sustain damages by reason of the premises. Demurrer and joinder.

Per Cur. In reality the damage sustained is the whole foundation of the action, for any temporary damage done while the plaintiff's right of possession was suspended by his contract with the third person would not be the foundation of any action at all. The plea avers that the plaintiff had not suffered, and would not sustain any damage whatever. We think, therefore, it is a good answer. See *Mayhew v. Herrick*, 7 C. B. 229; S. C. 18 L. J. C. P. 179.

Day v. Edwards, 5 T. R. 648. S. P. Savignac v. Roome, 6 T. R. 125.

When the declaration charges that the defendant *furiously* drove against the plaintiff's carriage, the action should be trespass.[1]

In case; the plaintiff declared that he was driving a landaulet, drawn by one horse, and that the defendant, on the same day, was driving a horse and cart, then under his management, and that the defendant so *furiously* and negligently drove the cart and horse, that it struck with great force and violence upon and against the carriage of the plaintiff. To which the defendant demurred specially, assigning for causes that the declaration was for a mere consequential injury, whereas it appeared to have been an immediate and direct trespass; that the plaintiff had declared in trespass on the case, whereas it ought to have been trespass *vi et armis*, &c. Joinder in demurrer.

Per Cur. The distinction between the action of trespass *vi et armis* and on the case is perfectly clear. If the injury be immediate, the action must be trespass; if the injury be merely consequential, case is the proper remedy. And as the plaintiff complains of an immediate act, he should have brought trespass. Judgment for the defendant. *See* 1 Stra. 636; 2 Blac. 892; 2 Wils. 259; 6 T. R. 125; 8 T. R. 188.

Leame v. Bray, 3 East, 593; S. C. 5 Esp. 18.

And if the injury be immediate, it need not be wilful.

Trespass; the declaration stated that the defendant drove and struck a single-horse chaise, which he was then driving along the highway, with force and violence against plaintiff's curricle. *Plea*, not guilty. At the trial it appeared that the accident happened on a dark night, owing to the defendant driving his carriage on the wrong side of the way, without any design on his part to injure the plaintiff; the objection that the injury having resulted from negligence, and not from design, that the form of action should have been case, and not trespass, was taken and allowed, and the plaintiff accordingly nonsuited. A motion was made to set it aside; 1st. On the ground that it was immaterial,

[1] Or where, in an action for running down a ship, the injury is stated to have been done *wilfully*. *Ogle v. Barnes*, 8 T. R. 188. See *Reynolds v. Clarke*, 1 Stra. 634. *Haward v. Banks*, 2 Burr. 1113. *Day v. Edwards*, 5 T. R. 648. *Savignac v. Roome*, 6 T. R. 125. *Tripe v. Potter*, 6 T. R. 128. *Morley v. Gaisford*, 2 H. P. C. 442. *Weaver v. Ward*, Hob. 134. *Scott v. Shepherd*, 2 Blac. Rep. 892; S. C. 3 Wils. 403. *Turner v. Hawkins*, 1 B. & P. 472; 1 East, 106; 3 East, 593; 1 Selw. N. P. 435.

in order to decide as to the form of action, to consider whether or not the defendant intended to injure the plaintiff; 2d. That the defendant had impelled the horse forward, and from that the injury happened, and so there being an immediate injury from an immediate act of force by the defendant, the proper remedy was trespass.

Per Cur. The distinction between the propriety of adopting case or trespass consists, not in the consideration whether or not the injury was wilful, but whether the injury was direct and immediate, or mediate and consequential. Here, if the defendant had simply placed his chaise in the road, and the plaintiff had run against it, the injury would not have been direct, but in consequence of the defendant's previous improper conduct, case would have been proper; but the injury happened from the immediate act of driving, which occasioned the concussion of the carriage, and trespass has been properly adopted. Rule absolute. *See* Hob. 134; 1 Stra. 596. *Tripe v. Potter*, 6 T. R. 128; and 8 id. 191. *Ogle v. Barnes*, 8 T. R. 188. *Scott v. Shepherd*, 3 Wils. 403; 2 Bl. 895, S. C.; *Reynolds v. Clarke*, 2 Ld. Raym. 1399; 1 Str. 636; Bull. N. P. 26, 79; *Day v. Edwards*, 5 T. R. 648; 2 Hen. 7, 28 a; 1 East, 106; 2 Lev. 172; 6 T. R. 659; 2 Camp. 464; 3 id. 187; 2 N. R. 117. *Wayde v. Carr*, 2 D. & R. 255.

Rogers v. Imbleton, 2 N. R. 117. Sheldrick v. Abery, 1 Esp. 55.

And the party injured has an election either to treat the negligence as the cause of action, in case; or the act itself as the injury, in trespass.

The plaintiff declared against the defendant for driving his cart against the plaintiff's horse with force and violence, alleging it to have been done "by and through the mere negligence, inattention, and want of proper care of the defendant." The defendant demurred, on the ground that the declaration ought to have alleged that the act had been committed *vi et armis*. But the Court were clearly of opinion, that as the declaration charged the defendant with mere negligence, the demurrer could not be sustained.

In this case *Sir J. Mansfield, C. J.*, expressed his disapprobation of the decision pronounced in *Leame v. Bray, supra.*

Covell v. Laming, 1 Camp. 497.

Trespass may be supported by the owner of one vessel against the owner of another, who is himself at the helm, and by whose unskilfulness the plaintiff's vessel is unintentionally run down.[1]

In an action of trespass for running the defendant's ship against the plaintiff's, it appeared that at the time of the accident the defendant was on board his ship, at the helm, but that there was a desire on the part of the defendant to steer clear of the plaintiff, and that the accident was to be ascribed to the mere unskilfulness of the defendant. It was contended, that as the act was not wilful, an action on the case was the proper remedy; but,

Per Lord Ellenborough, C. J. "Whether the injury complained of arises directly or follows consequently from the act of the defendant, I consider as the only just and intelligible criterion of trespass and case. The winds and the waves were only instrumental in carrying her along in the direction which the defendant commanded. The force, therefore, originated with him."

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[1] The following rules, extracted from the judgment delivered by *Lord Stowell*, in the High Court of Admiralty, in *Woodrose v. Sims*, as to the practice there, may be useful:— There are four probabilities, he says, under which an accident of this sort may occur. In the first place, it may happen without blame being imputable to either party, as where the loss is occasioned by a storm, or any other *vis major*. In that case the misfortune must be borne by the party on whom it happens to light, the other not being responsible to him in any degree. Secondly, a misfortune of this kind may arise where both parties are to blame, where there has been a want of skill or of due diligence on both sides. In such a case the rule in the Admiralty is, that the loss must be apportioned between them, as having been occasioned by the fault of both of them. Thirdly, it may happen by the misconduct of the suffering party only; and then the rule is, that the sufferer must bear his own burthen. Lastly, it may have been the fault of the ship which ran the other down; and in this case the injured party would be entitled to an entire compensation from the other. *See* 2 Dodson, *Adm. Rep.* 85.

(*d*) *Injuries to the Person.*[1]

UNDERWOOD v. HEWSON, 1 Stra. 596.

Trespass will lie for an immediate injury to the person, though unintentionally committed.[2]

The defendant was uncocking a gun, and the plaintiff standing to look at it, it went off and wounded him. It was holden that the plaintiff might maintain trespass. *See Dixon v. Bell*, 5 M. & S. 198. *Weaver v. Ward*, Hob. 134; *per Lord Ellenborough*, and *Lawrence, J.*, 3 East, 595; 3 Wils. 403; 2 Bl. Rep. 894; *ante* p. 83, note [1].

EWART v. JONES, 14 Mee. & W. 774; 3 D. & L. 252.

Trespass cannot be maintained against a creditor who, without malice, sues out a *ca. sa.*

Trespass for false imprisonment. *Plea*, justifying under a writ of *ca. sa.* on a judgment regularly obtained. *Replication*, that after the judgment was recovered plaintiff was discharged therefrom under the provisions of the Irish Insolvent Debtors' Act, 3 & 4 Vic. c. 107, and that the defendant, after such discharge, caused the plaintiff to be imprisoned on the said writ.

A stable-keeper who lets out a chaise and horse, driven by his own servant, has such a possession as will enable him to maintain *trespass* for an injury done by the hirer (*Dean v. Branthwaite*, 5 Esp. 35); or where there is a gratuitous permission to use a chattel, as the possession constructively remains in the owner, he may maintain trespass for an immediate injury to it. *Lotan v. Cross*, 2 Camp. 464. *See* 2 C., M. & R. 659; 15 Mee. & W. 212; 4 Ex. R. 343.

But if A.'s horses are hired by B., and C. drives a cart against them, A.'s remedy is case for the injury done to his reversionary interest. *Hall v. Pickard*, 3 Camp. 187.

The hirer of a carriage, who appoints his own coachman and furnishes the horses, may sue as the owner and proprietor of it, and may sue in case. *Croft v. Alison*, 4 B. & A. 590. *Quarman v. Burnett*, 6 Mee. & W. 499. *Laugher v. Pointer*, 5 B. & C. 547.

[1] Trespass to the person consists in any direct injury to the person, as a battery, an assault, or an imprisonment.

A battery is the unlawful beating of another. The least touching of another's person hostilely or against his will is a battery. *Rawlings v. Till*, 3 Mee. & W. 28; 3 Bl. Com. 120. It includes the striking another with a missile. *Pursell v. Horn*, 8 Ad. & E. 602. Touching a person for the purpose of inviting his attention is not a battery. *Coward v. Baddeley*, 28 L. J. Ex. 260.

An assault is an attempt at a battery; a menacing attitude, as holding up a hand or stick to strike a person who is within reach at the time, constitutes an assault. 3 Bl. Com. 120. *Stephens v. Myers*, 4 Car. & P. 349. *Read v. Coker*, 13 C. B. 850. A mere verbal threat, if followed by actual damage through fear thereof, as by the interruption of a man's business, will, it is said, support an action of trespass. 3 Bl. Com. 120.

An imprisonment consists in the restraint of the liberty of a person, as by confining him in a prison or within walls, or by the forcible detaining him in an open place. 3 Bl. Com. 127. It must amount to a total restraint of his liberty for some period, however short. A partial obstruction of his will, as the prevention of his going in one direction, or in all directions but one, does not constitute an imprisonment. *Birch v. Jones*, 7 Q. B. 742; *Lord Denman, C. J., dissentiente.* If a person order another, as a policeman, to take a third person, it is an imprisonment by the first as well as by the policeman, and the ground for an action of trespass against him. *Wheeler v. Whiting*, 9 Car. & P. 262. *Stonehouse v. Elliott*, 6 T. R. 315. If he merely states the facts to a policeman (or other person), who takes the party on his own responsibility, or if he procures a magistrate to issue a warrant for taking him, it is no imprisonment or trespass by him. Where, however, a person puts the law in motion maliciously and without reasonable or probable cause, it is the ground of an action *on the case* for malicious prosecution. *Barber v. Rollinson*, 1 C. & M. 330. As to the distinction between an action for a trespass and for a malicious prosecution, and the counts for each, see *Chivers v. Savage*, 25 L. J. Q. B. 85; 5 E. & B. 697. *Brandt v. Craddock*, 27 L. J. Ex. 314. *Guest v. Warren*, 9 Ex. 379.

[2] Hence, where a lighted squib was thrown in a market, and afterwards thrown about by others in self-defence, and ultimately hurt the plaintiff, the injury was considered as the immediate act of the first thrower, and a trespass. *Scott v. Shepherd*, 3 Wils. 403; 2 Blac. 892.

Where a justice of the peace maliciously and irregularly grants a warrant against a person without any information upon oath, the remedy against the justice should be trespass, not case. *Morgan v. Hughes*, 2 T. R. 225. Cited 6 id. 447.

But whenever an injury to a person is effected by *regular process* of a court of competent jurisdiction, but maliciously resorted to, case is the proper remedy. *Belk v. Broadbent*, 3 T. R. 183. *Cooper v. Booth*, 3 Esp. 135, cited in *Johnston v. Sutton*, 1 T. R. 535; S. P. *Goslin v. Wilcock*, 2 Wils. 302. *Smith v. Cattel*, 2 Wils. 376. *Morgan v. Hughes, supra. Stonehouse v. Elliott*, 6 T. R. 515. *Beecher v. King*, cited 1 Anst. 263. *White v. Taylor*, 4 Esp. 80.

upon a judgment after the debtor's discharge under the Irish Insolvent Act; but if a party knowing of an exemption from arrest maliciously sues out a writ case may be supported.[1]

Per Cur. It has been long established that exemptions from arrest will not entitle parties to sue in trespass where those exemptions have been violated. This was clearly settled in the case of *Tarleton v. Fisher*, *infra*, note [1]. It would be productive of great inconvenience and great mischief if a party were to be held liable in an action of trespass for issuing a writ where he had no notice whatever that he was not entitled to do so, or with no notice of a discharge obtained behind his back. And no argument can be founded on the hardship of the case; for, so far back as *Tarleton v. Fisher*, it was clearly laid down that a party who, knowing of an exemption from arrest, maliciously sues out the writ, is liable in an action on the case.

BROOKS v. HODGKINSON AND ANOTHER, 29 L. J. Ex. 93.

But trespass will lie for issuing a *ca. sa.* on a judgment for less than 20*l.*, and without the writ being first set aside.

Trespass for false imprisonment. *Plea*, justifying under a *ca. sa.* sued out a judgment recovered against the plaintiff. *Replication*, that the judgment was for a less sum than 20*l.*, inclusive of costs, and was recovered after the passing of the 7 & 8 Vic. c. 96, s. 57.

The above section enacts, "that no person shall be taken or charged in execution upon any judgment obtained, &c. wherein the sum recovered shall not exceed the sum of 20*l.*, *exclusive of the costs*." It was contended by the defendant that the proceedings were merely irregular, and that the *ca. sa.*, until set aside, protected him from an action of trespass.

Per Cur. The plain meaning of the statute is, that a man shall not be imprisoned for sums not exceeding 20*l.*; and if he is imprisoned, he may maintain trespass for the unlawful act. See *Riddell v. Pakeman*, 2 C., M. & R. 30.

(*e*) *Injuries to relative Rights.* *See* Husband and Wife; Master and Servant; Parent and Child; Seduction.

WINSMORE v. GREENBANK, Willes, 577; S. C. Buller, N. P. 78.

The husband may maintain an action on the case against a defendant who has enticed his wife to live apart from him without sufficient cause.[2]

The plaintiff declared that his wife, unlawfully and without his consent, had departed from him and continued absent; during which time a considerable real and personal estate had been devised to her, to her sole and separate use, and that thereupon she was desirous of returning, and again cohabiting with him, but that the defendant enticed and persuaded her to

[1] See *Tarleton v. Fisher*, 2 Dougl. 676. *Yearsly v. Heane and another*, 14 Mee. & W. 322. *Parsons v. Lloyd*, 3 Wils. 341. *Barker v. Braham*, id. 368. And where the declaration stated that the defendant had falsely and maliciously procured plaintiff to be adjudged a bankrupt, and the adjudication of bankruptcy had been made on an affidavit by defendant, containing statements which were not true in fact, the adjudication was subsequently annulled on the ground that the affidavit did not show that any act of bankruptcy had been committed:—*Held*, that an action on the case was maintainable, notwithstanding the defect in affidavit. *Farley v. Danks*, 4 E. & B. 493; 1 Jur. N. S. 381.

[2] And generally it would seem, with respect to personal injuries to the wife, committed before the marriage, the husband and wife *must* join in suing. With respect to injuries to the person of the wife during coverture, the husband and wife must join in suing, and the husband cannot sue alone for damages in respect of the injury to the wife, irrespective of its damage to himself; but may sue alone for damages occasioned thereby to himself solely. To recover these two sets of damages, he must therefore formerly have brought two separate actions, one by himself and wife, and the other by himself alone; but now by C. L. P. Act, 1852, s. 40, "in any action where the wife is necessarily joined as co-plaintiff, the husband may add thereto claims in his own right." It would also seem that the form of the action would be trespass or case, according as it would be if the wife were a *feme sole*. Thus, the husband may maintain trespass for driving against a chaise in which his wife is riding, *per quod* she is thrown out and injured. *Hopper and Wife v. Reeve*, 7 Taunt. 698; 1 Moore, 407. And the husband and wife may maintain case for an injury to the wife arising from the defendant leaving an open cellar near a public highway, with a count by the husband alone for the damage sustained in his own right. *Stone v. Jackson*, 16 C. B. 199. 2 Hill on *Torts*, 585. Add. on *Torts*, 711.

continue absent: by means of which she continued apart from him till her death, whereby he lost the comfort and society of his wife, and the advantage he ought to have had from such real and personal estate. After verdict for the plaintiff and 3000*l.* damages, it was moved in arrest of judgment that this was an action *primæ impressionis*. But the Court said that every action on the case was in itself a novelty; no action lies without damages, and the *per quod* will not alone be sufficient, unless the act done be unlawful: but though a bare enticement will not be sufficient nor actionable, yet the jury, under the direction of the judge, are judges of the legality. And as receiving the servant of another *scienter* is a ground for an action *à fortiori*, it is so in the case of a husband; and injuries that are in their nature of spiritual cognizance, if attended with a temporal damage, are actionable. See *Guy v. Livesey*, Cro. Jac. 501. *Hyde v. Scyssor*, Cro. Jac. 538.

COURTNEY v. COLLET, 1 Ld. Raym. 274. DAVIS v. STANNION, 2 Ld. Raym. 1042. DITCHAM v. BOND, 2 M. & S. 436; 3 Camp. 526. WOODWARD v. WALTON, 2 N. R. 476.

Per Holt, C. J. If A. brings an action against B. for battery of his servant, *per quod servitium amisit*, it is a plain action of trespass.

Trespass lies by a master for the battery of his servant, *per quod servitium amisit*.[1]

TAYLOR v. NERI, 1 Esp. 386.

Declaration against the defendant in case, for having assaulted and beat one B. engaged to perform at A.'s theatre, whereby he was deprived of B.'s services. But *Eyre, J. C.*, being of opinion that B. could not be considered as the servant of A., nonsuited the plaintiff, observing that if the present action could be supported, any man whose servant, whether domestic or not, was detained a day from his business, could maintain an action. *See* F. N. B., G. 2, H.; 1 Ex. 48.

But a public performer is not a servant of that description which will enable his employer to bring an action against a defendant for beating him.[2]

(*f*) *Injuries occasioned by Persons in Defendant's Employ.* *See* also Master and Servant; Nuisance; Principal and Agent.

MORLEY v. GAISFORD, 2 H. Black. 442.

In case, the declaration stated that the plaintiff was possessed of a chaise and horse, and that the defendant by his servant so negligently drove his cart that it struck against the chaise of the plaintiff with great force and violence, and broke the same, &c. A verdict was found for the plaintiff; and on the authority of *Day v. Edwards*, 5 T. R. 648, and *Savignac v. Roome*, 6 T. R. 125, a motion in arrest of judgment was attempted to be supported.

Case, and not trespass, is the proper remedy against a master for an injury sustained by the misconduct of his servant.

Sed per Cur. It is difficult to put an instance where the master can be considered as a trespasser for an act done by his servant which was not committed at his command, and therefore the rule laid down in the cases cited cannot be supported; as we are clearly of opinion that case, and not trespass, is the proper form of action. Rule discharged. *See* 2 Lev. 172; 1 Ld. Raym. 139; Dy. 238; 3 Mod. 323; 1 B. & P. 404; 1 Taunt. 568; 2 N. R. 446; 1 T. R. 659; 4 Man. & G. 58; 1 East, 106; Smith's M. & S. 172.

HUGGETT v. MONTGOMERY, 2 N. R. 446.

The plaintiff declared that the defendant with *force and arms* drove a vessel, whereof the defendant was the commander, against and over a certain boat of

As when the defendant's ship is run

[1] The gist of this action is the actual loss of service to the master from the act of the defendant. *Eager v. Grimwood*, 1 Ex. 61. *Davies v. Williams*, 10 Q. B. 725. *Grinnell v. Wells*, 7 Man. & G. 1033. *Griffiths v. Teetgen*, 15 C. B. 344; but the master may, if he chooses, waive the *tort*, and sue as upon a contract for the value of the services. *Lightly v. Clouston*, 1 Taunt. 112. *Foster v. Stewart*, 3 M. & S. 191.

[2] *Sed qu.* since *Lumley v. Gye*, 2 E. & B. 216; 17 Jur. 827; 22 L. J. Q. B. 463.

against the plaintiff's by the negligence of the pilot of the former.

the plaintiff, and sunk her *damno*, &c. *contra pacem*, &c. It appeared that the defendant was master and owner of the vessel by which the injury to the plaintiff's boat had been committed; but that, though on board at the time, he had not given the order which occasioned the accident, but the pilot had; that the vessel would not obey her rudder, and that mischief was owing to no design or wilful act of any person on board. It was left to the jury to say whether the accident was attributable to the mere force of the wind or to negligence. The jury gave a verdict for the plaintiff. On a motion to set aside the verdict and enter a nonsuit, on the ground that the action should have been an action on the case, and not trespass, the Court were of opinion that trespass could not be maintained against the defendant, and said the case differed from the case of *Leame v. Bray*, because here the defendant, though on board the vessel, did not give the order which occasioned the accident, but the pilot did; whereas in *Leame v. Bray* the defendant was driving the carriage which injured the plaintiff's vehicle. See *Covell v. Laming*, 1 Camp. 497; 21 L. J. Ex. 9.

GORDON v. ROLT, 18 L. J. Ex. 432; 4 Ex. 365; 7 D. & L. 87.

A master is not liable in trespass for the act of a servant, unless it can be shown that he ordered the particular act to be done.

Trespass for breaking the plaintiff's crane. *Plea*, not guilty. The crane was set up by the plaintiff, an iron-founder, in Portsmouth Dockyard, with a view to its being tested, and, if approved, ultimately purchased by the Government. It was not fixed to the freehold. The defendant was a contractor for the performance of important works at Portsmouth Dockyard, and he employed a person named Harvey, as a sub-contractor under him. The men employed by Harvey broke the crane by using it to snap off the head of a pole, which had been half sawn through. Cutting off the piles was part of the defendant's work under the contract. The defendant had never given any authority to Harvey, or his men, to use the crane, nor had he any knowledge that they had used it. Harvey knew that the men at times used the crane, but he had never authorised their using it for this particular purpose. It was contended on the trial that the defendant was not liable for the acts of the servants of Harvey, a sub-contractor, or that, if liable at all, the action should have been case, not trespass, as the defendant had given no authority to use the crane. The jury found that the injury was done by men employed by the defendant in the ordinary course of his work, and a verdict was found for the plaintiff, leave being reserved to the defendant to enter a nonsuit in case the Court should be of opinion that trespass was not the proper form of action.

Per Cur. The act was done by the men in the ordinary course of their work. Trespass only lies against a master if he orders the act to be done, or orders his servant to do some act which necessitates the act being done which causes the injury.

To render a master liable in trespass, you must be able to say from the evidence that the master ordered the servant to do the particular act. That is not the case here. *See* 1 East, 106; 4 Ex. Rep. 580; S. C. 7 D. & L. 213; 4 Man. & G. 452.

V. OF CIRCUITY OF ACTION.

JOHNSON v. CARRE, 1 Lev. 152.

To avoid circuity, a covenant in the same deed may be pleaded in bar to an action on the deed.[1]

In debt for rent on a lease for years. The defendant pleaded in bar, a covenant by the lessor that the lessee might deduct so much for charges. Upon demurrer to this plea, it was said,—

Per Cur. That the covenant being in the same deed is well pleadable in bar, the thing being executory, and the party shall not be put to the circuitous

[1] But it is otherwise when the covenant is in another deed, for the last deed does not take away the effect of the former; and a subsequent covenant cannot be pleaded in bar of a former; but the defendant must bring his action on the last indenture.

In *Turner v. Davies*, Keil. 34 b, 35 a, which was an action of covenant, the plaintiff

proceeding of bringing a cross action of covenant. *See* 1 Com. Dig. Action, H; Show. Ca. Parl. 17. *Dowse v. Jeffries*, Cro. Eliz. 352. *Hodges v. Smith*, Cro. Eliz. 623; 2 Saund. 479 g. Platt on Covenants, 593.

CARR v. STEPHENS, 9 B. & C. 758.

A plaintiff who, having a case against a defendant in one form of action, would be liable over to him in another on the same subject-matter, cannot sue.

In this case the defendant was the receiver of the plaintiff's wife's estate, who, by the directions of the husband, but without the wife's authority, accepted a bill for the husband's debt to the drawer, and was afterwards called upon by the husband and wife to pay over to them the rent received; and when the bill became due, he refused to pay it unless the plaintiff would give him an indemnity for being reimbursed by the husband and wife; which was accordingly given. The bill, however, not being ultimately paid, the Court held, that, to avoid circuity of action, the drawer could not maintain the action.

CHARLES AND ANOTHER v. ALTON, 15 Com. B. 46. S. C. 23 L. J. C. P. 197.

But the sum which the defendant is entitled to recover from the plaintiff must be the *same* as that for which the plaintiff sues.

The declaration stated, that by a charter-party the plaintiffs agreed to pay the defendant, the master of a vessel, one-third of the freight at the final sailing of the vessel, the same to be returned to the plaintiffs if the cargo should not be delivered at the port of destination, the plaintiffs insuring at the owner's expense, and deducting the costs out of the first payment of freight. The plaintiffs paid the defendant the one-third freight, deducting the costs of insurance. The ship and cargo were lost, and the plaintiffs brought their action to recover back the one-third freight. The defendant pleaded that the loss of the one-third freight was a loss which the plaintiffs were to be insured against; that the plaintiffs insured so negligently that the insurance was useless; and that by such negligence the plaintiffs became liable to the defendant for the same amount which they now claimed from the defendant, and liable to make good to the defendant such amount as he should have to return to the plaintiffs under the charter-party. The Court gave judgment for the plaintiffs. The defendant had not, by his plea, brought himself within the rule which enables a person to set up a defence in avoidance of circuity of action. The rule is plain as to circuity of action, that the defendant must be in a condition to show that the sum sought to be recovered is, of necessity, *the* sum which he is entitled to recover back from the plaintiffs under the same circumstances. See *Minshull v. Oakes*, 2 H. & N. 793; S. C. 27 L. J. Ex. 194.

ALSTON AND OTHERS v. HERRING, 25 L. J. Ex. 177.

And even where a cross action will lie the amount of damages sought to be pleaded in avoidance of

The declaration was for not delivering the plaintiffs' goods in good order and well conditioned, received by the defendant on board his ship, to be conveyed from Glasgow to Colombo, and agreed by him to be there so delivered. *Plea*, setting out a charter-party, by which the defendant, as owner, chartered the ship to the plaintiffs, and agreed to load a cargo from the plaintiffs' factors at Glasgow, and convey it to Colombo, and deliver the same to the freighters or

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declared, that the defendant had covenanted with him to collect his rents in C.; and assigned a breach, that the defendant did not collect them. The defendant pleaded that the plaintiff himself had interrupted his collecting the same. It was insisted that the plea was not good; for if it was, the defendant might bring trespass against the plaintiff, and recover damages, and therefore it was no plea to the action. But *per Cur.* The plea is good in avoidance of circuity of action; for if the defendant should bring trespass and recover damages, then the plaintiff might have an action of covenant against the defendant, and recover, which circuitous mode of proceeding the law will not suffer. But a cause of action against a plaintiff will be no bar to an action by him for avoiding circuity of action, when the recovery in both actions is not equal; as in waste it is no bar that the plaintiff covenanted to repair, for in waste the plaintiff is entitled to recover treble damages, but the defendant in his action of covenant could only recover single. *See* Moore, 23, pl. 80.

circuity of action must necessarily be the same in both actions, and the act of the plaintiffs must be the proximate cause of the damage.

their assigns. The plea then alleged that the plaintiffs shipped the goods mentioned in the declaration; and that the plaintiffs, not wishing to make up the whole cargo with goods of their own, contracted with Messrs. Milne & Co. to receive from them, and carry, certain cases of sulphuric acid on board the said ship for freight, to be paid by Messrs. Milne & Co. to the plaintiffs; and that Messrs. Milne & Co. shipped the said cases on board; and that it was the duty of the plaintiffs, as the shippers, to give notice to the owners of the ship of the article being sulphuric acid, in order that it might be stowed in some place where, if it leaked, it would not come in contact with other parts of the cargo; and that neither the plaintiffs nor Messrs. Milne & Co. gave the defendant notice; and that they caused the cases to be stowed near the goods mentioned in the declaration, and that some of the acid leaked, and damaged the goods, and so prevented the defendant from performing the agreement; and that the damage was occasioned by the plaintiffs' neglect. The plea concluded with an averment, that if the defendant was compelled to pay the plaintiffs any money for such damage, the defendant would be entitled to recover the same amount from the plaintiffs as damages sustained by him, by reason of thus omitting to give such notice. On demurrer to this plea the Court held, that the plea was no answer to the action, the act of the plaintiffs not being the proximate cause of the damage; and that, assuming a cross action would lie, the amount of damages would not be necessarily the same in both actions. *Jackson v. Isaacs*, 3 H. & N. 405.

Connop and another, Executors of Davey, v. Levy, 11 Q. B. 769.

A contract of indemnity made by the plaintiff to the defendant in respect of the debt sued for, may be pleaded in bar of the action.

The first set of counts of the declaration was for work done, and money paid by, and on an account stated, with Davey.. The second set was for the same, by and with the plaintiffs as executors of Davey. The first of the pleas alleged that Davey, being the projector of a company for a railway, agreed, in consideration of defendant consenting to act on the provisional committee, to indemnify him from any professional or other charges on account of the said railway; that defendant did consent so to act; that the works, monies, and accounts, in the two sets of counts mentioned, were in and about the surveying of the line of the said railway, and after the said agreement to indemnify; that defendant became liable to the said professional charges in respect of surveying the said railway, and the other charges on account of the said railway, and made the promises only in his character of member of the provisional committee, and not otherwise; that the project was abandoned, and the said work and money became useless and of no value; that any sums recovered on account of the said work and monies paid will be lost to the defendant, and the defendant will be damnified to that extent, contrary to the promise of Davey to indemnify. Upon demurrer the Court held, "that the plea shows that the causes of action were professional and other charges on account of the railway, comprised within the testator's agreement to indemnify, and that the defendant could recover from Davey, or his representatives, as much as the plaintiffs can recover from the defendant in respect of these causes of action. The plea, therefore, is a bar to avoid circuity of action. Judgment for defendant.

Bartlett v. Holmes, 13 Com. B. 630; S. C. 22 L. J. C. P. 182.

A breach by the plaintiff of the contract sued upon, since action brought, cannot be pleaded, or given in

The declaration stated, that before the time of the making of the contract between the plaintiff and defendant, the plaintiff had bought of Messrs. Hall, Holcroft, & Pearson, a certain quantity of iron, which the said Messrs. H., H. & P. then held at the disposal of the plaintiff, and which they were under an engagement to deliver to the order of the plaintiff, on presentation of a certain warrant in writing, duly indorsed by the plaintiff, which they had before handed to the plaintiff. And thereupon, in consideration that the plaintiff, at the de-

fendant's request, would sell to the defendant the said iron so held by the said Messrs. H., H. & P., and would indorse over to the defendant the said warrant, so as to enable the defendant to receive the said iron instead of the plaintiff, he, the defendant, promised the plaintiff to pay him the sum of 5000*l.* in manner following: that is to say, 2000*l.*, part thereof, on the 14th Feb. 1853, and the residue in certain bills of exchange, to be handed over by the defendant to the plaintiff. That the plaintiff did then sell to the defendant the said iron on the terms aforesaid, and did then indorse over to the defendant the said warrant, so as to enable the defendant to receive the said iron instead of the plaintiff. It also alleged that the defendant, in part performance, did hand over certain bills of exchange in discharge of the said sum of 5000*l.* Yet he did not, nor would, on the said 14th Feb. 1853, or at any other time, pay the plaintiff the said sum of 2000*l.* *Plea*, that the defendant could not have obtained, nor did he obtain, the delivery to him of the said iron from the said Messrs. H., H. & P. according to the tenor of the said warrant. At the trial it appeared that on the 27th Jan. 1853, he agreed to sell the iron to the defendant, to be delivered at any time within two months, taking for it a cheque for 2000*l.* dated the 14th Feb. 1853, and bills for the remainder. At the same time the plaintiff indorsed the warrant in blank, and handed it to the defendant. On the 14th Feb. the defendant's cheque for the 2000*l.* was dishonoured. The writ in the action was issued on the 21st Feb. About the middle of Feb. the delivery order was shown to Messrs. H., H. & P., but they refused to deliver the iron until the delivery order was given up to them. They would have delivered the iron at any time before the 14th Feb. on receiving the order. In the month of March, after action, Messrs. H., H. & P. refused to deliver the iron at all. The Judge thought the right of action was complete on the 15th of Feb., and that if the defendant had a right of action for the refusal by Messrs. H., H. & P. to deliver in March that was no defence to the action. The case came before the Court, and on the question of circuity of action, *Jervis, C. J.*, made the following observations:—"I think we should be carrying the doctrine of avoidance of circuity of action a great deal further than it ever has been carried before, if we were to allow the defendant to give in evidence a breach of the contract by the plaintiff subsequent to the bringing of the action in reduction of the damage. No doubt circumstances existing before action brought have been allowed to be pleaded in bar, to avoid circuity of action; but I do not think there is any case in which circumstances arising after action brought have been allowed to be pleaded in bar, or *puis darreign continuance*."

evidence in reduction of damages to avoid circuity of action.

Dean v. Newhall, 8 T. R. 168.

Debt on a joint and several bond for 200*l.* by the defendant and one C. Taylor. *Plea*, that while the bond remained in force, and before, &c., by a certain indenture made between the said C. Taylor of the first part; certain other persons, whose names were thereto subscribed and seals affixed, of the second part; and T. Fenner and C. Buckley of the third part; the plaintiff, for the consideration therein contained, released and discharged C. Taylor from his writing obligatory, and of and from any debt or sum of money due and owing to the plaintiff from C. Taylor thereon. The plaintiff replied, that he did not release C. Taylor *modo et formâ* issue.

A covenant or agreement not to sue for the same cause of action may be pleaded in bar to avoid circuity of action.[1]

At the trial it appeared that the defendant had become surety for Taylor to

[1] But a covenant by a plaintiff not to sue the defendant for any debt due from him to the plaintiff, cannot be pleaded as a release in bar of an action for a debt due to the plaintiff and another jointly. *Walmesly and another v. Cooper*, 11 Ad. & E. 216. And so, also, in an action by three joint payees of a promissory note against one of several, making a plea that one of the plaintiffs was also one of the makers, was held bad, and could not be supported on the ground of avoiding circuity of action. *Beecham and another v. Smith*, 27 L. J. Q. B. 257; Platt. on Cov. 593.

the plaintiff in the bond of 200*l.*; Taylor, becoming insolvent, by deed assigned all his effects to Fenner and Buckley, in trust for themselves and all the other creditors who should execute the deed. The plaintiff, one of the creditors, executed the deed, and received a dividend under it. In the deed was contained a covenant by the creditors that "they would not sue, arrest, implead, or prosecute Taylor, his executors or administrators, or his or their goods, &c., for or on account of any debt, &c.; and in case any of the said creditors should sue, &c., those presents should be a sufficient *release* and discharge, to all intents and purposes, both at law and in equity, to and for the said C. Taylor, his executors, &c.; and he and they should be and were thereby acquitted, *released*, and discharged against them the said creditors, &c., and such should and might be pleaded in bar by him, the said C. Taylor, &c.

It was contended by the plaintiff, that as the bond upon which the action was brought was joint and several, this deed could not be pleaded as a *release*, though as between the plaintiff and Taylor it might have the effect of a release, if Taylor only had become bound.

Lord Kenyon, C. J., held that the covenant was not a release in its nature, but only to avoid circuity of action. See *Hutton v. Eyre*, 6 Taunt. 289. *Thimbleby v. Barron*, 3 Mee. & W. 210, *infra*. *Ford v. Beech*, 11 Q. B. 852, 871. *Smith v. Mapleback*, 1 T. R. 446.

THIMBLEBY v. BARRON, 3 Mee. & W. 210.

But not a covenant or agreement not to sue for a limited time only.

This was an action of debt, in 1500*l.* for money paid, in 92*l.* for interest, and in 1600*l.* on an account stated. *Plea*, that as to the first and second counts, that the said 1500*l.* was paid by the plaintiff for the defendant's use, under a certain bond mentioned in deeds thereinafter mentioned, and that the same accrued, after the making of the deed of 21st June, thereinafter mentioned, upon and for the forbearance of the said monies so paid by the plaintiff for defendant's use, under and by virtue of the said bond; that plaintiff paid 750*l.* parcel, &c., at one time, and 750*l.* parcel, &c., at another, to one Edward Blithe Vise. And the defendant said that after the plaintiff had paid the first 750*l.*, and before he had paid the second, a certain deed had been made between plaintiff and defendant, reciting a family relationship existing between the parties. The plaintiff had become bound, at the request of the defendant, in a certain bond to Edward B. Vise, in the penal sum of 3000*l.*, conditioned to be void on payment of 1500*l.*, with interest, and reciting that the plaintiff had paid 750*l.* to the said E. B. Vise, in part discharge of the said bond, and that the principal sum of 750*l.* only remained due upon the said bond, and that the plaintiff had been requested by the defendant to pay the said remaining sum of 750*l.*; and that for the considerations therein specified plaintiff had agreed to advance the said sum of 750*l.*, and pay the same to the said E. B. Vise; and that he, the plaintiff, *should not, nor would, before the expiration of ten years from the date thereof, and which have not yet elapsed*, if the defendant should so long live, *call in, demand, or compel payment of the said sum of* 750*l. already advanced, or of the said sum of* 750*l.*, residue of the said sum of 1500*l.* in the declaration mentioned. And the defendant covenanted to pay the interest. General demurrer and joinder. The Court gave judgment for the plaintiff, taking the distinction between an absolute covenant not to sue and a covenant not to sue for a term limited. See *Ayloffe v. Scrimpshire*, Carth. 63; 1 Roll. Abr. 939. *Deux v. Jefferies*, Cro. Eliz. 352. *Lacy v. Kynaston*, 2 Salk. 575. *Smith v. Mapleback*, 1 T. R. 446. *Burgh v. Preston*, 8 T. R. 486; 2 Saund. 47 t. *Ford v. Beech*, 11 Q. B. 871. *Willis and another v. De Castro*, 27 L. J. C. P. 243. *Alston and others v. Herring*, 25 L. J. Ex. 177. *Connop and another, Executors of Davey, v. Levy*, 11 Q. B. 769. *Beecham and another v. Smith*, 27 L. J. Q. B. 257.

VI. Of splitting Actions.

Girling v. Alddas, 1 Vent. 73; 2 Keb. 617; S. C. 1 Lev. 464.

A party cannot separate one entire cause of action into parts, and sue for one part on one occasion, and the other on another.[1]

On a motion for a prohibition, it appeared that A. had contracted with B. for divers parcels of malt, the money to be paid for each.

By 9 & 10 Vic. c. 95, s. 63, it is enacted, "that it shall not be lawful for any person to divide any cause of action for the purpose of bringing two or three suits in any of the said courts:" *i. e.* County Courts.

In Re Grimbly v. Ackroyd, 1 Ex. 479; S. C. 17 L. J. Ex. 157.

Causes of action not to be split in the County Courts.

"Cause of action" means "cause of one action," and applies to the cases of tradesmen's bills, in which one item is connected with another, in the sense that the dealing is not intended to terminate with one contract;

This was an application for a writ of prohibition to issue to the Judge of the County Court of Worcestershire. Certain alleged agents of the defendant had given to several persons tickets for goods, which goods were to be supplied by the plaintiff, and the latter had brought 228 actions in the County Court against the defendant in respect thereof upon claims, none of which exceeded 5*l.*; many fell short of 20*s.*; the whole amounting to 303*l.* 19*s.* The Court granted a prohibition, and added that the above section applied at all events in the case of tradesmen's bills, in which one item is connected with another in this sense, that the dealing is not intended to terminate with one contract; but to be continuous, so that one item, if not paid, shall be united to another, and form one certain demand. *See* 18 L. J. Ex. 161; 21 id. Q. B. 388; 7 C. B. 106.

Kimpton v. Willey, 1 L. M. & P. 280; S. C. 19 L. J. C. P. 269; 14 Jur. 762.

but not where it does not appear that the items are connected, or the parties have treated them as forming one demand.[2]

The plaintiff brought two suits against the defendant in the County Court; one for 19*l.* 0*s.* 8*d.* for money lent between the years 1846 and 1850, and interest; the other for 19*l.* 19*s.* for work and labour, and goods sold and delivered between the years 1845 and 1850. It did not appear that the items in the two suits were connected, nor that the parties had ever treated them as forming one demand:—*Held*, that the plaintiff had not divided any cause of action within the meaning of the 9 & 10 Vic. c. 95, s. 63. *See* Broom, C. C. 53–55.

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[1] Hence, in slander, the plaintiff cannot have a second action by a new interpretation of the same words. *Gardner v. Heloes*, 3 Lev. 248. But where the causes of action are distinct, although they may all be due at the commencement of the suit, the plaintiff may sue for each separately. *The King v. Sheriff of Herefordshire*, 1 B. & Adol. 672. Therefore, the executors of a deceased rector may be sued in separate actions for dilapidations to different parts of the rectory. In *Young v. Munby*, 4 M. & S. 183. The Court said,—The damages sustained by the plaintiff originate from distinct and independent causes; the injury from the dilapidation of the rectory cannot be considered as identified with the non-repair of the chancel and pew: there is no entirety. In cases, however, of hardship, the Court would interpose, and restrain an improper use of such a distinction. *See* 1 Ld. Raym. 339; 1 Salk. 11.

If a plaintiff omits to give any evidence of a part of his demand in a prior action, though he had an opportunity of doing so, he is not precluded from bringing another suit; but he ought to show, beyond all controversy, that the second is a different cause of action from the first, in which he failed: in this case it is clearly shown that the demand was not inquired into on the former occasion. *Sedden v. Tutop*, 6 T. R. 607; S. C. 1 Esp. 401. *Hitchen v. Campbell*, 2 Bl. Rep. 830; S. C. 2 Wils. 309; 1 Phil. *Evid.* 254, 3d ed.; and *post*, Arbitration. *Ravee v. Farmer*, 4 T. R. 146. *Martin v. Thornton*, 4 Esp. N. P. C. 180. *Laing v. Chatham*, 1 Camp. 251. *Mure v. Laws*, 5 Bing. N. C. 444. *Thorpe v. Cooper*, 5 Bing. 129.

A second action may be brought for a part of a demand, where a plaintiff is incapable, for want of evidence, of sustaining his suit for it in the first. (*Heming v. Wilton*, 5 Car. & P. 54.) Or where the first action could not legally comprise all that is recoverable in the second. *Hodley v. Green*, 2 Tyr. 390.

[2] So where the items are of a different character, as for goods sold and money lent, separate plaints may be had. *Brunskill v. Powell*, 1 L. M. & P. 550; 19 L. J. Ex. 362. *See* also *Wickham v. Lee*, 12 Q. B. 521; 18 L. J. Q. B. 21; 12 Jur. 628.

XI. Of bringing an Action before the right to sue has legally accrued.

Harker v. Moreland, 2 Lev. 196; S. P. Venables v. Daffe, Carth. 114.

No action can be brought till the title of the plaintiff to bring it is perfect.

A *sci. fa.*, tested Feb. 12, was brought by plaintiff as administrator against the defendant. On oyer, it appeared that the letters of administration were dated on the 26th March. The defendant pleaded this in abatement. The Court said, as it appeared on the record that the plaintiff had prematurely brought his action, they were bound, *ex officio*, to abate the writ. *See* Cro. Eliz. 325; Cro. Car. 575; 1 Leon. 186; Yelv. 70; Ca. Temp. Hard. 141; 1 Vent. 135; 2 Lev. 13, 176; 1 T. R. 116; 1 B. & P. 367; 8 T. R. 456; 4 East, 75; 7 T. R. 4; Com. Dig. Pleader, c. 8; 1 Saund. 40, n. 1; 2 Black. Rep. 735. Abatement, Pleas in, p. 23.

Champion v. Skipweth, 1 Sid. 307.

Hence in debt upon bond, if a breach be assigned as committed after the commencement of the suit it will be bad.

Action of debt on bond. On oyer it appeared that the obligation was conditioned for the performance of covenants in an indenture. The defendant pleaded performance, and the plaintiff in his replication assigned a breach in the non-payment of rent becoming due after the commencement of the suit. Demurrer, and judgment for the plaintiff. *See* Lit. Rep. 61; Cro. Car. 272, 282; 3 Leon. 51; Hob. 198.

Broomfield v. Smith, 1 Mee. & W. 542.

And that the credit has not expired, need not be specially pleaded.[1]

Debt for goods sold and delivered. Plea, *nunquam indebitatus.* At the trial, the sale and delivery having been proved, the defendant proposed to show that the goods were sold on a credit which had not expired when the action was brought. It was objected for the plaintiff, on the authority of *Edmunds v. Harris*, 2 Ad. & E. 414, 4 Nev. & M. 182, that such defence was not admissible, unless specially pleaded; the Judge rejected the evidence, and the plaintiff had a verdict.

Rule was obtained for a new trial.

Per Cur. There is no debt till the credit has expired. How is the defendant indebted for goods sold and delivered till then? Rule absolute. *See* 3 Mee. & W. 473.

Strutt v. Smith, 1 C., M. & R. 312; S. C. 4 Tyr. 1019.

And where defendant is entitled to elect as to the period of credit, the plaintiff cannot sue till the expiration of time allowed for making the election.

In an action for goods sold, it appeared that the goods in question were sold on the terms of credit as follows: Prices of cotton yarns, &c., sold, &c., $7\frac{1}{2}$ per cent. discount, bill at three months; 10 per cent. discount, cash in fourteen days. The jury found a verdict for the plaintiffs for the whole price of the goods, with liberty to the defendant to move to enter a nonsuit if the Court thought the action was brought prematurely. On motion for that purpose, —

Per Cur. The plaintiffs and defendant defined their mode of dealing. The plaintiffs say we will deal with you either on the terms of your paying in cash at the end of fourteen days, or on the terms of your giving a bill at three months. The difficulty in the terms was as to what would be the credit if the cash were not paid and the bill were not given; but we need not determine that, as the plaintiffs have sued within the fourteen days, during which the defendant had a right to consider whether he would pay in cash or take the credit. See *Ferguson v. Carrington*, 9 B. & C. 59.

ACTIONEM non,[2] or Actionem ulterius non.

The allegation of *actio non*

By C. L. P. Act, 15 & 16 Vic. c. 76, s. 66, in a plea or subsequent

[1] See *Webb v. Fairmaner*, 3 Mee. & W. 473. *Mussen v. Price*, 4 East, 147. *Lee v. Risdon.* 2 Marsh. 495.

[2] A plea in bar, until the recent changes, had a formal commencement and conclusion, called respectively *actio non*, and the prayer of judgment.

pleading it shall not be necessary to use any allegation of *actionem non*, or *actionem ulterius non*, or to the like effect, or any prayer of judgment; nor shall it be necessary, in any replication or subsequent pleading, to use any allegation of *precludi non*, or to the like effect, or any prayer of judgment. By s. 67, no formal defence shall be required in a plea or avowry or cognizance, and it shall commence as follows, or to the like effect:—"The defendant by —— her attorney, or in person, says that," [*here state defence; if more than one plea, say*], "and for a second plea, defendant says that, &c." [*or if to part, so describe it.*] is no longer requisite.[1]

ACTON Burnel. A statute usually described as *Statutum de Mercatoribus*, because passed at a castle of that name in Shropshire, in the 11th Edw. 1. 2 Reeve's *Hist. Eng. Law*, 158–162; Barringt. *Obs. Stat.* 116. This statute was amended, and its provisions enlarged, by the 13 Edw. 1, st. 3, bearing the same title, *De Mercatoribus*.

ACTORE non probante absolvitur reus. *The plaintiff not proving* [his claim], *the defendant is discharged.* Hob. 103.

ACTORI incumbit probatio [onus probandi]. *The burden of proof lies on the plaintiff.* Hob. 103 a. *See* Evidence.

ACTS of Sederunt. In Scotland, an ordinance made by the Court of Session for regulating the forms of proceedings, in all actions, or matters before them. Ersk. *Inst.* b. 1, tit. 1, s. 40.

ACTS of Union. With Wales, 27 Hen. 8, c. 26. This statute in effect naturalises all persons born in the principality. *See* 1 Bl. Com. 94, 95; Welsh Judicature Act, 13 Geo. 3, c. 51; 1 Wm. 4, c. 70; and Wales; 2 Stark. 33; County Court.

——— With Scotland, 5 Anne, c. 8. *See* 6 id. c. 6; 7 id. c. 21; 21 Geo. 2, c. 48; and Scotland.

——— With Ireland, 39 & 40 Geo. 3, c. 67. *See* Ireland.

ACTUAL or bare Possession. *See* Abatement of Nuisance; Action;[2] Case; Detinue; Trespass; Trover.

ACTUARY. *See* Benefit Society; Joint-Stock Company; Life Insurance.

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[1] And before this statute by P. H. 4 Wm. 4, R. 9, the *actio non* was only requisite when pleading to the further maintenance of the suit. *Ratton v. Davis*, 1 Q. B. 496; 2 Mee. & W. 272; 6 Ad. & E. 824. Formerly a plea without this averment, where it was requisite, was specially demurrable. *Warley v. Harrison*, 3 Ad. & E. 763.

[2] It is a general rule, applicable alike to real and personal property (2 Bl. Com. 389), that possession is both sufficient and necessary to maintain an action for an immediate *tort* or wrong. Bare possession gives a right as against a wrong-doer, for the invasion of which an action of trespass is sustainable. *Per Ashurst, J., Smith v. Miles*, 1 T. R. 475. Hence, he who is in actual possession, whether he have a title or not, may maintain an action for an encroachment on his possessory right against any other person, except the real owner or he who has a paramount claim to possession. *See* 1 East, 246; 4 B. & C. 574; 1 B. & Adol. 241; 6 Bing. 516; 12 Ad. & E. 624.

A party in possession at the time of the injury may sue for it, though his possession has ceased at the time of suit. So a prior possession of land, accompanied with acts of ownership, by one through whom the plaintiff deduces title, will authorise a recovery against a defendant, who is afterwards found in possession without legal title or sustainable claim. And resumption of possession by the rightful owner will not defeat the prior wrongful possessor's action of trespass against a stranger. See cases, 2 Hill, *Torts*, 3.

"Property in chattels personal may be either in possession; that is, where a man has not only the right to enjoy, but has the actual enjoyment of the thing: or else it is in action; where a man has only a bare right, without any occupation or enjoyment. And of these the former, or property in *possession*, is divided into two descriptions—absolute and a qualified." "Actual possession is, *primâ facie*, evidence of a legal title in the possessor; and it may, by length of time, and negligence of him who has the right, by degrees ripen into perfect and indefeasible title. And at all events, without such actual possession no title in personalty can be perfect." 2 Bl. Com. 389. The character of

ACTUS Curiæ neminem gravabit. *An act of the Court shall prejudice no man.* Jenk. *Cent.* 118. Where a delay in an action is the act of the Court neither party shall suffer for it. 1 Taunt. 384; 6 Scott, N. R. 797; 1 Smith, L. C. 147 n. Thus, if one party die during a *curia adversari vult*, judgment may be entered *nunc pro tunc*, for the delay is the act of the Court. 1 Stra. 425. *See* Abatement of Suit, p. 10, n.

ACTUS Dei nemini facit injuriam. *The act of God does injury to no one.* 2 Bl. Com. 122, 560, 87; Broom, 108.

ACTUS inceptus, cujus perfectio pendet ex voluntate partium, revocari potest; si autem pendet ex voluntate tertiæ personæ, vel ex contingenti, revocari non potest. *An act already begun, the completion of which depends upon the will of the parties, may be revoked; but if it depend upon the will of a third person, or on a contingency, it cannot be revoked.* Bacon's *Max.* 79, reg. 20.

ACTUS Legis nemini facit injuriam. *The act of the law does injury to no one.* 5 Co. 116; *Eyre, C. J.*, 2 H. Black. 324, 334. Thus, if a lease be made to husband and wife during coverture (which gives them a determinable estate for life), and the husband sows the land, and afterwards they are divorced *a vinculo matrimonii*, the husband shall have the emblements in this case, for the sentence of divorce is the act of the law. 2 Bl. Com. 123. *See* Accident; and 2 Inst. 287; Broom, 89.

ACTUS Legitimi non recipiunt Modum. *Acts requiring to be done by law do not admit of qualification.* Hob. 153.

ACTUS me invito factus non est meus Actus. *An act done by me against my will, is not my act.* The concurrence of a person's will is essential to charge him with the act or its consequences. *See* Acquiescence; Admission; Assault; Contract; Husband and Wife; Infant; Lunatic.

ACTUS non facit reum, nisi mens sit rea. *An act does not make* [the doer of it] *guilty, unless the mind be guilty;* that is, unless the intention be criminal. 3 Inst. 107. The intent and the act must both concur to constitute a crime. *Lord Kenyon, C. J.*, 7 T. R. 514. *See* 2 Ad. & E. 612; Broom's *Max.* 144. This maxim is exclusively applicable to criminal law and to civil proceedings; for malicious arrest and malicious prosecution, slander and libel, in civil proceedings generally: the intent is immaterial if the act done be injurious to another. Id. 155, 161.

AD admittendum Clericum, or de Clerico admittendo. *For admitting a clerk.* A writ in the nature of an execution, in the action of *quare impedit*, founded on the judgment (that the plaintiff recover his presentation), and commanding the bishop to whom it is directed to admit his clerk. 3 Bl. Com. 250; 3 Steph. Com. 665.

AD comparendum. *To appear.*

AD comparendum, et ad standum juri. *To appear and to stand to the law, or abide the judgment of the Court.* Cro. Jac. 67.

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the possession depends much upon the nature of the subject of it; as in case of real and personal property generally; and, more especially, that possession of an easement (*see* Easement), for example, does not require possession of the corporeal property to which such easement appertains, but only a present right of enjoying the easement. Possession necessarily involves very different rights and liabilities as between the possessor and a mere stranger or wrong-doer, and as between such possessor and one having the right of property, present or future, in the same subject-matter.

AD Curiam. L. Lat. *At a Court.* 1 Salk. 195.

AD Damnum—Ad Dampnum. *To the damage.* In pleading, the emphatic words of the clause at the end of the declaration; literally, in the ancient forms, "to the damage of the said A. of ——, and therefore," &c.; and hence the clause itself was technically termed the "*ad damnum.*" 1 Chitt. Pl. 419. Now superseded; the conclusion being, "the plaintiff claims," &c.

AD ea quæ frequentius accidunt jura adaptantur. *Laws are adapted to those cases which most frequently occur.* 2 Inst. 137; 5 Co. 128; 6 id. 77; Wingate's *Max.* 716; *Max.* 101.

AD exitum. *At issue.* *See* Issue.

AD faciendum. See *Habeas Corpus.*

AD feodi firmam. *To fee farm.* *Fleta*, lib. ii. c. 50, s. 30.

ADDING. *See* Affidavit; Amendment; Bail; Declaration; Pleas.

ADDITION.[1] *See* also Abode, Place of, p. 54; Affidavit; Peer and Peerage; Titles.

ADDRESS. Attorney's to be indorsed on Process. See *Capias;* Summons, Writ of.

ADDRESS Card.[2]

ADDRESS of Plaintiff. *See* Abode, Place of, p. 54.

ADDRESS of Defendant. *See* Appearance.

[1] The title or description of a party, given in *addition* to his name. An affix used to identify an individual with greater precision, to show his estate, degree, mystery, and sometimes, but not correctly, includes the place of abode. In Sc. L. "designation" is used in the same sense. Pater. *Comp.* 480. The object of giving these additions is clearly explained in the stat. 1 Hen. 5, c. 5, by which the practice was introduced. It ordains that in actions where process in outlawry lay, such additions should be given to the name of the defendant, to show his estate, mystery, and place of residence, in order that *one man might not be vexed or troubled by the outlawry of another;* but that, by reason of the certain *addition*, every person might be known and bear his own burden. Barr on Stat. 381. But as neither the stat. 2 Wm. 4, c. 39, s. 1 (Uniformity Process Act), nor the 15 & 16 Vic. c. 76, giving the forms of writs of summons and *capias*, require the addition of the defendant to be inserted in the writ, the practice of doing so is entirely discontinued, and as there can now be no plea in abatement to the form of the writ (*see* Abatement, Pleas in, p. 13), no advantage can be taken of the omission. *Morris v. Smith*, 2 C., M. & R. 120. It need never be inserted in the declaration, unless the defendant be a peer or a person of higher degree. As outlawry can now only be obtained after judgment, the want of the defendant's addition, or an incorrect description of it, is immaterial.

A similar provision was applied by the statute of Hen. 5, to indictments, in order to identify the accused. But now it is sufficient if the party charged by the indictment be described by his Christian or first name and his surname; and it is no longer necessary, though still usual, to state his addition of place, or of degree or mystery. If, however, he have a name of dignity, he should be called by it. *R. v. Gregory*, 15 L. J. M. C. 38. Whether this description be a correct one or not is immaterial; for by stat. 7 Geo. 4, c. 64, s. 19, if any objection be made on this ground the Court shall forthwith cause the indictment to be amended, and shall call upon the party to plead thereto. *See* stat. 14 & 15 Vic. c. 100, s. 24. Nor was it ever essential to insert the addition of the prosecutor. 2 Hale, P. C. 183. *R. v. Peace*, 3 B. & A. 579. Under the Bill of Sale Act (17 & 18 Vic. c. 36) it has been held not sufficient if a party hold any office or occupation to describe him "gentleman." *Allen v. Thompson*, 1 H. & N. 15; S. C. 25 L. J. Ex. 249. Nor an attorney's clerk as "gentleman." 27 id. C. P. 293; S. P. 28 id. Ex. 249.

[2] To make a defendant's card evidence, notice must be given him to produce his card, unless the one proposed to be given in evidence can be proved to have been given to the witness by the defendant himself. *Clark v. Capp*, 1 Car. & P. 199. *Per Lord Tenterden.* An address given by parties in a carriage is evidence against the owner in an action for negligent driving. *Beaman v. Ellice*, 4 Car. & P. 585.

ADDRESSES of the Houses of Parliament. These, as well as the speech of the Sovereign from the Throne, would be evidence, in the nature of reputation of the public matters they recite. *R. v. Francklin*, 17 How. St. Tr. 636, 638.

ADEMPTION of Legacy. *See* Legacy.

ADEQUATE Consideration. *See* Accord and Satisfaction, p. 88; Annuity; Bill of Sale; Bond; Contract; Deed; Voluntary Conveyance.

AD filum Aquæ. *To the thread, or central line, of the Stream.*

AD filum Viæ. *To the thread of the Way.*

ADJOINING. *See* Abuttals, p. 81; Boundaries; Building Act; Common; Easements; Lights; Nuisance; Walls; Watercourses; Ways; Windows.

ADJOURNMENT. *See* Inquiry, Writ of; Summons and Orders; Trial.

ADJOURNMENT Day. Causes tried at the adjournment of a sitting are to be considered as tried on the first day of the sittings. *Cheetham v. Sturtevant*, 12 Mee. & W. 515; S. P. *Taylor v. Harris*, 3 B. & P. 550.

ADJUSTMENT. *See* Insurance.

ADMINISTERING Poison or Drugs, with Intent, &c. *See* Abortion, p. 55; Murder; Poison.

ADMINISTRATION.[1] *See* Executor & Administrator; Probate, Court of.

[1] By the interpretation clause of the 20 & 21 Vic. c. 77, the term "administration" "shall comprehend all letters of administration of the effects of deceased persons, whether with or without the will annexed, and whether granted for general, special, or limited purposes."

The practice and procedure of the ancient ecclesiastical courts, now abolished, were in some respects commendable, in others they were open to exception. The course of proceeding in the Prerogative Court of Canterbury was, in a large measure, made the model of that of the other courts. The non-contentious, or, as it was called, "common-form" business, constituted by far the greater part of the testamentary business, and the practice with reference to it was simple, and well adapted to the purpose intended. To prove a will in common form it was necessary to have recourse to a proctor; a party was not allowed, as he was in contentious cases, to act in person. The mode of proceeding, which is substantially adopted under the new act, was this:—"The will or testamentary instrument intended to be proved was brought to a proctor, whose duties were to examine it carefully, and to see whether it was properly executed and attested; whether it contained cancellations, interlineations, or erasures; whether it appointed executors; whether it referred to other papers, &c. Affidavit was made by the executor, or party applying for the grant, of the death of the alleged testator, and that his personal estate did not exceed a specified amount (in pursuance of stat. 55 Geo. 3, c. 184, s. 38). If the proctor found no fatal defect, the testamentary instrument and affidavit were brought into the Registry of the Court, where they were again examined by a subordinate officer, who, if he discovered any difficulty or apparent irregularity, referred the question to one of the deputy registrars; and the latter, if he felt any doubt, required the matter to be brought before the Judge of the Court. If ultimately all was found correct, the grant of probate or of letters of administration, with the will annexed, issued in common form under the seal of the Court; but if any substantial question presented itself, the parties whose interests were affected by the testamentary instrument were required to be cited before probate or administration was granted. In cases of intestacy the claimant had to make an affidavit, stating the death of the intestate, that the value of the property was below a certain amount, that the deceased died intestate, and that the claimant filled some character entitling him to a grant. Any one desirous of questioning the validity of the will, or the right to administration, caused to be entered a *caveat*, or warning against granting probate or administration without previous notice to the person entering it. The proctor entering the *caveat* disclosed only his own name, and not that of his principal. The notice required was afterwards sent to the proctor entering the *caveat*, or, in technical language, "the *caveat* was warned." Thereupon, either the *caveat* was withdrawn or not acted upon, in which case probate or administration proceeded in common form, without a disclosure of the name of the person on whose behalf the *caveat* was entered; or else the party warned appeared and opposed the grant, whereupon the matter became contentious. Jebb's Introd. to Act 20 & 21 Vic. c. 77.

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I. By whom Administration may be granted.

(A) *By the Court of Probate.*

(*a*) *Jurisdiction to grant and revoke vested in.*

Jurisdiction to grant and revoke letters of administration is vested in the Court of Probate.

By the 20 & 21 Vic. c. 78, s. 4, "the voluntary and contentious jurisdiction and authority in relation to the granting or revoking probate of wills and letters of administration of the effects of deceased persons, now vested in, or which can be exercised by any court or person in England,[1] together with full authority to hear and determine all questions relating to matters and causes testamentary, shall belong to and be vested in her Majesty, and shall, except as hereinafter is mentioned, be exercised in the name of her Majesty, in a court to be called the Court of Probate, and to hold its ordinary sittings, and to have its principal registry, at such place or places in London or Middlesex as her Majesty in Council shall from time to time appoint."

(*b*) *Suits pending at passing of Act transferred to.*

Suits pending at passing of Act transferred.

By the 84th & 85th sections of the 20 & 21 Vic. c. 77, provision is made for the transfer to the new Court of Administration of suits pending in the old tribunals at the time the act came into operation. And by the 21 & 22 Vic.

[1] By the third section, all the existing jurisdictions are abolished.

c. 95, s. 14, it is provided that all non-contentious business pending in any ecclesiastical court when the Court of Probate Act came into operation should be deemed to have been transferred to the Court of Probate, in the same way as all pending suits were transferred to the said Court under the said act.

(B) *By District Registrars.*

(*a*) *Where Deceased had fixed Place of Abode within District.*

District registrars may grant administration upon affidavit that deceased at the time of his death had a fixed place of abode within the district.

By the 20 & 21 Vic. c. 77, s. 46, "probate of a will or letters of administration may, upon application for that purpose to the district registry, be granted in common form by the district registrar in the name of the Court of Probate, and under the seal appointed to be used in such district registry, if it shall appear by affidavit of the person, or some or one of the persons applying for the same, that the testator or intestate, as the case may be, at the time of his death had a fixed place of abode within the district in which the application is made, such place of abode being stated in the affidavit;[1] and such probate or letters of administration shall have effect over the personal estate of the deceased in all parts of England accordingly."

(*b*) *Provided no Contention is pending as to Grant.*

Provided no contention is pending as to the grant.

By sect. 48, "the district registrar shall not grant probate or administration in any case in which there is contention as to the grant until such contention is terminated or disposed of by decree or otherwise, or in which it otherwise appears to him that probate or administration ought not to be granted in common form."[2]

(C) *Jurisdiction of County Court.*

(*a*) *Contentious Jurisdiction of, in cases where Personal Estate under* 200*l.* *and Real Estate under* 300*l.*

Judge of County Court has contentious jurisdiction where registrar of principal registry is satisfied personal estate

By the 21 & 22 Vic. c. 95, s. 10,[3] "where it appears by affidavit,[4] to the satisfaction of a registrar of the principal registry that the testator or intestate, in respect of whose estate a grant, or revocation of a grant, of probate or letters of administration is applied for, had at the time of his death his fixed place of abode in one of the districts specified in Schedule A. to the said Court of Probate Act,[5] and that the personal estate, in respect of which such probate or letters of administration are to be or have been granted, exclusive of what the deceased

[1] The affidavit is conclusive as to the abode; and the administration protects persons dealing with the administrator, notwithstanding the want of or defect in such affidavit. 20 & 21 Vic. c. 77, s. 47.

[2] The district registrars are required to communicate with the principal registry before granting administration, for the purpose of ascertaining whether any other application has been made (20 & 21 Vic. c. 77, s. 49); and in case of doubt they may transmit a statement to the registrars of the Court of Probate for the direction of the judge. S. 50.

[3] Substituted for the 54th section of the 20 & 21 Vic. c. 77, which by sect. 11 is repealed.

[4] The affidavit as to the place of abode and state of the property of a testator or intestate, which is to give contentious jurisdiction to the Judge of a County Court, is conclusive for the purpose of authorising the exercise of such jurisdiction, and the grant or revocation of administration in compliance with the decree of such judge. Neither are the letters of administration liable to be revoked if it should turn out that the affidavit was erroneous in either respect. But if it should appear that the affidavit is incorrect in either respect, while the proceedings are pending, the Judge of the County Court will stay all further proceedings in his court, "leaving any party to apply to the Court of Probate for such grant or revocation, and making such order as to the costs of the proceedings before him as he may think just." 20 & 21 Vic. c. 77, s. 57.

[5] Schedule A. is a Table of the "Districts and Places of District Registries throughout England and Wales."

may have been possessed of or entitled to as a trustee, and not beneficially, but without deducting anything on account of the debts due and owing from the deceased, was at the time of his death under the value of 200*l.*, and that the deceased at the time of his death was not seised or entitled beneficially of or to any real estate of the value of 300*l.* or upwards, the Judge of the County Court having jurisdiction in the place in which the deceased had at the time of his or her death a fixed place of abode, shall have the contentious jurisdiction and authority of the Court of Probate in respect of questions as to the grant and revocation of the will or letters of administration of the effects of such deceased person, in case there be any contention in relation thereto."[1]

of the deceased is under 200*l.* and real estate under 300*l.*

And by the 55th section of 20 & 21 Vic. c. 77, the Registrar of the County Court is required to transmit a certificate of the decree to the district registrar of the district in which it was sworn the deceased had his fixed place of abode; "and thereupon, on the application of the party or parties in favour of whom such decree shall have been made, a probate or administration, in compliance with such decree, shall be issued from such district registry, or, as the case may require, the probate or letters of administration heretofore granted shall be recalled or varied by the district registrar according to such decree."

(*b*) *Appeal lies to Court of Probate.*

By the 20 & 21 Vic. c. 77, s. 58, "any party who shall be dissatisfied with the determination of the Judge of the County Court in point of law, or upon the admission or rejection of any evidence, may appeal from the same to the Court of Probate, in such manner and subject to such regulations as may be provided by the rules and orders to be made under this act, and the decision of the Court of Probate on such appeal shall be final."

Appeal from County Court to Court of Probate.

(*c*) *It is not, however, obligatory to go to County Court.*

By the 20 & 21 Vic. c. 77, s. 59, "it shall not be obligatory on any person to apply for probate or administration to any district registry, or through any County Court."[2]

But it is not obligatory to make the application in the County Court.

(*d*) *But if in Court of Probate, Judge may send it to County Court.*

20 & 21 Vic. c. 77, s. 59, "but in every case such application may be made through the principal registry of the Court of Probate, wherever the testator or intestate may at the time of his death have had his fixed place of abode: Provided that where, in any contentious matter arising out of any such application, it is shown to the Court of Probate that the state of the property and place of abode of the deceased were such as to give contentious jurisdiction to the Judge of a County Court, the Court of Probate may send the cause to such County Court, and the Judge thereof shall proceed therein as if such application and cause had been made to and arisen in his court in the first instance."

If in the Court of Probate, however, the Judge may send it to the County Court.

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[1] By 20 & 21 Vic. c. 77, s. 56, the County Court Judge "before whom any disputed question shall be raised relating to matters and causes testamentary under this act, shall, subject to the rules and orders under this act, have all the jurisdiction, power, and authority to decide the same, and enforce judgment therein, and to enforce orders in relation thereto, as if the same had been an ordinary action in the County Court."

The 60th section empowers the framing of rules for regulating the procedure and practice of the County Courts in relation to proceedings under this act, by the same authority as in other matters of jurisdiction in the County Courts. *See* a further power to frame rules given by the 21 & 22 Vic. c. 95, s. 13.

[2] By the 21 & 22 Vic. c. 95, s. 12, it is enacted, that this section "shall, so far as the County Court, or a judge thereof, is concerned, apply to an application for a revocation of a grant of probate or administration, as well as to an application for any such grant."

II. To whom Administration may be granted.

(A) *To the Next of Kin.*

(*a*) *Administration is granted to Next of Kin of Deceased.*

Administration is granted to the next of kin.

By 31 Edw. 3, s. 1, c. 11, the ordinary shall depute the next and most lawful friends of the deceased person intestate to administer his goods; and the 21 Hen. 8, c. 5, s. 3, provides that, in case any person die intestate, or that the executors named in any testament refuse to prove it, the ordinary shall grant administration to the widow of the deceased, or to the next of kin, or to both, as by the discretion of the same ordinary shall be thought good. The same section further provides, that where divers persons, equal in degree of kindred to the deceased, claim administration, the ordinary shall be at liberty to accept any one of them.

(*b*) *The Husband is entitled to administer to the Estate of his Wife.*

Wilson v. Drake, 2 Mod. R. 20.

The husband is entitled to administer to the estate of his wife.

The husband has a right, exclusively of all others, to be the administrator of his wife.[1]

(*c*) *But the Widow has not an absolute Right to Administration of the Estate of her Husband.*

Sand's Case, Raym. 931; Sid. 179.

But the widow has not an absolute right to be administratrix to her husband.

But a widow has not an absolute right to be appointed administratrix to her husband. The Court has an election to grant it to her or to the next of kin, as to the father, or other next of kin, and not to the wife. See *Blackborough v. Davis*, 12 Mod. 618.[2]

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[1] See Cro. Car. 106; 1 Saund. R. 26; 1 Plowd. 381; 11 Vin. Abr. 86. The husband is preferred even though the marriage be voidable, unless sentence of nullity be declared before her death. (Cro. Eliz. 482.) But he is not entitled to administration if the marriage be void *ab initio*, or if the wife be of unsound mind. (*Browning v. Reane*, 2 Phil. R. 69.) And the husband is so entitled, although it should be agreed before marriage that the wife should have power to make a will. (*Rex v. Bettesworth*, 2 Str. 891. *See* 11 Vin. Abr. 87; Gilb. Eq. R. 143.) Unless he has parted with all his interest in her property (*Rex v. Bettesworth*, 2 Str. 1111; 2 Barn. 420); or done some other act to exclude himself (id. 218). By the old practice, if the husband died before he obtained administration, it was granted to the wife's next of kin. (1 Williams on Exors. 338.) But by the present practice, if the property does not belong to them, it shall be granted to the husband's representative. (*Fielder v. Hanger*, 3 Hagg. 769.) But if the next of kin are entitled to the beneficial interest (as by settlement) the administration is still to be decreed to them, because the principle is, that the grant ought to follow the interest. *In the Goods of Pountney*, 4 Hagg. 289. *See* also *Gutteridge v. Stilwell*, 1 M. & R. 486. *Joy v. Duckett*, 1 Craig & Phil. 312.

The rule of the Prerogative Court was, that where the husband and wife were drowned in the same ship, it was presumed that they perished at the same moment, unless proof could be obtained as to the exact time of the death of either. Hence in such cases, in order to entitle the husband to the wife's property, it must be proved that he survived her, and consequently the administration thereof must be granted to her next of kin, if his representatives cannot give any such proof. *In the Goods of Selwyn*, Hagg. 748; 1 Curt. 705. *Latterthwaite v. Powell*, 1 Curt. 705.) In a recent case (*In the Goods of Wainwright*, 28 L. J., M. & P. 2), an application was made for letters of administration to the mother of deceased, an officer, who, together with his wife and an only child, were killed in the Cawnpore massacre, in June 1857. The application was made in consequence of the inability to make an affidavit that the deceased died a widower. The Court said, that as there was nothing to show that the deceased wife survived, administration ought to be granted as prayed.

[2] Or the Court may grant administration to them jointly (*Cox v. Webb*, Comb. 289. *Anon.* 12 Mod. 16); or in part to the wife and in part to the next of kin. *Fawtry v. Fawtry*, 1 Salk. 36; Holt, 42; 1 Shaw, 351. *Anon.* 1 Str. 551.

In modern practice, however, the election of the judge is in favour of the widow under ordinary circumstances. (*Stretch v. Pynn*,

(*d*) *Of Next of Kin, the half Blood is equally entitled with the whole Blood.*

Smith v. Tray, 1 Vent. 307, 316; S. C. 1 Mod. 204.

Of the kin, the half-blood are equally entitled to administration with the whole blood.[1]

Of the kin, the half blood are equally entitled with the whole blood.

(*f*) *And if all are of equal Degree, the Court grants Administration to which it pleases.*

Blackborough v. Davis, 12 Mod. 610.

Administration may be granted to which of kindred in equal degree the Court pleases.[2]

If the next of kin die before administration granted, his representative is entitled to it. 2 Hagg. Appendix, 157 ; 1 Wms. Exors. 360.

And if all are of equal degree, the Court grants to which it pleases.

(*g*) *Administration may be granted to their Attorney where they reside abroad.*

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1 Cas. Temp. Lee, 30. *Goddard v. Goddard*, 3 Phil. 638. *See* also *Atkinson v. Barnard*, 2 Phil. 317.) But the Court has always held that administration may be granted to the next of kin, and the widow be set aside upon good cause. For instance, if she has barred herself of all interest in her husband's personal estate by her marriage settlement (*Walker v. Careless*, 2 Cas. Temp. Lee, 560); or where she is a lunatic (*In the Goods of Williams*, 3 Hagg. 217. *In the Goods of Dunn*, 5. *Notes of Cases*, 97); or where she has eloped from her husband and cohabited in his lifetime with another man (*Fleming v. Pelham*, 3 Hagg. 217, n. 6. *Conyers v. Kitson*, 3 Hagg. 556); or has lived separate from her husband. (*Lambell v. Lambell*, 3 Hagg, 568. *Chappell v. Chappell*, 3 Curt. 429.) But the circumstance of the wife having married again is no valid objection. *Webb v. Needham*, 1 Add. 494.

In *Evans v. Burrell*, 28 L. J., P. & M. 82, application was made for letters of administration of an intestate who died in Van Dieman's Land, to be granted to his brother in this country: the widow of the intestate was resident in Australia, where she had married a second husband. She had been cited, but had not entered an appearance. *Sir C. Cresswell* said: "Before I grant the motion an affidavit should be filed, that neither the deceased's widow nor her husband has any agent in this country."

[1] Therefore the brother of the half blood will exclude the uncle of the whole blood. *Collingwood v. Pace*, Vent. 425.

(*e*) *And such as are nearest in Degree are preferred.*

A father is entitled to administration of his son's effects in preference to his brother or sister. (*Coplestone v. Coplestone*, 2 Show. 307. *Taylor v. Ames*, 2 Show. 285.) A mother is preferred to a brother or sister; a grandmother before a niece or aunt; and a brother or sister before a grandmother. (*Blackborough v. Davis*, 12 Mod. 623; 1 Salk. 38; Holt, 43; 1 Ld. Raym. 684, S. C. *See* 11 Vin. Abr. 93; Com. Dig. Administration, B. 6.) The order is thus:—In the first place, the children and their lineal descendants to the remotest degree; and on failure of children, the parents of the deceased are entitled to the administration; then follow brothers and sisters, then grandfathers and grandmothers, then uncles or nephews, great grandfathers and great grandmothers, and, lastly, cousins. 1 Williams on Exors. 350.

[2] As to the considerations by which the Court are influenced in exercising this discretion, the following rules have been laid down:—Where there are several next of kin in equal degree, the Court has the exercise of its discretion, and grants administration to him whom the majority of parties interested desire, if there is no material objection to that course. *Elwes v. Elwes*, 2 Cas. Temp. Lee, 573. *Budd v. Silver*, 2 Phil. 115. *Williams v. Wilkins*, ib. 101. *Darwick v. Greville*, 1 Phil. 123. *Cartwright's case*, 1 Freem. 258. *Coppin v. Dillon*, 1 Hagg. 376. But see *Weldrill v. Wright*, 2 Phil. 248. And in a contest between one of the whole blood and one of the half blood, will prefer the whole blood, unless material objections can be proved. *Mercer v. Morland*, 2 Cas. Temp. Lee, 499. And if all other considerations are equal, primogeniture may form a ground of preference. *Warwick v. Greville*, 1 Phil. 125. *Coppin v. Dillon*, 4 Hagg, 376. Again, a son is preferred to a daughter, unless there are material objections to him. *Chittenden v. Knight*, 2 Cas. Temp. Lee, 559. *Cæteris paribus*, a man accustomed to business is preferred. *Williams v. Wilkins*, 2 Phil. 100. And one who is unobjectionable to another who has been a bankrupt. *Bell v. Timiswood*, 2 Phil. 23. The fact of a next of kin being also a creditor, is rather adverse than favourable to his claim to administration. *Webb v. Needham*, 1 Add. 494. A sole is generally preferred to a joint administration. 1 Phil. 126. *Stanley v. Bernes*, 1 Hagg. 222. But see *contra*, *Jacomb v. Harwood*, 2 Ves. sen. 267.

IN THE GOODS OF JOSEPH LEESON, 29 L. J., P. & M. 19.

Administration may be granted to the attorney of the next of kin where they reside out of the jurisdiction; and even where the attorney resided in France, but the sureties to the bond were both in England, the grant was made.

Application for letters of administration to Miss Leeson, who had been appointed by her niece in India to be her attorney for the purpose of obtaining such grant. Miss Leeson resided in France, and she had, with two sureties who resided in England, entered into the usual administration bond.

Sir C. Cresswell. "Where the person entitled to administration and the attorney were both resident in the same place, out of the jurisdiction, the late Judge of the Prerogative Court declined to grant administration to the attorney. Here that is not so, and as the next of kin are resident in India, and the attorney is on the other side of the Channel, I think, as the sureties of the administration bond are both resident in England, that the grant should issue to Miss Leeson." [1]

(B) *In case of Foreign Domicile.*

(*a*) *Administration is granted to Person entitled according to the Law of Country of Domicile.*

(*b*) *As to the* Factor loco tutoris *to the Infant Children of a deceased domiciled Scotchman.*

IN THE GOODS OF WM. JONES, 28 L. J., P. & M. 80.

Administration will be granted to the person entitled according to the law of the country of domicile.[2] Thus, where there was a *factor loco tutoris* to the infant children of a deceased domiciled Scotchman, the Court granted letters of administration to him.

A domiciled Scotchman died in England, possessed of certain shares in an English joint-stock company,[3] the Court granted letters of administration to a

[1] See *In the Goods of O'Byrne*, 1 Hagg. 316. Administration may be granted to the attorney of all the next of kin, provided they reside out of the jurisdiction; and if the effects are under 20*l.* such administration may be granted, it seems, whether they are so resident or not. 1 Wms. Exors. 361; Toller, 108. See *Lucas v. Lucas*, 2 Cas. Temp. Lee, 576. *In the Goods of Reitz*, 3 Hagg. 766. *In the Goods of Eldeston*, 4 Hagg. 210. *Re Elector of Hesse*, 1 Hagg. 93. Where letters of administration are granted to persons under a power of attorney from the party entitled to the representation, the letters express that they are granted "for the use and benefit" of the latter. *See* 10 Sim. 629; 2 Hare, 537, n. a., where the form of such letters will be found at full length. But these words do not exclude the claim of other persons to share in the personal estate. *Anstruther v. Chalmer*, 2 Sim. 5. And such an administrator is liable to be sued in respect of the estate of the intestate by the parties beneficially interested in it, in the same way as if he had obtained letters of administration in his own right. *Chambers v. Bicknell*, 2 Hare, 536. See *De la Viesca v. Lubbock*, 10 Sim. 629.

[2] If the intestate was domiciled in a foreign country, and left assets in this country, administration must be taken out here as well as in the country of domicile. *Le Breton v. Quesne*, 2 Cas. Temp. Lee, 261. *Attorney-General v. Bowens*, 4 Mee. & W. 193. If the party applying for administration here has already obtained a grant in the proper Court of the country where the domicile was, it should seem that the Court here, generally speaking, would follow that grant. *Viesca v. D'Aram Ouru*, 2 Curt. 277. *In the Goods of Rogerson*, id. 656. But if an original administration be applied for here, in such case, whether the deceased were a British subject or an alien, since, in either event, the distribution of his personal property is to be regulated according to the law of the country in which he was a domiciled inhabitant at the time of his death, it appears to be a necessary consequence that the grant should be made to the person entitled to the effects of the deceased according to the law of that country. See *In the Goods of Johnson*, 4 Hagg. 182; 1 Wms. Exors. 355.

In the case of a foreigner dying intestate within the British dominions, it should seem, that if no question is raised, the Court will grant administration to the person entitled to the effects of the deceased, according to the law of his own country. *In the Goods of Beggia*, 1 Add. 340. If the legal title be disputed, the question will depend on the fact whether the deceased was domiciled within the British dominions, or only a temporary resident there. 1 Add. 342.

[3] In *Evans v. Burrell*, 28 L. J., P. & M. 82, application was made for the grant of letters of administration to the brother of the intestate, who died in Van Dieman's Land.

Sir C. Cresswell. "It does not appear from the affidavits that there is any property of the deceased in this country. Unless there is, I have no jurisdiction to decree that letters of administration should be granted. Before the grant issues, you must satisfy the registrar that there is property in this country for it to issue a probate upon."

person who had been appointed by the Court of Session at Edinburgh *factor loco tutoris* to the infant children of the deceased.[1] As to Administration in Scotland, *see* Pater. *Comp.* 732, 733.

(*c*) *And to the Guardian of an Infant abroad, notwithstanding he would not have been appointed Guardian here.*

In the Goods of Luis Bianchi, 28 L. J., P. & M. 139.

The Court, upon the application of the attorney of a person who was appointed the guardian of infants, upon the marriage of their mother with a second husband, by the Court of Orphan's at Brazil, the domicile of their father, granted letters of administration to him.

So where a person, other than the mother of the infant, was appointed guardian according to the law of Brazil, the place of domicile, the Court granted administration to his attorney.

(C) *In case of Insolvency of Intestate, or where Executor abroad, by virtue of the* 20 *&* 21 *Vic. c.* 77, *s.* 73.

(*a*) *In case of Insolvency of the Estate of an Intestate, or where Executor abroad, the Court may appoint such person Administrator as it may think fit.*

By the 20 & 21 Vic. c. 77, s. 73, "where a person has died or shall die wholly intestate as to his personal estate, or leaving a will affecting personal estate, but without having appointed an executor thereof willing and competent to take probate, or where the executor shall at the time of the death of such person be resident out of the United Kingdom of Great Britain and Ireland;[2] and it shall appear to the Court to be necessary or convenient in any such case, by reason of the insolvency of the estate of the deceased,[3] or other special circumstances,[4] to appoint some person to be the administrator of the personal estate of the deceased, or of any part of such personal estate, other than the person who, if this act had not been passed, would by law have been entitled to a grant of administration of such personal estate, it shall not be obligatory upon the Court to grant administration of the personal estate of such deceased person to the person, who, if this act had not passed, would by law have been entitled to the grant thereof; but it shall be lawful for the Court in its discretion to appoint such person[5] as the Court shall think fit to be such

In case of insolvency of the estate of the deceased, or other special circumstances, Court may appoint such persons to be administrator as it shall think fit.

[1] Where, according to the rules regulating the proceedings of the Court of the country of the intestate's domicile, administration would be granted to a minor, the Court here will not follow that rule, since an infant is incapable of doing the acts necessary to the character of administrator. If the infant elects as his guardian his next of kin, the Court will grant administration to him. *In the Goods of the Duchesse d'Orleans*, 28 L. J., P. & M. 129.

[2] See *In the Goods of Escot*, 28 L. J., P. & M. 17.

[3] Where the intestate died insolvent, leaving children who were minors, and who had no known relations, and were the only persons entitled in distribution, the Court appointed a creditor guardian to the children for the purpose of taking out administration. *In the Goods of Elisha Peck*, 27 L. J., P. & M. 106.

[4] The Court in a recent case resorted to the discretionary power, by which it is invested under this section, in a case where the presumption of death had arisen by the absence of a person for more than seven years, during which he had not been heard of: his father died five years after the son was last heard of. There being nothing to raise any presumption as to whether the son had survived or pre-deceased his father, the *Judge Ordinary* said he should cut the knot by having recourse to the power given by the 73d section, and under this section granted administration to the next of kin of the son. *In the Goods of W. Peck*, 29 L. J., P. & M. 95.

[5] The Court cannot, under this section, grant general administration to a person entitled to limited administration only; as, for example, to grant general administration to a guardian, instead of with the usual limitation "during the children's minority." "It is a power to substitute one person for another as administrator, not to substitute one description of administration for another." *Per Sir C. Cresswell, In the Goods of S. Smith*, 27 L. J., P. & M. 105.

The Court will not in general, under the above section, grant administration to a person other than he who is entitled by law to administration, merely on the ground that such person is abroad. It must in general be shown that such person has received notice of the intended application, and has had an opportunity of accepting or refusing letters of administration. The Court, however, has power under the section

administrator, upon his giving such security, if any, as the Court shall direct; and every such administration may be limited as the Court shall think fit."

(D) *Administration with the Will annexed, where Executor resident abroad.*

(*a*) *Under special circumstances, Court will grant Administration until such time as Executor shall apply.*

In the Goods of James Lewis, 29 L. J., P. & M. 94.

The Court, under special circumstances, will grant limited administration, with the will annexed, where the executor is abroad, before he has renounced or appointed his attorney.

J. Lewis died, leaving a will, in which he appointed two executors in trust, one of whom died in his lifetime. W. Lewis, the surviving executor, was at the time of the testator's death resident in Australia. A. Lewis, his agent here under a general power of attorney, sent out to W. Lewis a form of special power of attorney for A. Lewis to take out administration, and also a form of renunciation; and in the meantime, with the consent of all the persons interested under the will, he applied for a limited grant of administration. The mother of the deceased was residuary legatee for life; but she was incompetent, by senility, to take a grant. Subject to her interest, the residue was bequeathed to A. Lewis and others.

The *Judge Ordinary* granted administration, limited until such time as W. Lewis should apply for probate, or his attorney for letters of administration with the will annexed.[1]

(E) *Where Administrator resident abroad.*

(*a*) *Administration may be granted to any Creditor, Next of Kin, or Legatee.*

If administrator residing abroad twelve months after

By 20 & 21 Vic. c. 77, s. 74, "the provisions of an act 38 Geo. 3, c. 87,[2] shall apply (in like manner) to all cases where letters of administration have been granted, and the person to whom such administration shall have been

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to act without such notice having been given, but the circumstances must be special to induce it to do so. *In the Goods of H. Cooke*, 27 L. J., P. & M. 43. *In the Goods of F. Keene*, 28 L. J., P. & M. 34.

And in a case decided shortly after the passing of the act, the Court granted administration to the father-in-law of the next of kin of the intestate, for the use and benefit of his son-in-law, who was in Australia, until he should apply for the same to be granted to himself, on the applicant giving justifying security, and being assigned to exhibit an inventory of the goods. *In the Goods of John Jones*, 28 L. J., P. & M. 17.

[1] Previous to the passing of the 20 & 21 Vic. c. 77, administration was granted where the executor was beyond the sea at the time of the death, limited to such time as he should return. *Hodge v. Clare*, 4 Mod. 14; 1 Lutw. 342. *See* also *Slater v. May*, 2 Ld. Raym. 1071; 1 Salk. 42. *Beale v. Simpson*, 1 Lutw. 632.

[2] By the 38 Geo. 3, c. 87, it is enacted, that if at the expiration of twelve calendar months after the death of the testator the executor (or, according to the effect of the recent statutes, "the administrator"), to whom probate has been granted, is residing out of the jurisdiction of the King's Courts, the Ecclesiastical Court, which has granted the probate, may, upon the application of any creditor, next of kin, or legatee, grounded on affidavit, grant a special administration to such creditor, next of kin, or legatee, for the purpose of being made a party to a bill in equity, to be exhibited against him, and to carry the decree into effect, and no further or otherwise. By sect. 4, the Court of Equity, in which the suit shall be depending, may appoint any person to collect the debts due to the estate, and give discharges for the same. By sect. 5, if the executor capable of acting as such shall return to reside within the jurisdiction of any of the King's Courts pending such suit, such executor shall be made party to such suit, and the costs incurred by granting such administration, and by proceeding in such suit against such administrator, shall be paid by such person out of such fund as the Court shall direct.

And by the 21 & 22 Vic. c. 95, s. 78, "the provisions of an act, the 38 Geo. 3, c. 87, and of the Court of Probate Act, shall be extended to all executors and administrators residing out of the jurisdiction of her Majesty's Courts of law and equity, whether it be or be not intended to institute proceedings in the Court of Chancery; and to all grants made before and subsequently to the passing of the last-mentioned act; and it shall be lawful to alter the language of the grant prescribed by the first-mentioned statute, so as to make it apply to grants made in the Court of Probate under the said last-mentioned act."

granted shall be out of the jurisdiction of her Majesty's Courts of law and equity."

grant of letters, administration may be granted to any creditor, next of kin, or legatee.

(F) *Where Executor dies without taking Probate, or being cited does not appear, or renounces Probate.*

(*a*) *The Court may grant Administration.*

By the 21 & 22 Vic. c. 95, s. 16, "whenever an executor appointed in a will survives the testator, but dies without having taken probate, and whenever an executor named in a will is cited to take probate, and does not appear to such citation, the right of such person in respect of the executorship shall wholly cease, and the representation of the testator and the administration of his effects shall and may, without any further renunciation, go, devolve, and be committed in like manner, as if such person had not been appointed executor."

Where executor dies without having taken probate, or being cited does not appear, the Court may grant administration.

(*b*) *As where a surviving Executor does not appear to the Citation.*

Collison v. Mawe, 28 L. J., P. & M. 90.

One only of three executors proved the will; upon the death of such executor intestate, the Court granted letters of administration to the attorney of the residuary legatee (the residuary legatee herself being abroad), and the only surviving executor not appearing to the citation, calling upon him to accept or refuse probate.

As where a surviving executor does not appear to the citation.

(*c*) *Or where the Executor renounces Probate.*

In the Goods of J. J. Martindale, 28 L. J., P. & M. 29.

J. Martindale died in 1857, leaving a will, by which he appointed J. Weekes his sole executor and universal legatee in trust. After directing that his debts should be paid, he bequeathed the residue of his property to the said J. W., in trust for such person or persons as Martha Brown should, by any writing or writings under her hand, or by her last will and testament, notwithstanding her coverture, appoint, and in default of appointment, for her sole and separate use. Weekes renounced probate. Martha Brown, under the power given by the will, assigned by an indenture of appointment and assignment all her separate estate, and all her right and interest given to her by the will, and also her right and title to the letters of administration with the will annexed, to E. M. and H. W. J., upon trust for the purposes therein mentioned, in order that they might apply for letters of administration, with the will annexed. They, by the indenture, accepted the trust. The Court being moved to grant administration to them accordingly, it being contended that the indenture was a sufficient exercise of the power to entitle the nominees to a grant of letters of administration,—

Sir C. Cresswell. At present there is only a copy of the indenture of assignment in the registry. The original must be brought in and compared with the copy in the registry. If that is found correct, the grant may go as prayed.

Administration, with the will annexed, granted to the nominees of a married woman appointed pursuant to a power in that behalf under a will, the sole executor renouncing probate.

(*d*) *After Administration granted, the Executor cannot act in any way as to the Personal Estate affected by the Grant.*

By the 20 & 21 Vic. c. 77, s. 75, "after any grant of administration, no person shall have power to sue or prosecute any suit, or otherwise act as executor of the deceased, as to the personal estate comprised in or affected by such grant of administration, until such administration shall have been recalled or revoked."

After administration granted, the executor cannot act in any way as to the personal estate affected by the grant.

(*e*) *But if Executor dies Intestate after Probate, Administration* de bonis non *is necessary.*

TINGREY v. BROWN, 1 B. & P. 310.

Where executor dies intestate after probate, administration *de bonis non* is necessary.

If a surviving executor or sole executor dies *after* probate, then no interest is transmissible to his own administrator, but administration of another sort becomes necessary, which is called administration *de bonis non;* that is, of the goods of the original testator left unadministered by the former executor.[1]

(*f*) *Which is generally granted to the Person having the largest Interest.*

REPPINGTON v. HOLLAND, 2 Cas. Temp. Lee, 254.

The party having the largest interest is in general preferred.

With regard to the rule according to which the Court acts in granting administration *cum testamento annexo*, the general principle is, that he who has the greatest interest in the effects of the deceased will be preferred in a contest for the representation.[2]

(*g*) *Administration with Will annexed cannot be granted unless the Will applies to Personalty.*

O'DWYER v. GEARE AND OTHERS, 29 L. J., P. & M. 47.

Administration with will annexed cannot be granted unless the will applies to personalty.

Application for administration, with the will annexed, to M. O'D. of the personal estate of M. P. In execution of a power contained in her marriage settlement, M. P. made a will disposing of real estate, and appointing G. and E. her executors, but she made no testamentary disposition of any personal estate.

Sir C. Cresswell. "The grant cannot be made with the will annexed, inasmuch as the testatrix died intestate, except as to certain real property devised in execution of a power. I agree that the original appointment of executors would operate to prevent an intestacy as to any part of the property of the deceased, and that their renunciation or non-appearance to a citation would not so operate as to cause an intestacy; but the question turns upon the effect of the appointment of executors, not upon their renunciation or non-appearance. The will professes to deal with nothing but some real property, by virtue of a power of appointment to G. and E., and their heirs, &c., upon trust, and afterwards appointing them executors in trust of that her will. In *Tugman v. Hopkins*, (4 Man. & G. 400), *Tindal, C. J.*, in a well-considered judgment, ruled that executors so appointed took nothing *jure representationis*, and that as to property not disposed of under the power the deceased died intestate; so, here the executors would take nothing *jure representationis*. The will operated only on the property disposed of in execution of the power, and the grant to M. O'D. must be without the will annexed. She may swear that the testatrix made no will except as to real estate."

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[1] This administration will be granted to the person generally entitled to administration *cum testamento annexo*. 1 Wms. Exors. 388.

[2] *See* also *Dobson v. Cracherode*, 2 Cas. Temp. Lee, 326. *Elwes v. Elwes*, id. 573. *Weldrill v. Wright*, 2 Phil. 248. *Tucker v. Westgarth*, 2 Add. 352. *In the Goods of Gill*, 1 Hagg. 341. Hence the residuary legatee is preferred to the next of kin (*Presant v. Goodwin*, 29 L. J., P. & M. 115. *Atkinson v. Barnard*, 2 Phil. 318. *Taylor v. Shore*, T. Jones, 162. *Thomas v. Butler*, 1 Vent. 219), even where there is no residue, or where he is only trustee (*Atkinson* v. *Barnard*, 2 Phil. 316. *Hutchinson v. Lambert*, 3 Add. 27); and his representative has the same right. *Jones v. Bytagh*, 3 Phil. 635. *Yster v. Stanley*, Dyer, 372 a. But the next of kin have a *primâ facie* right, and therefore, where a party claims derivatively from a residuary legatee, the burden of proof lies on such party. *Taylor v. Diplock*, 2 Phil. 261. And if the residuary legatee declines, administration *cum testamento annexo* is usually granted to the next of kin. Or it may be granted to a legatee if they are cited and do not appear. *In the Goods of W. Watts*, 29 L. J., P. & M. 108.

(G) *Grant to Creditor.*[1]

(*a*) *Affidavits must show that all Persons entitled in Distribution have been cited.*

BROWN v. WILDMAN, 28 L. J., P. & M. 54.

Affidavits must show that all persons entitled in distribution have been cited.

Motion for grant of letters of administration to creditor. It appeared that J. W., the intestate's son, and only next of kin, had been served with a citation, but had not appeared.

Sir C. Cresswell. "I cannot on the affidavits filed grant the motion. In the first place, though it appears from them that J. W. is the only next of kin of the deceased, it is consistent with them that the deceased may have left grandchildren. Further, though it appears that J. W. is a minor,[2] the affidavits do not state that he was served with a citation in the presence of any one else."[3]

(*b*) *And the Amount of the Personal Estate of the Deceased.*

BRIGGS v. ROOPE, 29 L. J., P. & M. 96.

And the amount of the personal estate of the deceased.

Before administration will be granted to a creditor an affidavit of the amount of the personal estate of the deceased must be filed.[4]

(*c*) *If no Next of Kin are known to exist, Notice of the Application ought to be advertised.*

CLAYTON v. BROWN, 28 L. J., P. & M. 128.

If no next of kin are known to exist, notice of the application ought to be advertised.

M. Brown died intestate, without any known relation. A citation was issued under the seal of the Court, citing the next of kin and persons having interest in the estate of the deceased to accept or refuse letters of administration, or show cause why they should not be granted to J. C., as a creditor of the deceased. An abstract of the citation, settled by one of the registrars, was, by his direction, advertised twice, with an interval of a fortnight, and notice was given to the Queen's proctor.

The *Judge Ordinary* granted administration to the creditor.[5]

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[1] If none of the next of kin will take out administration, a creditor may by custom do it (2 Black. Com. 505; 2 Cart. 850), on the single ground that he cannot be paid his debt until representation to the deceased is made (*Elme v. De Costa*, 1 Phil. 177); and therefore administration is only granted to him failing every other representative. *Webb v. Needham*, 1 Add. 494. *Graham v. Maclean*, 2 Cart. 659. So, letters of administration may be granted to the executor of a creditor: *Jones v. Beytagh*, 3 Phil. 635. The Court does sometimes grant administration to more creditors than one, but it prefers that one should be fixed on. *Harrison v. All Persons in general*, 2 Phil. 249. *Kearney v. Whitaker*, 2 Cas. Temp. Lee, 324. *Carpenter v. Shelford*, id. 502. And on the petition of the others it will compel the one selected to enter into articles to pay debts of equal degree in equal proportions, without any preference of his own. Fonbl. on Equity, B. 4, Pt. 2, c. 2, s. 2 n. m; Toller, 106; 1 Wms. on Exors. 364.

[2] *See*, as to service on a minor, *Cooper v. Green*, 2 Add. 454.

[3] The necessary course is, when a creditor applies for administration to issue a citation for the next of kin in particular, and all others in general, to accept or refuse letters of administration, or show cause why administration should not be granted to such creditor. *In the Goods of Barker*, 1 Curt. 592. The next of kin may appear to the citation, and will then be preferred to the creditor; but if the next of kin has unduly delayed to take out administration (as where six months elapse from the death of the intestate) the creditor will be allowed his costs. *Cole v. Rea*, 2 Phil. 428. See *Jones v. Beytagh*, 3 Phil. 635.

[4] *See* also to same effect *Martineau v. Read*, 2 Add. 455. An affidavit is also necessary of the amount of the debt, and that the creditor has no other security. *Aitkin v. Ford*, 3 Hagg. 193.

[5] By rule 58 of the original rules of the Probate Court it is ordered that "Citations against all persons in general, and other instruments heretofore required to be served by affixing them in some public place, are in future to be served by the insertion of the same as advertisements in such of the leading morning and evening papers and such of the local papers as the judge may from time to time direct. Such citations can only be allowed to issue in cases where there is an affidavit to lead them."

(H) *Administration* pendente lite.

(*a*) *Administrator may be appointed pending a Suit touching Validity.*

An administrator may be appointed pending any suit touching the validity of the will.

By the 20 & 21 Vic. c. 77, s. 70, "pending any suit touching the validity of the will of any deceased person, as for obtaining, recalling, or revoking any probate or any grant of administration,[1] the Court of Probate may appoint an administrator of the personal estate of such deceased person; and the administrator so appointed shall have all the rights and powers of a general administrator, other than the right of distributing the residue of such personal estate; and every such administrator shall be subject to the immediate control of the Court, and act under its direction."[2]

(I) *Administration* durante minore ætate.

(*a*) *Granted in case the Person entitled to administration is within Age.*

Cartwright's Case, 1 Freem. 258.

Granted in case the person entitled to administration is within age.

The intestate died, leaving four grandchildren, whereof one was of age and the other three were minors, and the administration was contested betwixt her that was of age and the mother and guardian of the other three; and this case was argued at Serjeants' Inn, before the two Chief Justices and the Chief Baron, *et al.*, who granted it to the mother, as guardian to the three, *durante minore ætate;* though it was strongly urged that she that was of age being capable, and the others incapable, she ought to be preferred: but, on the other hand, it was laid down, that since the statute (22 & 23 Car. 2, c. 10) which entitled them all to a distribution, the interest of the three preponderated, and therefore that was to be regarded; and they compared it to the case of a residuary legatee, who shall be preferred before the next of kin.[3]

(K) *Grant to a Corporation named Executor.*

(*a*) *Administration is granted to their Syndic.*

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[1] In *De Chatelain v. De Pontigny*, 28 L. J., P. & M. 18, the Court appointed the defendant in the suit, no opposition being made, saying, however, at the same time, that if the plaintiffs had objected they would have thought it better that administration should be granted to a third party.

By the 21 & 22 Vic. c. 95, s. 22, all the provisions contained in the 20 & 21 Vic. c. 77, respecting grants of administration pending suit are to be deemed to apply to the case of appeals to the House of Lords under that act.

[2] By section 72 the Court of Probate may direct that administrators appointed pending suits involving matters and causes testamentary shall receive, out of the personal and real estate of the deceased, such reasonable remuneration as the Court think fit. He may be sued on the contracts of the deceased. *Impey v. Pitt*, 2 Show. 69; T. Jones, 133.

[3] Administration *de minore ætate* is also granted if the person appointed sole executor be an infant, but not if a co-executor be of full age. *Pigot v. Gascoigne's case*, Brownl. 46. *Foxwist v. Tremain*, 1 Mod. 47; 4 Burn's Ecc. L. 384, by Phillim. See *contra*, *Colborne v. Wright*, 2 Lev. 240.

By rule 35 it is ordered, "Grants of administration will continue to be made, as heretofore, to the guardian of minors and infants, for the use and benefit of such minors and infants during their minority; and election by minors of their next of kin or next friends, as the case may be, to such guardianship, will continue to be required, but proxies accepting such guardianship will in future be dispensed with."

There is no absolute right to this kind of administration, but the Court exercises a discretion in granting it to such persons as it thinks fit. *Buers v. Goddard*, Hob. 250. *Thomas v. Butler*, Vent. 219. *West v. Willby*, 3 Phil. 379. *Rex v. Bettesworth*, 1 Barn. 370. Usually the Spiritual Court granted it to the guardian (*Brotherton v. Harris*, 2 Cas. Temp. Lee, 131. As to guardian of child domiciled abroad, *see ante*, p. 170); but the Court sometimes passed over the guardian, and granted it to trustees (*Appleby v. Appleby*, 1 Cas. Temp. Lee, 135. *Hughes v. Ricards*, 2 id. 543), creditors (*West v. Willby*, 3 Phil. 374), or next of kin (*In the Goods of Ewing*, 1 Hagg. 381), where circumstances rendered that course more expedient.

IN THE GOODS OF E. DARKE, 29 L. J., P. & M. 71.

The testatrix by her will and codicil gave the greater part of her property for the purpose of building and endowing a church at Exeter, and appointed the Bishop of Exeter and the Dean and Chapter of Exeter her executors. The Bishop of Exeter renounced. Motion for the grant of letters of administration, with the will annexed, to R. Barnes, the Chapter Clerk of the Dean and Chapter of Exeter, who had been appointed by them, under seal, their syndic, to take letters of administration with the will annexed. Motion granted.[1]

Where a corporation aggregate is named as executor in the will, administration with the will annexed will be granted to their syndic; that is, a person specially appointed by the corporation for that purpose.

(L) *Administration to a Bastard or other Person without kindred.*

(*a*) *Right of Crown in case of.*

By rule 62 of the original rules of the Probate Court it is ordered, that "in all cases where application is made for letters of administration (either with or without a will annexed) of the goods of a bastard dying a bachelor, or a spinster, or a widower or widow without issue, or of a person dying without known relation, notice of such application is to be given to her Majesty's Procurator-General, in order that he may determine whether it will be expedient to interfere on the part of the Crown: save and except that when the deceased is domiciled within the Duchy of Lancaster, notice is to be given to the Solicitor for the Duchy in London; and no grant is to be issued until that officer has signified the course it will be proper to take under the circumstances of each particular case."[2]

Notice must be given to the Procurator-General, in order that he may determine whether he ought to interfere on the part of the Crown.

(M) *Administration limited to Part of the Estate.*

(*a*) *Where for special object affecting Part only will be limited to such Part.*

IN THE GOODS OF C. DODGSON, 28 L. J., P. & M. 116.

Letters of administration, limited to the purpose of appearing and supporting a petition in Chancery having been granted to G. M., the Lords Justices made a decree in the matter of the petition, ordering a fund to be transferred to the administrator. The letters of administration, however, gave no title to the administrator to receive the fund.

Dr. Phillimore moved the Court to grant letters of administration of the personal estate and effects generally, without any limitation, to G. M., but admitted that it was contrary to the practice of the Ecclesiastical Court, under such circumstances, to make a grant of administration generally.

Sir C. Cresswell. "It has generally been supposed that, in making a grant of administration limited to carry on a suit, it is intended to give a right to that which is the subject-matter of the suit. The lords justices, however, having considered that the limited grant did not give a right to the fruits of the suit, I see no other way of removing the difficulty than by an alteration in the wording of the grant, so as to authorise the administrator not only to carry on the suit, but also to receive the subject-matter of it. Beyond that I cannot go: a grant of administration generally is out of the question. Perhaps the most convenient course to adopt will be to revoke the letters of administration already granted, and to make a fresh grant, limited to the purpose of carrying on the

Letters of administration granted to a person having an interest in a part only of the estate, will be limited to such part.

[1] See 1 Williams' Exors. p. 199.

[2] If a bastard, who is *nullius filius*, has no kindred, or any other person having no kindred, die intestate and without wife or child, the Crown is entitled to the property as *ultimus hæres* (*Jones v. Goodchild*, 3 P. Williams, 33), subject, nevertheless, to the debts of the intestate (*Megit v. Johnson*, 2 Dougl. 548). Yet in such case it is the practice to transfer the royal claim by letters patent, or other authority from the Crown, with a reservation, as it is said, of a tenth, or other small proportion of the property, and then administration is granted, as of course, to such appointee. *Stote v. Tyndall*, 2 Cas. Temp. Lee, 394; and see *Manning v. Knapp*, 1 Salk. 37.

suit, and also of receiving the sum which is the subject-matter of it. Let the grant issue in that form."

(b) Where Application founded on Interest granted by Deed, it must be brought into Registry.

In the Goods of Francis Keene, 28 L. J., P. & M. 34.

Where application founded on interest granted by deed, it must be brought into registry.

But where the ground of requiring administration limited to the remainder of a term, in a case where the executor was beyond the seas, was, that the applicant was entitled to the equitable interest in the residue of such term, the legal estate having been vested in the intestate.

Sir C. Cresswell said: "According to the usual practice, before such a grant can be made, all the deeds showing the deduction of the title to the term must be brought into the registry. I cannot act simply on affidavits that A. assigned to B., B. to C., &c.; but the deeds themselves must be brought in. It will be necessary that there should be a special grant, the preparation of which will require some nicety. The executor of F. Keene, who has proved the will in America, should be cited."

Motion to stand over, in order that the deeds showing the deduction of title might be brought into the registry, and that the executor of the deceased might be cited.

(N) *Where Administratrix a* Feme Covert.

(a) Must obtain Sanction of Husband.

Thrustout v. Coppin, 2 Bl. R. 802.

A *feme covert* cannot administer without her husband's permission.

Per Cur. A *feme covert* cannot administer without the consent of her husband.[1]

(O) *Within what time to be granted after Death of Intestate.*[2]

In the Goods of George Smyth, 28 L. J., P. & M. 1.

Where there was evidence raising a presumption that a vessel in which the intestate was had been wrecked, the Court refused administration until inquiries should be made at the foreign port from which she last sailed, as to whether

Application for letters of administration of the estate of G. Smyth, master mariner. He sailed as the master of the Thankful, on a voyage from North Shields to Barcelona, in Spain, thence to Constantinople. He arrived at Barcelona, and sailed thence to Constantinople, on the 15th November, 1857. Neither the vessel nor any of the crew had been seen or heard of down to the time of the application in November, 1858, although the average duration of the voyage was only thirty days.

Sir C. Cresswell. "I do not find in the affidavits any statement that inquiries have been made at Barcelona, or elsewhere, about the crew. The affidavits only state that neither the vessel, G. Smyth, nor any of the crew, have been heard of. I should undoubtedly presume that the vessel has been lost; but it does not follow that the crew, or some of them, may not have been saved. The case had better stand over till you have written to Barcelona, and ascertained whether any of the crew have survived. I will, however, allow letters of administration to pass to the widow, upon an affidavit being left in the registry to the effect that

[1] *See* 2 Hen. 7, c. 15; 1 Salk. 306; 1 And. 117; Cro. Eliz. 278; Cro. Jac. 318. The reason assigned for this rule is, that the husband is required to enter into the administration bond, which she, as a married woman, is incapable of doing. But if it can be shown by affidavit that the husband is abroad, or otherwise incompetent, a stranger may join in such security in his stead.

[2] R. & O. 44, no probate or letters of administration, with will annexed, shall issue until after the lapse of seven days from the death of the deceased, unless under the direction of the Judge.

By r. 44, no administration shall issue until after the lapse of fourteen clear days from the death of the deceased, unless under the direction of the Judge.

such inquiries have been made, and that nothing has been heard of any of the crew."

any of the persons had been heard of there, notwithstanding a year had elapsed and they had not been heard of here.[1]

III. Effect of Grant of Administration.

(A) *Payments made to Administrator are valid Discharges, notwithstanding any Defect in the Grant.*

By the 20 & 21 Vic. c. 77, s. 78, "all persons and corporations making or permitting to be made any payment or transfer *bonâ fide* upon any probate or letters of administration granted in respect of the estate of any deceased person under the authority of this act, shall be indemnified and protected in so doing, notwithstanding any defect or circumstance whatsoever affecting the validity of such probate or letters of administration."[2]

Debtors of the estate paying to administrators are protected, notwithstanding any defect or circumstance affecting the validity of the administration.

IV. Amendment of Letters of Administration.

(A) *Court has power to amend.*

By the 21 & 22 Vic. c. 95, s. 17, "the Judge of the Court of Probate shall have the same power of altering and amending grants of probate and letters of administration made before the 11th of January, 1858, as any ecclesiastical court had and exercised in respect of such grants."[3]

Court has power to amend letters of administration made before 11 Jan. 1858.

V. Revocation of Letters of Administration.[4]

(A) *New Administrator may continue pending Proceedings by Suggestion, on Revocation of temporary Administration.*

By the 20 & 21 Vic. c. 77, s. 76, "where, before the revocation of any

Upon revocation of tempo-

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[1] In the Goods of H. Bishop, 28 L. J., P. & M. 93.

Motion for letters of administration of the estate of H. Bishop, a master mariner. He sailed from Demerara for London on October 23, 1858. Neither the vessel nor he, nor any of the crew, had since been heard of. The application was made on March 30, 1859. It was supposed the vessel had been lost in a hurricane she encountered some few days after she had sailed. The average duration of the voyage is five or six weeks.

Sir C. Creswell. "The underwriters have not yet shown their belief in the loss of the vessel by paying the amount for which she was insured. Independently of this, however, there are other objections to granting the motion. I think it is probable that the vessel is lost; but it does not appear that inquiries have been made at Demerara whether any of the crew have been heard of. I also think that the application has been made too soon, and that it would not be safe at present to grant letters of administration. Only five months have elapsed since the vessel sailed from Demerara; and though she may have been lost, the crew may have been picked up by some vessel bound on a long voyage, and there may have been no opportunity of tidings being received of them."

Afterwards, on June 22, the motion was renewed on affidavits, showing that the underwriters had paid on the policy as for a total loss, and that the owners had no tidings of vessel or any of the crew, and administration was granted as prayed.

[2] The personal estate of a person dying intestate is vested in the Judge of the Probate Court until administration is granted, by virtue of the 21 & 22 Vic. c. 95. s. 19, which enacts that "from and after the decease of any person dying intestate, and until letters of administration shall be granted in respect of his estate and effects, the personal estate and effects of such deceased person shall be vested in the Judge of the Court of Probate for the time being, in the same manner, and to the same extent, as heretofore they vested in the Ordinary."

Caveats against the grant of probates or administration may be lodged in the principal registry, or in any district registry, and (subject to any rules or orders under this act) the practice of procedure under such caveats in the Court of Probate shall, as near as may be, correspond with the practice and procedure under caveats now in use in the Prerogative Court of Canterbury. 20 & 21 Vic. c. 77, s. 53. See *ante*, p. 162.

[3] By the 86th section of the 20 & 21 Vic. c. 77, grants of administration made before the commencement of the act, which may be void or voidable by reason only that the country from which respectively the same were obtained had not jurisdiction to make such grants, shall be as valid as if the same had been obtained from a country entitled to make such grants, provided they have not been revoked before the act.

[4] Form of renunciation and practice, 9 W. R. 252.

rary administration, new executor or administrator may continue pending proceedings in any suit by suggestion,

temporary administration, any proceedings at law or in equity have been commenced by or against any administrator so appointed, the Court in which such proceedings are pending may order that a suggestion be made upon the record of the revocation of such administration, and of the grant of probate or administration which shall have been made consequent thereupon, and that the proceedings shall be continued in the name of the new executor or administrator, in like manner as if the proceeding had been originally commenced by or against such new executor or administrator, but subject to such conditions and variations, if any, as such Court may direct."

(B) *Payments are protected if made* bonâ fide *before Revocation.*

Payments *bonâ fide* made to administrator before revocation are protected.

All payments *bonâ fide* made to an administrator before the revocation of administration are a legal discharge to the person who made the same, and the administrator who acted under the revoked administration may retain and reimburse himself in respect of any payments made by him, which the person to whom probate or administration is afterwards granted might have lawfully made. 20 & 21 Vic. c. 77, s. 77.

(C) *An Administrator with Will annexed is not compellable, after Revocation, to take Administration with a later Will annexed.*

In the Goods of David Davis, 29 L. J., P. & M. 72.

An administrator with the will annexed cannot be compelled to take a grant of administration with a later will annexed upon the revocation of the original administration.

Davis died, leaving a will dated in 1841. Administration, with will annexed, was taken out by E. M., and the administratrix intermeddled with the estate. Subsequently a will of 1849 was discovered, and the administratrix was cited to bring in the letters of administration of the earlier will, and to take out administration with the later will annexed.

Sir C. Cresswell rejected a motion to compel E. M. to take out letters of administration, saying that there was no instance to be found in which an administrator had been compelled to take a grant. An executor who has intermeddled may be compelled to take probate; but a person who is not an executor, though he has intermeddled, cannot be compelled to take letters of administration.

VI. Of the Administration Bond.

(A) *Administrator must give a Bond.*

Administrator must give bond to the Judge of the Probate Court, conditioned for duly administering the estate.

By the 20 & 21 Vic. c. 77, s. 81, "every person to whom any grant of administration shall be committed shall give bond[1] to the Judge of the Court of Probate, to enure for the benefit of the judge for the time being, and if the Court of Probate, or (in the case of a grant from the district registry) the district registrar shall require, with one or more surety or sureties conditioned for duly collecting, getting in, and administering the personal estate of the deceased, which bond shall be in such form as the Judge shall from time to time, by any general or special order, direct: Provided that it shall not be necessary for the Solicitor for the affairs of the Treasury, or the Solicitor of the Duchy of Lancaster, applying for or obtaining administration to the use or benefit of her Majesty, to give any such bond as aforesaid."

(B) *In a Penalty of Double the Amount of the Estate, unless reduced by the Court.*

The penalty of the bond is double the

By the 82d section, "such bond shall be in a penalty of double the amount under which the estate and effects of the deceased shall be sworn, unless the

[1] By the 80th section, "So much of an act 21 Hen. 8, c. 5, and of an act 22 & 23 Car. 2, c. 10, and of an act 1 Jac. 2, c. 17, as requires any surety, bond, or other security, to be taken from a person to whom administration shall be committed, shall be repealed."

Court or district registrar, as the case may be, shall in any case think fit to direct the same to be reduced; in which case it shall be lawful for the Court or district registrar so to do;[1] and the Court or district registrar may also direct that more bonds than one shall be given,[2] so as to limit the liability of any surety to such amount as the Court or district registrar shall think reasonable."

amount of the estate, unless the Court think fit to direct the same to be reduced.

Mode of suing on Bond.[3]

(C) *Which, when put in, Suit is assigned for that purpose.*

By the 83d section, "the Court may, on application made on motion or petition, in a summary way, and on being satisfied that the condition of any such bond has been broken, order one of the registrars of the Court to assign the same to some person to be named in such order, and such person, his executors or administrators, shall thereupon be entitled to sue on the same bond in his own name, both at law and in equity, as if the same had been originally given to him instead of to the Judge of the Court, and shall be entitled to recover thereon, as trustee for all persons interested, the full amount recoverable in case of any breach of the condition of the said bond."

And when broken the Court will order it to be assigned for the purpose of being sued on.[4]

(D) *The same of Bonds given previous to the new Jurisdiction.*

By 21 & 22 Vic. c. 95, s. 15, "bonds given to any archbishop, bishop, or other person exercising testamentary jurisdiction, in respect of grants of letters of administration, made prior to January 11, 1858, or in respect of grants made in pursuance of the Court of Probate Act or of this Act, whether taken under a commission or requisition executed before or after the said 11th of January, shall enure to the benefit of the Judge of the Court of Probate, and, if necessary, shall be put in force in the same manner, and subject to the same rules, so far as the same may be applicable to them, as if they had been given to the Judge of the said Court subsequently to that day." Shortly after the passing of the act it was held that this section is not retrospective, so as to apply to a suit then pending on a bond previously assigned. *Young v. Hughes*, 4 H. & N. 76; 28 L. J. Ex. 161.

Bonds given to archbishops and others exercising testamentary jurisdiction before Jan. 11, 1858, to enure to benefit of Judge of Probate Court, and be put in suit in same way as bonds made after that date.

VII. Sealing in Ireland of Letters of Administration granted by Court of Probate of England, and of Irish Grants in England.

(A) *Letters of Administration of Probate Court of England are operative in Ireland, on being sealed with the Seal of the Probate Court there, and stamped.*

Letters of administration granted in England, by being sealed with the seal of the Probate Court of Ireland, are rendered as effectual there as if originally granted by that Court; and, by a similar process, letters granted in Ireland may be made of the same operation in England, as if they had been granted by the Court of Probate of England, by having the seal of that Court affixed. This is effected by the 94th and 95th sections of 20 & 21 Vic. c. 89. By the former section it is enacted, that "from and after the period at which this act shall come into operation, when any probate or letters of administration to be granted by the Court of Probate of England shall be produced to, and a copy thereof deposited with, the registrars of the Court of Probate in Ireland, such probate or

Letters of administration of Probate Court of England are operative in Ireland, on being sealed with the seal of the Probate Court there, and stamped.

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[1] The Court, in pursuance of this power, have reduced the bond to double the amount of the debts, in a case where administration was granted to the sole next of kin of the intestate. *In the Goods of M. Gent*, 27 L. J., P. & M. 37.

[2] Where, subsequently to the giving of the bond, the estate was increased by a dividend upon the estate of a bankrupt debtor of the intestate, and it became necessary to re-swear the effects, the Court ordered that an additional bond, in double the amount of such addition to the estate, should be given. *In the Goods of H. Wier*, 28 L. J., P. & M. 111.

[3] *See* 1 Car. & M. 181–690.

[4] *See* 8 B. & C. 151.

letters of administration shall be sealed with the seal of the said last-mentioned Court, and, being duly stamped, shall be of the like force and effect, and have the same operation in Ireland, as if it had been originally granted by the Court of Probate in Ireland."

(B) *So Grants of the Court of Probate in Ireland may be rendered Operative in England, on being sealed with the Seal of the Probate Court of England, and stamped.*

So grants of the Court of Probate in Ireland may be rendered operative in England, on being sealed with the seal of the Probate Court of England, and stamped.

The 95th section enacts, that "from and after the period at which this act shall come into operation, when any probate or letters of administration to be granted by the Court of Probate in Ireland shall be produced to, and a copy thereof deposited with, the registrars of the Court of Probate in England, such probate or letters of administration shall be sealed with the seal of the last-mentioned Court, and being duly stamped, shall be of the like force and effect, and have the same operation in England, as if it had been originally granted by the Court of Probate in England."[1]

VIII. Sealing and Confirmation of Commissary Court where Deceased died domiciled in Scotland possessed of Personalty in England.

(A) *Personal Property in England may be included in Inventory, and Confirmation granted by Scotch Court.*

Where a person dies domiciled in Scotland possessed of personal property situated in England, such property may be included in the inventory of his effects, and confirmation be granted by the Scotch Court in respect thereof.

By 21 & 22 Vic. c. 56 (an act to amend the law relating to the confirmation of executors in Scotland, and to extend over all parts of the United Kingdom the effect of such confirmation, and of grants of probate and administration) it is by sect. 9 enacted, that "it shall be competent to include in the inventory of the personal estate and effects of any person who shall have died domiciled in Scotland, any personal estate and effects of the deceased situated in England or Ireland, or both: Provided that the person applying for confirmation shall satisfy the Commissary, and that the Commissary shall, by his interlocutor, find that the deceased died domiciled in Scotland, which interlocutor shall be conclusive evidence of the fact of domicile: Provided also that the value of such personal estate and effects situated in England or Ireland respectively, shall be separately stated in such inventory, and such inventory shall be impressed with a stamp corresponding to the entire value of the estate and effects included therein, wheresoever situated within the United Kingdom."

(B) *Which being sealed in Probate Court, shall have same effect as Letters of Administration.*

And upon production of such confirmation, &c. in the Court of Probate, it shall be sealed, and have the like force, as if letters of ad-

And by the 12th section, "when any confirmation of the executor[2] of a person who shall in manner aforesaid be found to have died domiciled in Scotland, which includes, besides the personal estates situated in Scotland, also personal estate situated in England, shall be produced in the principal Court of Probate in England, and a copy thereof deposited with the registrar, together with a certified copy of the Commissary, finding that such deceased person died domiciled in Scotland, such confirmation shall be sealed with the seal of the said Court, and returned to the person producing the same, and shall thereafter have

[1] By the 21 & 22 Vic. c. 95, s. 29, it is enacted, that "letters of administration granted by the Court of Probate in Ireland shall not be re-sealed, under sect. 95 of the 21 & 22 Vic. c. 79, until a certificate has been filed, under the hand of a registrar of the Court of Probate in Ireland, in a sum sufficient in amount to cover the property in England, as well as in Ireland, in respect of which such administration is required to be sealed."

[2] This includes an administrator. The corresponding term in the Scotch law is executor-dative. *See* Paterson's *Compendium of English and Scotch Law*, 481.

the like force and effect in England as if a probate or letters of administration, as the case may be, had been granted by the said Court of Probate.[1]

ministration had been granted by Court of Probate.

IX. Administration Duty.

The duty upon administration is payable by stamps. By 20 & 21 Vic. c. 77, s. 92, it is provided, that nothing therein contained shall affect the stamp duties payable upon probates and administrations. The duties now in force are those specified in the schedule to the 55 Geo. 3, c. 184. By 22 & 23 Vic. c. 36, provision is made to extend the graduated scale, according to which the duties were imposed by the 55 Geo. 3, c. 184, beyond one million pounds, at which it stopped under that Act.

ADMIRALTY,[2] Court of.

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(C) *Provided the Contract was not by Deed, or of an unusual kind*, p. 186.

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[1] By the 13th section similar provision is made for the production of the confirmation in the Court of Probate in Dublin, in case of there being personal property in Ireland, and for the sealing thereof with the seal of the Court of Probate in Dublin. The 14th section is a corresponding one for the production in the Commissary Court of Edinburgh of letters of administration of the Probate Court in England or of Ireland (in whichever country the deceased was domiciled), and for their authentication and adoption there by indorsement and stamping, whereupon they become "of the like force and effect, and have the same operation in Scotland, as if a confirmation had been granted by the said Court."

And by the 21 & 22 Vic. c. 56, s. 12, "from and after the 12th November, 1858, when any confirmation of the executor of a person who shall, in manner aforesaid, be found to have died domiciled in Scotland, which includes, besides the personal estate situated in Scotland, also personal estate situated in England, shall be produced in the principal Court of Probate in England, and a copy thereof deposited with the registrar, together with a certified copy of the interlocutor of the Commissary, finding that such deceased person died domiciled in Scotland, such confirmation shall be sealed with the seal of the said Court, and returned to the person producing the same, and shall thereafter have the like force and effect in England, as if a probate or letters of administration had been granted by the said Court of Probate."

[2] By the 3 & 4 Vic. c. 65, for improving the practice and extending the jurisdiction of the High Court of Admiralty of England, the Dean of Arches is empowered to sit as assistant judge, sec. 1. Advocates, surrogates, and proctors of the Court of Arches are admitted to practise therein, sec. 2.

By the 22 & 23 Vic. c. 6, s. 1, the Court was thrown open to sergeants, barristers, attornies, and solicitors, who respectively are entitled to the same rights and privileges of practising as advocates and proctors enjoyed. And by the 21 & 22 Vic. c. 95, s. 1, the Judge of the High Court of Admiralty, and the Judge of the Court of Probate, are respectively empowered to sit for each other.

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I. Jurisdiction[1] generally.

II. In Suits for Seamen's Wages.

(A) *Claim must not exceed 50l. with certain Exceptions.*

The Admiralty entertained a general jurisdiction in suits for the recovery of seamen's wages. This privilege of suing in the Admiralty has, however, been restricted by statute. By the 17 & 18 Vic. c. 104, s. 189, it is enacted, that "no suit or proceeding for the recovery of wages[2] under the sum of 50*l.*[3] shall be instituted by or on behalf of any seaman or apprentice in any Court of Admiralty or Vice-Admiralty, or in the Court of Session of Scotland, or in any superior Court of Record in her Majesty's dominions, unless the owner of the ship is adjudged bankrupt, or declared insolvent, or unless the ship is under arrest, or is sold by the authority of any such Court as aforesaid, or unless any justices acting under the authority of this act refer the case to be adjudged by such Court, or unless neither the owner nor master is or resides within twenty miles of the place where the seaman or apprentice is discharged or put ashore."[4]

If the seaman's claim for wages does not exceed 50*l.* no suit can be brought in the Admiralty Court unless the owner is bankrupt or insolvent, or the ship is under arrest, or sold by authority of the Admiralty Court, or a magistrate shall refer the case to the Admiralty Court, or neither owner nor master reside within twenty miles of the port of discharge.

[1] Formerly the High Court of Admiralty had an exclusive jurisdiction with reference to offences committed on the high seas. But now, by the 7 & 8 Vic. c. 2, such offences are tried at the assizes in the same way as other cases, and the Court of Admiralty has ceased to exercise any such jurisdiction. That statute, by sect. 1, enacts that "all offences alleged to have been committed on the high seas, and other places within the Admiralty of England, may be inquired of, heard and determined, by her Majesty's Justices of Assize, or others her Majesty's Commissioners, by whom any court shall be holden under any of her Majesty Commissions of Oyer and Terminer, or general gaol delivery, and they shall have severally and jointly all the powers which by any act are given to the Commissioners named in any commission of oyer and terminer for the trying of offences committed within the Admiralty of England, and may deliver the gaol in every county and franchise within the limits of their several commissions of any person committed to or imprisoned therein for any offence alleged to have been committed upon the high seas," &c. By sect. 2, the venue laid in the margin shall be the same as if the offence had been committed in the county where the trial is had. And by the 17 & 18 Vic. c. 104, s. 267, it is enacted, that "all offences against property or person committed in or at any place, either ashore or afloat, out of her Majesty's dominions, by any master, seaman or apprentice, who at the time when the offence is committed is, or within three months previously has been, employed in any British ship, shall be deemed to be offences of the same nature respectively, and be liable to the same punishment respectively, and be inquired of, heard, tried, determined, and adjudged in the same manner, and by the same courts, and in the same places, as if such offences had been committed within the jurisdiction of the Admiralty of England; and the costs and expenses of the prosecution of any such offence may be directed to be paid as in the case of costs and expenses of prosecution for offences committed within the jurisdiction of the Admiralty of England." By the 268th section rules are laid down to be observed with respect to offences committed on the high seas or abroad, by which consuls abroad are required, upon complaint made, to provide for the safe custody of the offender, and his transmission to the United Kingdom, or to a colony where there is a court capable of taking cognizance of the offence. *See* also 17 & 18 Vic. c. 104, s. 518.

[2] The right of a seaman to his wages is no longer dependent upon the earning of freight; but in all cases of wreck or loss of the ship, proof that he did not exert himself to the utmost to save the ship and stores bars his claim. 17 & 18 Vic. c. 104, s. 183.

[3] In cases not exceeding 50*l.*, the remedy of the seaman for his wages is by application to a magistrate, under the 17 & 18 Vic. c. 104, s. 188, by which it is enacted, that "any seaman or apprentice, or any person duly authorised on his behalf, may sue in a summary manner before any two justices of the peace, acting in or near to the place at which the service has terminated, or at which the seaman or apprentice has been discharged, or at which any person upon whom the claim is made is or resides, or in Scotland, either before any such justices, or before the sheriff of the county within which any such place is situated, for any amount of wages due to such seaman or apprentice, not exceeding 50*l.* over and above the costs of any proceeding for the recovery thereof, so soon as the same becomes payable; and every order made by such justices or sheriff in the matter shall be final."

[4] A master and crew suing *in pœnam* against the ship for wages, are entitled to recover compensation for short allowance of provisions, under the 17 & 18 Vic. c. 104, s. 223, which entitles seamen to recover as wages compensation for the reduction of provisions during the voyage, below what has been stipulated for in his agreement. *The Josephine*, 1 Swab. Ad. R. 159.

It has been held, as to the costs of the

(B) *Subject to which Wages may be recovered in the Court of Admiralty.*

Anonymous, 1 Vent. 146. Anon. 2 Show, 86. Opy v. Child, 1 Salk. 31. Bayley v. Grant, id. 33. Harding v. Brook, Comb. 255. Coke v. Cretchet, 3 Lev. 60.

Subject to the above restrictions, seamen's wages may be recovered in the Court of Admiralty, and that notwithstanding the contract was made on land.

The Court refused a prohibition to restrain the Admiralty from proceeding in a cause for the recovery of seamen's wages, though the contract or charter-party was made on land,[1] and not upon *altum mare;* for mariners' wages grow due to them for labour done at sea, and according to the Maritime Law, if the ship perished by the mariners' default, they would lose their wages. The charter-party and contract at land is only to ascertain the amount of the wages; and it is more convenient for them to sue in the Court of Admiralty, for there they may all join.

(C) *Provided the Contract was not by Deed, or of an unusual kind.*

Opy v. Child, 1 Salk. 31. Caupun v. Nicholas, 2 Stra. 405.

Provided the contract was not by deed, or of an unusual kind.

On a motion for a prohibition to the Court of Admiralty in a suit pending there for mariners' wages, on a suggestion of a contract made for them on land,—

Per Cur. For the convenience of seamen, the Admiralty has been allowed to hold suit for mariners' wages, but subject to the limitation, that if there be any special agreement by which the mariners are to receive the wages in any other mode than is usual, or if the agreement be under seal,[2] so as to be more than a parol agreement; in such a case a prohibition shall be granted, and it must be conceded in this case.

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proceeding, that an offer to pay seamen's wages before a shipping-master, according to 13 & 14 Vic. c. 93, s. 98, is no tender so as to bar the costs of the seaman's action for wages in the Admiralty Court. *The Mobile*, 1 Swab. Ad. R. 256.

[1] In the case of wages, seamen may sue in the Admiralty, though the contract be not on the high seas (*Smith v. Crosby*, Fortescue, 230), and although the contract be for a sum in gross (*Anon.* 1 Vent. 343); and they may sue for their wages for fitting out a ship, though she does not actually proceed on the intended voyage. *Wells v. Osmond*, 6 Mod. 238; 2 Ld. Raym. 244. *Mills and another v. Gregory*, Sayer, 127. *See* also *The City of London*, 1 W. Rob. 143. And they may so sue for the wages of a coasting voyage, as for navigating a vessel from one port in England to another. *Anon.* 1 Vent. 343. If the subject come before the Court of Admiralty, that Court may decide whether a place at which a ship shall have arrived be such a determination of the voyage as to entitle the seamen to their wages. *Brown v. Benn*, 2 Ld. Raym. 1247. The seamen may, by the process of Court of Admiralty, arrest the ship as a security for their demand, or cite the masters and owners personally to answer. They may sue jointly or severally. *Hook v. Moreton*, 1 Ld. Raym. 397. *See* 13 Rep. 51; 1 Sid. 351; 1 Vent. 343.

And the Admiralty may order the ship, sails and tackle, to be sold to pay the seamen their wages. *Edmonson v. Walker*, 1 Show. 177.

[2] In *Day v. Serle*, 2 Barnard, 419; S. C. 2 Strange, 969, a prohibition was granted on both these grounds. *Lord Hardwicke, C. J.*, saying, that as the Admiralty Court proceeds in suits for mariners' wages upon contracts made at law, which cannot be the proper cognizance of the maritime jurisdiction, merely by indulgence, a prohibition would always be granted where the contract differed from the common and usual contracts between masters of ships and seamen about wages, by reason of some special terms contained in it, and that in this agreement there appeared to be some special covenants; for example: 1. That if the mariners should enter into any of her Majesty's ships of war they should forfeit their wages, which was directly contrary to a clause in the late act; and, 2. That when the agreement was by writing, signed and sealed, then also a prohibition should go, which was likewise in the present case. Although the agreement may have been in writing, if it was not under seal, the Admiralty Court has jurisdiction. *Bems v. Parre*, 2 Ld. Raym. 1206. A prohibition will be granted if there be anything special in the agreement (*Day v. Serle*, 2 Barn. 419; 2 Str. 969), but not where the deed has been obtained by fraud. And the Court of Admiralty so finding, have given sentence for the recovery of the wages. Neither will a deed oust the jurisdiction of the Admiralty Court, which merely provides for the forfeiture of wages under certain circumstances, but could not enable them to sue for their wages at law. *Buck v. Attwood*, 2 Str. 761.

(D) *This Privilege extends to Foreign Seamen.*

The Colubchick, 1 W. Rob. 143.

The same remedy is in general open to foreign seamen whose claim is founded on the Maritime Law.

The privilege of suing in the Admiralty Court extends to foreign seamen.

(E) *By the General Law it extended to all Officers of the Ship except the Master.*

Bayley v. Grant, 1 Salk. 33; 12 Mod. 440; 1 Ld. Raym. 632; Holt, 48. S. P. Hook v. Moreton, 1 Ld. Raym. 397.

The mate sued the master for his wages in the Admiralty, and this Court was moved for a prohibition, because the master himself could not sue there, and the mate was not in the nature of a mariner, but was to succeed the master if he died on the voyage.

Per Holt, C. J. The master contracts with the owners, but the mate contracts with the master for his wages, as the rest of the mariners do.[1]

And by the general law it extended to all the officers of the ship except the master.

(F) *And now, by Stat.* 17 *&* 18 *Vic. c.* 104, *the Master has the same Remedies for the Recovery of Wages as the Seamen.*

Now, however, by virtue of the Merchant Seamen's Act, 1854, the master has the same remedies as the seamen for the recovery of his wages. By the 191st section it is enacted, that "every master of a ship shall, so far as the case permits, have the same rights, liens, and remedies for the recovery of his wages which by this act, or by any law or custom any seaman, not being a master, has for the recovery of his wages; and if in any proceeding in any Court of Admiralty or Vice-Admiralty, touching the claim of a master to wages, any right of set-off or counter-claim is set up, it shall be lawful for such Court to enter into and adjudicate upon all questions, and to settle all accounts then arising or outstanding, and unsettled between the parties to the proceedings, and to direct payment of any balance which is found to be due."[2]

And now, by stat. 17 & 18 Vic. c. 104, the master has the same remedies for the recovery of wages as the seamen.

III. Jurisdiction in other Cases.

(A) *It has Jurisdiction to arrest a Ship upon the Application of a Part Owner until Security be given by the other Part Owners, but not to direct a Sale.*

Ouston v. Hebden, 1 Wils. 101. S. P. Lambert v. Aeretree, 1 Ld. Raym. 223. Blacket v. Ansley, 1 Ld. Raym. 235; The Apollo, 1 Hagg. 306 a.

This was an application to the Court for a prohibition; the defendant, who was a part owner of the ship Scarborough, having procured a warrant from

The Court of Admiralty has authority to

[1] It has been held that the surgeon of the ship may sue in the Admiralty Court for his wages (*Maddox v.* ——, 12 Mod. 526); and that the purser (*Alleson v. Marsh*, 2 Vent. 181), boatswain (*Rugg v. King*, 2 Str. 858) and carpenter (*Wheeler v. Thompson*, 1 Str. 707; *Creed v. Mallet*, Forbs, 231) are within the privilege. The same remedy is open to a pilot if the service was performed at sea; but not where it was all rendered within the body of a county under a contract made on land. *Ross v. Walker*, 2 Wils. 264.

[2] A master has, by the 191st section of the Merchant Shipping Act, 1854, a lien on the ship for his wages in a Vice-Admiralty Court abroad, whatever may be the municipal law of the colony. *Raja of Cochin*, 1 Swab. Ad. R. 473.

Although the 189th section applies in terms only to seamen and apprentices, it is, when construed with the 191st, applicable to masters also. *The Blakeney*, 1 Swab. Ad. R. 428. A master may sue *in rem* for his wages, after having obtained a judgment *in personam* against the owner, and proved the debt under his bankruptcy, even if the ship has changed hands. *The Bengal*, 1 Swab. Ad. R. 468. *See*, as to the master's suit for wages, *The Caledonia*, 1 Swab. Ad. R. 17; *The Glenlanner*, id. 540; *The Camilla*, id. 312.

arrest a ship upon the application of a part owner, until security be given by the other part owners, but not to direct a sale of the ship.[1]

the Admiralty, and arrested her in port. It appeared that the ship was built at Scarborough; that the builder sold one-third part of her in sixteen parts, retaining the other two-thirds of her to himself; that the whole ship was worth about 500*l.*; that the builder mortgaged his two-thirds and died; and that his widow and representative sold the same absolutely to Ouston, who was now the master, as well as owner of two-thirds; that this sale to Ouston was made without the consent of the other part owners, and without any security given to them by Ouston; that he, being master and chief part owner, insisted upon going a voyage against the will of the part owners; that he refused to pay them for their shares (they desiring not to continue any longer part owners with him) or to sell the ship and distribute the money among them in proportion; and the libel in the Admiralty concluded by praying that the ship might be sold, or that they might have such other remedy as the Court thought proper. Ouston, in his answer to the libel, alleged that Hebden's share was not worth more than 50*l.*; that the remaining parts were worth 450*l.*; that the other part owners agreed to his (Ouston's) purchase, and did not insist upon his giving security before the institution of the suit in the Admiralty: he further alleged that there was no such usage as set forth in the libel for the Court of Admiralty to sell the ship; and he insisted that the ship ought to be allowed to proceed on her voyage; and suggested for a prohibition that the Admiralty had no jurisdiction in ships in port.

Lee, C. J. "Generally speaking, the Court of Admiralty has no jurisdiction of matters or contracts done or made on shore, but this particular case must be determined upon the whole of the facts as they appear upon the pleadings. Now the libel concludes with praying that the ship may be sold, &c., or that the party libelling may have such other remedy as the Admiralty Court shall think proper. I have no doubt that the Court has a power in this case to compel a security, for this is a proceeding *in rem*, and not *in personam;* and this jurisdiction has been allowed to that court for the public good, as is confirmed by the case from Fitzgibbon, where it is said that courts of law have allowed it. Indeed, the Admiralty has no jurisdiction to compel a sale; and if they should do that, you might have a prohibition after sentence, or we may grant a prohibition against selling or compelling the party to sell, or to buy the shares of the others." Which was agreed to *per totam Curiam*, and the rule as to that was made absolute; but as to compelling a security to be given, the rule discharged.[2] *See* Abbott by Shee, 82.

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[1] But when the shares are not ascertained, the Court of Admiralty has no jurisdiction; and in such case the Court of Chancery will exercise a concurrent jurisdiction by an injunction restraining the sailing of the ship until the share of the party complaining be ascertained, and security given to the amount of it; and in such cases the Court will refer it to the master to make an inquiry, and settle the security accordingly. But in all such cases the application to the Court of Chancery must be as expeditious as possible; and an injunction was lately refused to restrain the sailing of a ship upon the application of a part owner, where the ship was in preparation for sailing the following day, and there were no circumstances to account for the delay in the application. See *Holy v. Goodson*, 2 Merv. 77; *Christie v. Craig*, 2 Merv. 137.

[2] *See* Rol. Abr. 530; Fitz. 192; Raym. 78; 6 Mod. 162; Str. 890; Fitzgib. 197; Comb. 109; 1 Lev. 29; 1 Keb. 38; Co. Lytt. 200; Carth. 26. Part owners being tenants-in-common of the vessel, would hold it subject to the general rule of the common law, which permits any one tenant-in common to seize upon the chattel, and regulate the mode of its enjoyment, to the exclusion of the rest, were it not that public policy steps in and exempts this sort of property from a rule which, if applied to it, might prove injurious to commerce. Accordingly, if the owners themselves have not precluded all dispute by agreeing in the choice of a ship's husband, or managing owner, and delegating the care of their interests to him, the Court of Admiralty interferes by arresting the ship, and preventing the majority of owners from sending her abroad against the will of the minority, without first entering into a stipulation in a sum equal to the shares of the dissentients. On giving this security they are permitted to send the ship to sea (*see* Abbott on Ship. part 1, c. 3); and if the minority are in possession of it, may take it out of their hands for that purpose by a warrant of the Court. But the

(B) *And so it may for the Protection of the Owners against a Wrong-doer.*

Re Blanchard and others, 2 B. & C. 244.

Per Cur. As the Court of Admiralty may arrest the ship for the protection of one part of the owners against another, so it may for the protection of the owner or owners against a wrong-doer. And so it may for the protection of the owners against a wrong-doer.

(C) *A Stipulation entered into by some of several Shipowners cannot be enforced in the Admiralty.*

Knight v. Perry, Comb. 109; S. C. Carth. 24. See *contra*, Degrave v. Hedges, 2 Ld. Raym. 1285.

Upon a prayer for a prohibition to the Admiralty Court, it appeared that there were several part owners of a ship; the major part of them had sent the ship out to sea without the consent of the rest; the others libelled in the Admiralty Court, that the major part should give security for the return of the ship. The vessel being ultimately lost at sea, the executor of one of the contractors was libelled on this agreement, and decreed to pay. A stipulation entered into by some of several shipowners cannot be enforced in the Admiralty.

Sed per Cur. Although by the Admiralty law an executor is liable, still we are of opinion that this stipulation being matter done on land, the Admiralty has no jurisdiction over it. Notwithstanding it has been urged that it was the constant course of the Admiralty to proceed on such stipulations, yet such general usage cannot prevail against the statute of Hen. 4. Prohibition granted.

(D) *When a Vessel is arrested, the Court has Jurisdiction over the Claims of Mortgagees.*

By the 3 & 4 Vic. c. 65, s. 3, it is enacted, that "whenever any ship or vessel shall be under arrest by process issuing from the High Court of Admiralty, or the proceeds of any vessel having been so arrested shall have been brought into and be in the registry of the said Court, in either such case the said Court shall have full jurisdiction to take cognizance of all claims and causes of action of every person in respect of any mortgage of such ship or vessel, and to decide any suit instituted by any such person in respect of any such claim or causes of action respectively."[1] See *The Fortitude*, 2 Rob. 217. When a vessel is arrested, the Court has jurisdiction over the claims of mortgagees.

(E) *And it decides Questions of Title.*

And by the 3 & 4 Vic. c. 65, s. 4, it is enacted, "that the said Court of Admiralty shall have jurisdiction to decide all questions as to the title to or ownership of any ship or vessel, or the proceeds thereof, remaining in the registry, arising in any cause of possession, salvage, damage, wages, or bottomry, which shall be instituted in this Court after the passing of this act."[1] And it decides questions of title.

(F) *And Claims for Salvage.*

(G) *And for Necessaries supplied to Foreign Vessels.*

By the 3 & 4 Vic. c. 65, s. 6, it is enacted, that "the High Court of And claims for salvage.

dissentient owners bear no part of the expense, and are entitled to no part of the profit of the voyage, to which they have disagreed. *Davis v. Johnstone*, 4 Sim. 539. *The Apollo*, 1 Hagg. Ad. R. 306. In case the owners be equally divided in opinion, either half may apply to the Court to interfere in the manner above stated. Smith's *Mercantile L.* 180. It has been held that a part owner who had arrested the ship by process out of the Admiralty Court, and obtained security for her share, is bound to pay his proportion of the expense of the repairs and outfit incurred previous to the arrest, although he is not entitled to any share of the profits of the voyage. *Davis v. Johnstone*, 4 Sim. 539. *Castelle v. Cook*, 7 Hare, 93. Abbott by Shee, 81.

[1] Before the act the Court had no jurisdiction to take cognizance of the right of mortgagees. The act gives the Court power over the freight as well as the ship. *The Dowthorpe*, 2 W. Rob. 80.

And for necessaries supplied to foreign vessel.

Admiralty shall have jurisdiction to decide all claims and demands whatsoever in the nature of salvage for services rendered to, or damage received by any ship or sea-going vessel, or in the nature of towage,[1] or for necessaries supplied to any foreign ship or sea-going vessel, and to enforce the payment thereof, whether such ship or vessel may have been within the body of a county or upon the high seas at the time when the services were rendered, or damages received, or necessaries furnished, in respect of which such claim is made."

(H) *And has Jurisdiction to try Questions concerning Booty of War.*

And has jurisdiction to try questions concerning booty of war.

The Court has jurisdiction, by virtue of the 3 & 4 Vic. c. 65, s. 22,[2] "to decide all matters and questions concerning booty of war, or the distribution thereof, which it shall please her Majesty, her heirs and successors, by the advice of her then Privy Council, to refer to the judgment of the said Court; and in all matters so referred the Court shall proceed as in cases of prize of war, and the judgment of the Court therein shall be binding upon all parties concerned."

(I) *It has Jurisdiction in a Suit by the Master of a captured Vessel who has given himself up as an Hostage.*

Wilson v. Bird, 1 Ld. Raym. 22.

It has jurisdiction in a suit by the master of a captured vessel who has given himself up as an hostage.

Where the master of a captured vessel gives himself up as an hostage, and the owner neglects to pay, he may proceed against the ship in the Admiralty Court for his redemption.

(K) *And will exercise Jurisdiction over a Suit for a Collision in Foreign Waters, brought by the Owner of a British Ship against a Foreign Ship.*

The Griefswald, 1 Swab. Adm. Rep. 30.

And will exercise jurisdiction over a suit for a collision in foreign waters, brought by the owner of a British ship against a foreign ship.

This was a cause in the Admiralty Court for a collision, brought by the owners of an English barque against the owners of a Prussian ship. The collision took place in the Goadslead, off the town of Dardanelles, and the question raised on objection to the jurisdiction was, whether a decree made by three judges, commissioners nominated by a decree of the Prussian Legation at Constantinople, whereby the claim of the captain of the Constellation for indemnification for damages sustained by the collision was dismissed, was, under the circumstances stated in the judgment, binding, so as to bar the action in the Admiralty Court.

The Court overruled the protest, and held that it had jurisdiction.

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[1] By the 460th section of the Merchant Shipping Act, 1854 (17 & 18 Vic. c. 104), disputes as to salvage not arising within the boundaries of the Cinque Ports are determinable by justices, if the sum claimed does not exceed 200*l.*; if it exceed 200*l.*, and the parties do not consent to refer it to the arbitration of justices, it may be decided in the Court of Admiralty, subject to the claimant being deprived of costs by the certificate of the Court, if he recover less than 200*l.* Upon the construction of this section it has been held, that if the salvage service is performed beyond three miles of the coast of the United Kingdom, the case is not within the section, and costs are absolutely in the discretion of the Court. *The Leda*, 1 Swab. Ad. R. 40. The burden of proof lies on the owners to show that the Court has no jurisdiction. *The Argo*, id. 112. If the ship is otherwise in the custody of the Court, the salvors may sue in the Admiralty, although they claim less than 200*l.* As to cases within the jurisdiction of the Cinque Ports, the concurrent jurisdiction of the Court of Admiralty still subsists. *The Maria Luisa*, id. 67.

[2] By the 23d section, provision is made for preserving the jurisdiction of courts of law and equity as fully as if the act had not been passed.

In case of a false capture of goods at sea, if they are brought to land, the Admiralty has concurrent jurisdiction. *Anon.* 12 Mod. 16. The jurisdiction over a prize cause continues in the Prize Court of Admiralty, although the prize may have been taken after the time limited for the cessation of hostilities. *Harmony*, 2 Dods. 78.

(L) *But the Admiralty has no Jurisdiction to award Damages.*

Sparkes v. Martyn, 1 Vent. 1.

The Admiralty may punish any one who resists their process, and may fine and imprison for a contempt, but cannot give the party aggrieved damages. *Sed vide* Ship and Shipping.

But the Admiralty has no jurisdiction to award damages.

(M) *Nor to adjudicate upon Mischief done to a Foreign Vessel by the Misconduct of the Master of another Foreign Vessel in Foreign Waters.*

The Ida, 1 L. T., N. S. 417.

The master of a Danish schooner lying alongside the quay at the port of Ibraila, in the Danube, got on board an English barque lying outside him, and, with a view to get the schooner out, wilfully cut the barque adrift from her moorings, whereby she swung to the stream and capsized a barque which contained part of her cargo, belonging to Turkish owners. The Turkish owners sued the Danish schooner in the Court of Admiralty.

Nor to adjudicate upon mischief done to a foreign vessel by the misconduct of the master of another foreign vessel in foreign waters.

Dr. Lushington dismissed the cause, saying, "I shall not now attempt to define where the Admiralty jurisdiction in foreign rivers begins or ends, and where municipal jurisdiction obtains exclusively; it is enough to say, that the Court of Criminal Appeal has lately unanimously held that the whole of the Bristol Channel is within the counties by the shores of which its ports are respectively bounded (*Reg. v. Cunningham*, 28 L. J. M. C. 65); that this Court has not taken cognizance of *torts* in any foreign river, except in Turkish waters, where special provisions are applicable; that the Court is not anxious to extend its jurisdiction over foreign waters; that this cause is between foreigners, and that the jurisdiction claimed is beyond any yet exercised by the Court. These are reasons which make the Court very unwilling to affirm its jurisdiction over the present case. The Court is, however, still further indisposed on account of the peculiar nature of the act for which the plaintiffs are now trying to render the defendant's ship liable. The Court, it must be remembered, has never exercised a general jurisdiction over damage, but over causes of collision only, and this is no collision in the proper sense of the term. The ship proceeded against had nothing to do with the damage; nothing actually, or even constructively; for the act of the master I consider to be wholly unwarrantable and out of the scope of his duty: he might as well have attempted to open a dock. And again, if in such a case, the case of a *tort* committed by one foreigner upon another in a foreign port, the English law of master and servant is to prevail in this Court, it would on the ground disentitle the plaintiffs from recovering against the defendants or their property."

IV. Mode of Proceeding in.

(A) *Proceeding may be by way of Monition.*

By the 17 & 18 Vic. c. 78, s. 13, "in all cases in which a party has a cause or right of action in the High Court of Admiralty of England against any ship or freight, goods, or other effects whatever, it shall not be necessary to the institution of the suit for such person to sue out a warrant for the arrest thereof; but it shall be competent to him to proceed by way of monition, citing the owner or owners of such ship, freight, goods, or other effects, to appear and defend the suit; and upon satisfactory proof being given that the said monition has been personally served upon such owner or owners, the said Court may proceed to hear and determine the suit, and may make such order in the premises as to it shall seem right.

Proceeding may be by way of monition.

(B) *If Defendant make Default in appearing he may be arrested.*

THE EVANGELINE, 2 L. T., N. S. 139.

If the defendant in a personal action make default in appearing he may be arrested.

If a personal action be instituted, no judgment can be awarded until the defendant appears; and if he does not appear voluntarily, or enter into a stipulation of bail, the Court of Admiralty may compel his appearance by arrest under a warrant: but if the defendant does not appear, and the plaintiff notwithstanding goes on with his suit, the Court will allow an exception to its jurisdiction taken on that ground.

(C) *Answer may be filed without further Formality than is required in the case of an Affidavit.*

Answer may be filed without further formality than is required in the case of an affidavit.

By 17 & 18 Vic. c. 78, s. 5, "it shall not be necessary to sue out any commission to take the personal answers of any party in any matter, suit, or proceeding in the said Court, and any such answers may be filed without any further or other formality than is required in the swearing and filing of an affidavit.[1]

(D) *If Proceeding by Arrest of Ship, she may be reseized anywhere if rescued.*

If by arrest of ship, she may be reseized anywhere if rescued.

If a ship arrested by Admiralty process within their jurisdiction be rescued, she may be reseized anywhere.[2] *Rigdon v. Hedges*, 12 Mod. 246.

(E) *Execution.*[3]

[1] The following provisions relate to the swearing of answers, affidavits, &c. By the 17 & 18 Vic. c. 78, s. 3, the Judge of the High Court of Admiralty of England is empowered "from time to time, and as and when he may think fit, to appoint any person practising as a proctor, solicitor, or notary public in any part of England and Wales, to administer oaths and take declarations in the High Court of Admiralty of England; and such persons shall be styled Commissioners to administer oaths in Admiralty." By the 6th sect. "it shall not be necessary to sue out any commission for the examination of any witnesses in any matter, suit, or proceeding in the said Court, and any examiner appointed by any order of the said Court shall have the like power of administering oaths as Commissioners now have under commissions issued by the Court for the examination of witnesses."

And by sect. 7, "all answers, examinations, affidavits, depositions on oath, declarations, affirmations, and attestations, in or relating to any matter, suit, or proceeding in the said High Court of Admiralty, shall and may be sworn and taken in England and Wales before any such Commissioner appointed as aforesaid, or before any magistrate or justice of the peace, or before any Commissioner to administer oaths in Chancery."

Out of England and Wales, and in any part of her Majesty's dominions or colonies, they may be sworn "before any judge, court, magistrate, notary public, or person lawfully authorized to administer oaths." 17 & 18 Vic. c. 78, s. 8. And the Judge of the Admiralty Court has power to appoint any person to administer oaths, and to take affidavits and depositions, &c. relating to prize proceedings during the time such person shall be on the high seas, or in any place not within her Majesty's dominions." Id. sect. 11.

The Court has power to examine witnesses *viva voce*, by virtue of the 1 & 2 Vic. c. 65, s. 7. And it may empower Commissioners to make such examination (sect. 8), and may enforce the attendance of witnesses and production of documents by subpœna. It has power in any contested suit to direct a trial by jury of any issue or issues of fact, and has discretion over the costs of such trial. Sects. 11 & 12. On the trial, parties have the right to tender a bill of exceptions. Sect. 15. The Court may grant a new trial. Sect. 13. An appeal lies to the Privy Council from the decision of the Court, upon the directing or refusing of issues or new trials. Sect. 14.

The proctor has a lien for his costs upon all sums of money decreed by the Court to be paid by his party. *The Araminta*, 1 Swab. Ad. R. 81. It has been held, that payment to a third party under a judge's garnishee order of costs pronounced due to a party by decree of the Court of Admiralty, is satisfaction of the decree, even as against the party's proctor claiming a lien.

[2] The warrant for arrest of a ship by the Admiralty, and the process of citation, is notice to all the world of the subsequent proceedings. *Attorney-General v. Nostedt*, 3 Price, 109.

[3] Execution in the Admiralty is against the person of the defendant, under which he may be taken in any county in England. *Sandys v. East India Co.* Skin. 93. And the Court may appoint the prison in which he is to be confined (sect. 12); but execution cannot issue from thence against the defendant's lands. *Per Cook*, Godb. 261. If a

V. Effect of a Sentence in an English or Foreign Court.

(A) *To render a Sentence of a Foreign Court of Admiralty conclusive Evidence of the ground of Condemnation, such ground must be clearly stated therein.*

Dalgleish v. Hodgson, 7 Bing. 495; S. C. M. & P. 487.

To render a sentence of a foreign Court of Admiralty conclusive evidence of the ground of condemnation, such ground must be clearly stated therein.

This was an action on a policy of insurance on goods on board the ship George. The question was raised whether the sentence of condemnation of the George and her cargo at the Prize Court in Monte Video was to be received in our Courts as conclusive evidence of the fact that the ship was captured in attempting to break the blockade of Buenos Ayres.

Per Cur. "The general law upon this subject is well known, that the sentence of a foreign Court of Admiralty of competent jurisdiction is binding upon all parties, and in all countries, as to the fact upon which the condemnation proceeded, where such fact appears upon the face of the sentence free from doubt and ambiguity. But it is at the same time as well established, that in order to conclude the parties from contesting the ground of condemnation in an English court of law, such ground must appear clearly upon the face of the sentence. It must not be collected by inference only, or left in uncertainty, whether the ship was condemned upon one ground, which would be a just ground of condemnation by the law of nations, or on another, which would amount only to a breach of the municipal regulations of the condemning country."[1] *See* 2 Dougl. 575; 7 T. R. 523; 2 Taylor on Ev. 1139.

VI. When and how restrained from Proceeding when it exceeds its Jurisdiction.

(A) *If the Original Cause arose within the Admiralty Jurisdiction, the Consequences of it may be determined in that Court.*

Turner and Cary v. Neele, 1 Lev. 243; S. C. 1 Sid. 367.

If the original cause arose within the Admiralty jurisdiction, the consequences of it may be determined in that Court.[2]

Upon an application for a prohibition, it appeared that a man who had letters of mark, during a war with the Dutch, seized an Ostend instead of a Dutch ship, and brought her into harbour, where on being libelled she was declared to be no prize, and a sentence to that effect pronounced. The owner of the Ostend vessel proceeded in the Admiralty against the captor for damages sustained by the seizure and detention. A prohibition was moved for, on the ground that this suit was for the recovery of damages for an injury done in port, and for which an action lies at common law; but the application was refused, because the original act being a caption at sea, and the bringing into port, in order to have it condemned as prize, but a consequence thereof, not only the original wrong, but

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person taken in execution upon a sentence of the Admiralty bring a *habeas corpus*, he shall not be discharged if the cause do not appear out of their jurisdiction, though irregular, for he ought to have made an appeal.

[1] The general principle is, that a sentence pronounced in a foreign Admiralty Court is conclusive here, if it be a final and not an interlocutory sentence. *Jurado v. Gregory*, 1 Lev. 267; S. C. 1 Vent. 32; 1 Sid. 418; S. P. *Hughes v. Cornelius*, 2 Show. 232; S. C. 2 Ld. Raym. 935; S. C. Skin. 59. See *Latham v. Henderson*, 3 B. & P. 513. *Harmer v. Bell*, 7 Moore, P. C. R. 267; 2 Keb. 511; 1 Sid. 418; 2 Show. 338; Raym. 473; 2 Jones, 66; 6 Mod. 70; Sto. *Conflict of L.* pl. 592. If a foreign Admiralty adjudge a ship to be prize, and after sale here upon land there be a suit for an account, a prohibition shall not go, for it is only an execution of the sentence which adjudged it to be a prize. The *King v. Broom*, Holt, 647; 12 Mod. 13; S. C. 1 Salk, 32; S. C. Carth. 398; Comb. 444; S. C. 5 Mod. 340. If the Admiralty has no jurisdiction over the subject matter, the whole is *coram non judice*. *Ladbroke v. Crickett*, 2 T. R. 653. *Burton v. Fitzgerald*, 2 Str. 1078. And the sentence being a nullity, is at any time impugnable. *Menetone v. Gibbons*, 3 T. R. 269. Sto. pl. 592.

[2] So shall all incidental or collateral matter. 2 Saund. 259 a; S. C. 2 Lev. 25. *Edmonson v. Walker*, Show. 177; S. C. Carth. 166; Holt. 650. *See* Cro. Eliz. 685; 3 Mod. 194; 1 Vent. 173; 2 Keb. 828; 1 Danv. 269; Raym. 473; 1 Rol. Abr. 530; 1 Sid. 320; Godl. 26; Hob. 78; 1 Vent. 32; Molloy, 449.

As to offences committed at sea, see *ante*, p. 58.

also the attendant results, shall be tried there. *See* Ld. Raym. 473; 6 Mod. 11, 79; 2 Keb. 360; Roll. Abr. 530; 3 Cro. 685; 1 Salk. 35; 1 Vent. 32; 2 Show. 338.

(B) *A Prohibition will not lie after Sentence, except for Cause appearing on the face of the Proceedings.*

Anonymous, 8 Mod. 194. S. P. Shermoulin v. Sands, 1 Ld. Raym. 272. Buggin v. Bennett, 4 Burr. 2034. *Per Buller, J.*, in Ladbroke v. Crickett, 2 T. R. 654.

A prohibition will not lie after sentence, except for cause appearing on the face of the proceedings.[1]

On a motion for a prohibition to the Admiralty Court an affidavit was produced, stating that the cause of action did not arise on the high sea.

But it was denied *per Cur.* For when the sentence is passed no prohibition ought to be granted, unless it be for some cause apparent on the face of the record. *See* 1 Com. Dig. Admiralty, F. 2; 6 id. Prohibition, D.; Str. 729.

(C) *A Court of Common Law will not restrain Proceedings in a Suit in the Admiralty on a Bottomry Bond, on the Application of a Defendant in an Action on the Charter-Party, who has been required to pay the Freight into the Admiralty Court.*

In re Place, 8 Ex. 704; 22 L. J. Ex. 241.

A court of common law will not restrain proceedings in a suit in the Admiralty Court on a bottomry bond, on the application of the defendant in an action on the charter-party, who has been required to pay the freight into the Admiralty Court.

After an action for freight had been commenced by a shipowner against a charterer, a monition issued from the Court of Admiralty, requiring the defendant to bring the freight into that Court in a suit there by the holder of a bottomry bond on the ship. The defendant pleaded to that suit, paid in the money, and the cause stood for hearing. It was suggested that the suit in the Admiralty was brought by collusion between the holder of the bottomry bond and the defendant, to deprive the plaintiff in the action of his freight.

The Court refused a prohibition, *Parke, B.*, saying, that if a judgment *in rem* were obtained, and the defendant should set that up as an answer to the action in this Court, the plaintiff might reply the fraud.

(D) *If the Libel be stated to be for Flotsam when it is really for a Wreck, a Prohibition may be obtained.*

The Lady Wyndham's Case, 2 Mod. 294.

If the libel be stated to for flotsam when it is really for a wreck, a prohibition may be obtained,[2]

Per Cur. If flotsam come to land, and is taken by him who has no title, the action shall be brought at common law, and no proceedings shall be taken thereon in the Court of Admiralty, for there is no need of condemnation thereof as there is of prizes. *See* 4 Inst. 134, 154; 1 Rol. Abr. 531, 640; id. 529; 3 Buls. 148.

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[1] Neither will it lie before sentence, where the matter of suggestion is *dehors* the proceedings, and not verified by affidavit. *Caton v. Burton*, Cowp. 330. *Roberts v. Cadd*, Bunb. 247.

[2] A prohibition should not, in general, be granted upon process out of the Admiralty, upon an affidavit that it is for a cause of action upon land, but a libel should be first exhibited. *Trantor v. Watson*, 6 Mod. 11; S. C. Salk. 35; S. C. 2 Lord Raym. 931. But where the Admiralty had granted a warrant according to the course of the Court, to seize a ship before libel was exhibited, a prohibition was moved for and granted. *Powell v. Robinson*, Bunb. 9. And where there was a libel for mariners' wages after seizure of the ship for smuggling a prohibition was refused, notwithstanding the owner had compounded, in submission to a fine, &c.; and it was argued that this amounted to a condemnation, and avoided all prior incumbrances. *Minnett v. Robinson*, Bunb. 122. *See* the *Attorney-General v. Norstedt*, 3 Price, 97. A prohibition will not be granted to the Admiralty Court on the application of the plaintiff in that Court. *Browne v. Walker*, 2 Show. 406. See *Worts v. Clyston*, Cro. Jac. 350; Stra. 576; 2 Inst. 602; 2 T. R. 473; 1 Show. 173; 2 Burr. 813; 2 Roll. Abr. 312; 3 Mod. 286; 1 T. R. 552; Cro. Eliz. 55; 6 Com. Dig. Prohibition, E. And it does not lie for the refusal by the Court of a copy of a libel. *Anon.* 12 Mod. 243; S. P. *Anon.* 2 Salk. 553.

VII. Of the Remedy for Suing in the Admiralty Court out of its Jurisdiction.[1]

ADMINISTRATION of Justice. *See* Justice, Administration of.

ADMISSIBILITY of Evidence is a Question for the Judge. *See* Evidence; Witness.

ADMISSION of Documents. *See* Documentary Evidence; Notice to Admit; Notice to Produce.

ADMISSIONS. *See* also Husband and Wife; Master and Servant; Principal and Agent; Principal and Accessory; Principal and Surety.

I. May be Verbal or in Writing,[2] p. 195.
II. „ by assumed Character,[3] p. 195.
III. „ by Conduct,[4] p. 195.
IV. „ by Non-dissent,[5] p. 195.

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[1] Parties grieved by suits in the Admiralty Court, under 13 R. 2, c. 5, shall recover double damages by action on the case against such pursuer, who, if attainted, shall also incur the penalty of 10*l.* to the king for his suit so made (2 Hen. 4, c. 11). An action lies upon the statute, 13 R. 2, for improperly issuing process out of the Admiralty. The simple act of detention renders the detainer liable to all interested in the ship. The staying of a ship is sufficient, though there be no further proceedings. A party secretly obtaining such detention is liable; but, regularly, all persons interested ought to be included in the action. *Sands v. Child*, 4 Mod. 176; 2 Lev. 351; Comb. 215, S. C. An action cannot be brought on the 2 Hen. 4, c. 11, for suing in the Admiralty upon an hypothecation. *Benson v. Jeffries*, 1 Ld. Raym. 152.

[2] The words, writings, and acts of a party to a suit connected with the matter in controversy, and which in their bearing tell against his interest, are, under the general designation of "admissions," receivable in evidence *against* him. Where the acknowledgment is of a crime, then it is called a "confession," and will be found treated of under that head in this work. Admissions of third parties are also in some instances receivable, partly as part of the *res gestæ*, partly as made against the interest of the party making them, and partly because of some privity with him against whom they are offered. The Roman law distinguishes with great clearness between confessions *extra judicium* and confessions *in judicio*, treating the former as of very little, and often of no weight, unless corroborated; and the latter as generally, if not always conclusive, even to the overthrow of the *presumptio juris et de jure*. Mascard de Prob. vol. i. quæst. 7, n. 15. *Vide* Dig. lib. 42, tit. 2, "De confessio Cod." lib. 7, tit. 59.

[3] Admissions may be implied from *assumed character*. Thus, when the existence of any domestic, social, or official relation is in issue, any recognition, whether by word or deed, of that relation, is *primâ facie* evidence against the person making such recognition that that relation exists. *Dickenson v. Coward*, 1 B. & A. 677. For example, if one has assumed to act in an official character, this is an admission of his appointment or title to the office so far as to render him liable, even criminally, for misconduct or neglect in such office. See *R. v. Borrett*, 6 Car. & P. 124. *Bevan v. Williams*, 3 T. R. 635. *Crosse v. Kaye*, 6 T. R. 663. *Trowbridge v. Baker*, 1 Cowen, 251. And where one has recognised the official character of another, by treating with him in such character or otherwise, this is at least *primâ facie* evidence of his title against the party thus recognising it. *Peacock v. Harris*, 10 East, 104. *Radford v. M'Intosh*, 3 T. R. 632. *Berryman v. Wise*, 4 T. R. 366. *Smith v. Taylor*, 1 New R. 196. Thus, in an action by the assignees of a bankrupt against a debtor who has made them a partial payment (*Dickenson v. Coward*, 1 B. & A. 677), or has acknowledged their title in letters to the solicitor of the commission (*Inglis v. Spence*, 1 C., M. & R. 432; *Crofton v. Poole*, 1 B. & Adol. 568), the plaintiffs need not prove their title as assignees, though notice to dispute has been given.

[4] Admissions may also be implied from *conduct*. Thus, the suppression of documents is an admission that their contents were deemed unfavourable to the party suppressing them. *Bell v. Frankis*, 4 Man. & G. 446. *Curlewis v. Corfield*, 1 Q. B. 814; Gale & D. 489. *James v. Bion*, 2 Sim. & Stu. 606. The entry of a charge to a particular person in a tradesman's book, or the making out of a bill of parcels in his name, is an admission that the goods were furnished on his credit. *Storr v. Scott*, 6 Car. & P. 241. *See* also *R. v. Barnsley*, 1 M. & S. 377. *R. v. Carnarvonshire*, 2 Q. B. 325. *Hicks v. Duke of Beaufort*, 4 Bing. N. C. 229.

[5] Admissions may also be implied from

(A) *Whose Admissions receivable*, p. 197.
(*a*) *Parties to the Record*, p. 197.
(1) *Although Nominal*, p. 197.
(2) *In Divorce Causes*, p. 197.
(*b*) Prochein Amy, *or Guardian, or Trustee*, p. 198.
(*c*) *Partner or Co-obligor*, p. 198.
(*d*) *Co-executor or Co-trustee*, p. 199.
(*e*) *Inhabitants of Townships, &c.* p. 199.
(1) *Where Parties to Indictment for Non-repair, &c.* p. 199.
(*f*) *Persons interested in Suit*, p. 199.
(*g*) *Voters on Election Petitions*, p. 200.
(*h*) *Strangers to Suit*, p. 200.
(1) *Where Issue upon their Rights*, p. 200.
(2) *Or they have been referred to by a Party for Information on the disputed Question*, p. 200.
(*i*) *Wife of Party*, p. 201.
(*k*) *Attorney of Party*, p. 201.
(*l*) *Counsel*, p. 202.
(*m*) *Principal when Evidence against Surety*, p. 202.
(*n*) *Third Party by reason of Privity*, p. 202.

(B) *Rules respecting Admissibility, and Effect of*, p. 203.
(*a*) *Whole must be taken together*, p. 203.
(*b*) *If an Offer or Proposition made "without prejudice" excluded*, p. 204.
(*c*) *Oral may be Evidence of Contents of Document*, p. 204.
(*d*) *An Admission acted upon by a Third Party is conclusive between such Party and he who made it*, p. 205.

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the *non-dissent* of the party. To have the effect of an admission, we have seen, p. 128, n. the acquiescence must exhibit some act of the mind, and amount to voluntary demeanour or conduct of the party. *Alten v. M'Keen*, 1 Sumn. 314. It must plainly appear that the language or conduct acquiesced in was fully known to and understood by the party before any inference can be drawn from his passiveness or silence. And the circumstances must be not only such as afforded him an opportunity to act or speak, but such also as would properly and naturally call for some action or reply. Thus, where a landlord quietly suffers a tenant to expend money in making alterations and improvements on the premises, it is evidence of his consent to the alterations. Though the mere lying by, and passively witnessing a breach of covenant for several years, is not such an acquiescence as to amount to a waiver of the forfeiture. *Doe v. Allen*, 3 Taunt. 78. So if a tenant receive notice to quit at a particular day without objection, it is generally an admission that his tenancy expires on that day (*Doe v. Biggs*, 2 Taunt. 109); but not if he cannot read, or even did not read the notice in the presence of the person serving it upon him. *Doe v. Calvert*, 2 Camp. 388. Again, the raising an objection to one item of an account, no remark being made as to the rest, will be evidence of an account stated as to those items to which no objection has been made. *Chisman v. Count*, 2 Man. & G. 307. And silence as to accounts rendered will, as regards accounts between merchants, after the lapse of a reasonable time for objecting, raise an inference of acquiescence in their correctness. *Sherman v. Sherman*, 2 Vern. 276. *Willis v. Jernegan*, 2 Atk. 252. There is, it appears, a distinction between silence as to a verbal statement in the hearing and presence of a person affected by it, and a statement in a letter: the former he is in some degree called upon to contradict, if he does not acquiesce in it; but a letter, it has been said, is quite different. *Fairlie v. Denton*, 3 Car. & P. 103. *Doe v. Frankis*, 11 Ad. & E. 795. Silence when statements were made during the course of a judicial investigation, or upon any other occasion, when the party could not without impropriety interpose a contradiction, cannot be treated as acquiescence. *Melen v. Andrews*, M. & M. 336. *R. v. Appleby*, 3 Stark. R. 33. *R. v. Turner*, 1 Mo. C. C. 347; *ante*, p. 128 n.

(A) *Whose Admissions receivable.*

(*a*) *Parties to the Record.*

SPARGO v. BROWN, 9 B. & C. 935.

Per Bayley, J. The general rule is, that every material fact must be proved by testimony on oath. There is an exception to that rule, namely, that the declarations of a party to the record, or of one identified in interest with him, are as against such party admissible in evidence.

The declarations of a party to the record are admissible against him.[1]

(1) *Although Nominal.*

BAUERMAN AND ANOTHER v. RADENIUS, 7 T. R. 668.

This was an action on a charter-party. The plaintiffs had shipped the goods as agents for a third party, who was the person really interested in the suit, and had indemnified the plaintiffs, in whose names they brought the action. On behalf of the defendant a letter of the plaintiffs, exculpating them from all imputation of negligence, was tendered and admitted in evidence.

Notwithstanding he be merely a nominal party.[2]

Lord Kenyon. "I cannot conceive upon what ground it can be said that the plaintiffs may be considered as the parties to the record for the purpose of rejecting their admissions, and yet as parties to the cause for the purpose of preventing their being examined as witnesses. I take it to be an incontrovertible rule, that an admission made by the plaintiff on the record is admissible evidence."

(2) *Admissions of Parties in Divorce Causes.*

ROBINSON v. ROBINSON, 27 L. J. P. & M. 91.

Suit for dissolution of marriage. On the part of the petitioner, the husband, entries in a private diary kept by the wife, detailing acts of adultery committed by her with the co-respondent, were tendered in evidence and objected to.

The admission or confession of a party to a divorce suit of the fact of having committed adultery, is evidence against such party.

Cockburn, C. J. "It never could have been the intention of the legislature that the petitioner should be placed in a worse position as to evidence than he would have been in proceedings for a divorce in the Ecclesiastical Court, or the House of Lords, in either of which cases the entries would clearly have been evidence against Mrs. Robinson as confessions or admissions."

The *Judge Ordinary.* "There is no pretence for the objection. The entries may be evidence against the wife, but not against the co-respondent. If several persons are indicted for burglary or conspiracy, and one of them makes a confes-

[1] Even to the admission of the execution of a deed. *Tupper v. Foulkes*, H. T. 1861, C. P. *Slatterie v. Pooley*, 6 Mee. & W. 664. It has been held, that notwithstanding it was made by the party while a minor, it is still admissible against him. *O'Neill v. Read*, 7 Ir. L. R. 432. According to the most approved authority, where the plaintiff on the record sues in a representative character, an admission made before he became clothed with that character, and at a time when he had no interest, is not admissible. *Fenwick v. Thornton*, M. & M. 41. *Smith v. Morgan*, 2 M. & Rob. 257, *contra*. *See* also *Plant v. M'Ewen*, 4 Conn. 544. In *Bruff v. The Great Northern Railway Cy.* 1 F. & F. 344, there being a difficulty in proving the sending of a letter to the secretary of a joint-stock company, it was proposed to prove that he had admitted the receipt in a conversation. *Willes, J.*, rejected the evidence, saying that the secretary was not an officer authorised to make admissions in behalf of the company.

[2] *See* also *Craib v. D'Aeth*, 7 T. R. 670 n. *Alner v. George*, 1 Camp. 392. Upon the application of this doctrine a release by the nominal party may be pleaded. But courts of law are in the habit of setting such releases aside, or preventing the defendant from pleading them. *Legh v. Legh*, 1 B. & P. 447. *Payne v. Rogers*, 1 Dougl. 407. *Scaife v. Jackson*, 3 B. & C. 422. *Innell v. Newman*, 4 B. & A. 419. *Mountstephen v. Brooke*, 1 Chit. R. 390. *Phillips v. Clagett*, 11 Mee. & W. 93. *Rawstorne v. Gandell*, 15 Mee. & W. 304. It is also ground for the interference of a court of equity in protection of the interests of the party beneficially interested. But the simpler redress by application to the court of law to prevent such a release being pleaded, is that to which resort is generally had. And the same remedy is, it seems, open if an admission be made collusively and in fraud of other parties jointly interested with the party making the admission. *Rawstorne v. Gandell*, 15 Mee. & W. 304.

sion inculpating the rest, against whom there is no other evidence, he may be convicted, although the others must be acquitted."

The evidence was admitted against the wife.[1]

(*b*) Prochein Amy, *or Guardian, or Trustee.*

Cowling v. Ely, 2 Stark. R. 366.

Admissions by *prochein amy* or guardian are not receivable.[2]

In an action of slander brought by guardian of infant plaintiff, a witness was examined as to declarations relating to the subject made by the guardian.

Abbott, J., was clearly of opinion that the declaration of the guardian was not admissible in evidence against the plaintiff.

Davies v. Ridge and others, 3 Esp. 101.

An admission of the receipt of money by a trustee is not receivable to charge his co-trustees.

This was an action on an award against the defendants as trustees of a Mr. Pigot. One of the trustees had admitted that he had money of the trust estate in his hands, and Lawes, for the plaintiff, submitted that this admission of one of them bound the rest.

Lord Eldon. "It would if they were all personally liable; but not where they are only trustees."

(*c*) *Partner or Co-obligor.*

Wood v. Braddick, 1 Taunt. 104.

The admission of a co-partner is receivable, notwithstanding when tendered the partnership has been determined.[3]

In an action for the proceeds of goods sold on behalf of the plaintiff by the defendant and another, his partner, a letter written by such other admitting a balance was received in evidence. A rule for a new trial, on the ground that the latter ought to have been rejected, was discharged.

Mansfield, C. J. "Clearly the admission of one partner, made after the partnership has ceased, is not evidence to charge the other in any transaction which has occurred since their separation; but the power of partners with respect to rights created pending the partnership remains after the dissolution. Since it is clear that one partner can bind the other during all the partnership, upon what principle is it that, from the moment when it is dissolved, his account of their joint contracts should cease to be evidence; and that those who are to-day as one person in interest, should to-morrow become entirely distinct in interest with regard to past transactions which occurred while they were so united?"

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[1] In the Ecclesiastical Courts, the confession of the wife was, under all circumstances, admissible, however little the value of it might be in certain cases, and whatever little weight they might consequently attach to it in such instances. See *Mortimer v. Mortimer*, 2 Hagg. Cons. R. 316. *Grant v. Grant*, 2 Curt. Ec. R. 16. In the House of Lords, confessions of the wife were admissible only in certain cases. If contained in letters addressed to the husband, they were in general rejected, unless strong circumstances of guilt were established by independent testimony. *Lord Cloncurry's case*, Macq. Pr. H. of L. 606. *Doyley's case*, id. 654. *Miller's case*, id. 620. But if in letters addressed to a stranger, or even to an agent of the husband, they were admitted if written without coercion. *Lord Cloncurry's case, supra.* *See* also *Dundas' case*, Macq. P. 600. *Boydell's case*, id. 651. An oral confession to a third party was admissible, at least as confirmatory evidence. *Lord Ellenborough's case*, id. 655; but see *Wiseman's case*, id. 631.

[2] *See* also *Eggleston v. Speke*, 3 Mod. 258. *Sinclair v. Sinclair*, 13 Mee. & W. 640. *Webb v. Smith*, R. & M. 106. The solemn admissions made by the guardian or *prochein amy* in good faith, and for the purposes of the trial only, are, however, admissible, on a like ground that a similar admission by the attorney would be.

[3] A partner may be bound by a representation made by his co-partner in the joint business, notwithstanding it is fictitious. *Kirkham v. Marer*, 2 B. & A. 613. Where it appeared on the record that an agreement sued on was made by the plaintiff on behalf of himself and the other proprietors of a theatre, statements made by one of such proprietors were admitted. *Kemble v. Farren*, 3 Car. & P. 623. *See* also *Thwaites v. Richardson*, Peake, R. 16. *Nicholls v. Dowding*, 1 Stark. 81. *Whitcomb v. Whiting*, 2 Dougl. 652. *Lucas v. De la Cour*, 1 M. & S. 249. *Crosse v. Bedingfield*, 12 Sim. 352. Upon the same prin-

(*d*) *Co-executor or Co-trustee.*

TULOCH v. DUNN, R. & M. 416.

An express promise by one executor does not, it seems, bind the co-executors.[1]

In an action against two executors for a debt of their testator, the plaintiff relied upon a promise by one of the defendants to pay the debt, as an answer to the Statute of Limitations.

Abbott, C. J. "I am of opinion that the plaintiff must be nonsuited. The only count on which he can pretend to recover is on the account stated and promise to pay by the executors. I think, as against an executor, an acknowledgment merely is not sufficient to take the case out of the statute; there must be an express promise. The promise by one is not enough to entitle the plaintiff to recover: there ought to be a promise by both."

(*e*) *Inhabitants of Townships, &c.*

REG. v. INHABITANTS OF ADDERBURY, 5 Q. B. 187.

The declarations of rateable inhabitants of a township indicted for non-repair of a bridge are admissible upon the trial of the indictment.[2]

On an indictment against a township for non-repair of a bridge, the declarations of rateable inhabitants were tendered and received in evidence on behalf of the Crown, and were held to have been properly received.

Patteson, J. "The admissibility of the declarations in evidence here turned not upon the parties being rated inhabitants, but upon their being rateable, and being parties to the record. Overseers or surveyors cannot exempt persons from an indictment by omitting to rate them. Every inhabitant, whether actually rated or not, is liable on an indictment against the inhabitants, and is a defendant on the record. And what a defendant on the record says is evidence against him in every instance."

(*f*) *Persons interested in Suit.*

HANSON v. PARKER, 1 Wils. 257.

The admissions of persons imme-

Action on a bond, with condition for payment of a certain sum to one Lydia Dovey. At the trial it was given in evidence that Lydia Dovey, in conversation

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ciple, before 19 & 20 Vic. c. 97, s. 14, a part payment of a note by one of several makers operated as an acknowledgment against all, and took the case out of the Statute of Limitations, as well against the others as the party making the payment. *See* Bills and Notes; Limitations, Stat. of; and 9 Geo. 4, c. 14, s. 1.

A joint liability must be shown before admissions of one will be evidence against another, and the fact of the existence of such a relation cannot be shown by the declaration of one as against the other. For example, if it be sought to charge several as partners, an admission of the fact of partnership by one is not receivable in evidence against any of the others to prove the partnership. *Nicholls v. Dowding*, 1 Stark. 81. *Gibbons v Wilcox*, 2 Stark. 43. *See* also *Catt v. Howard*, 3 Stark. 3. *Gray v. Palmer*, 1 Esp. 135. The same principle regulates the effect given to answers in Chancery. The rule is, that the answer of one defendant cannot be read against another, except in cases where the one claims through the other, or they have a joint interest in the transaction. *Pritchard v. Draper*, 1 Russ. & Mylne, 191. *Wych v. Meal*, 3 P. Wms. 311.

The admission must, of course, relate to a matter in which the party against whom it is used was jointly interested. See *Jaggers v. Binnings*, 1 Stark. R. 64. *Fox v. Waters*, 12 Ad. & E. 43. In actions of *tort*, as trespass or negligence, the admission of one defendant is not admissible in evidence against another defendant. *Daniels v. Potter*, M. & M. 501. *Morse v. Royal*, 12 Ves. 362. *R. v. Hardwick*, 11 East, 585. The same rule prevails in criminal proceedings, as there can be no partnership or joint interest in crime. *Grant v. Jackson*, Peake, R. 204.

[1] *See* also *Scholey v. Walton*, 12 Mee. & W. 514; but see *Atkins v. Tredgold*, 2 B. & C. 23; 3 D. & R. 200. *M'Culloch v. Dawes*, 9 D. & R. 40. *Slater v. Lawson*, 1 B. & Adol. 396. If a joint contract is severed by the death of one of the contractors, nothing that is subsequently done or said by the survivor can bind the personal representative of the deceased. *Atkins v. Tredgold*, 2 B. & C. 23; 3 D. & R. 200; and 12 Mee. & W. 510.

[2] So in settlement cases, declarations by rated inhabitants will be evidence against the parish. *R. v. Hardwick*, 11 East, 579. See *R. v. Whitley Tower*, 1 M. & S. 636. *R. v. Woburn*, 10 East, 395.

diately interested in the suit, although not parties, are receivable.[1]

touching this bond, being asked if the defendant owed her any money, declared he did not owe her anything, whereupon the jury gave a verdict. It was moved for a new trial, that the declaration of Lydia Dovey, who was not the party plaintiff in this action, ought not to affect the plaintiff. A new trial was refused, for Lydia Dovey ought to be considered as if she were really plaintiff, and the action was brought for her benefit.

(*g*) *Voters on Election Petitions.*

SOUTHAMPTON CASE, COCK. & ROWE, 113, 117.

The declarations of voters against their own votes are receivable on election petitions.[2]

A vote was objected to, on the ground that the person voting had personated another whose name was on the register, and in support of this objection evidence was received by the committee of a conversation in which he admitted that he had no vote, and stated that he had voted for another man who had.

(*h*) *Strangers to Suit.*

SLOMAN v. HERNE, 2 Esp. 695.

Where the issue is substantially upon the rights of a third party at a particular time his admissions are receivable.[3]

In an action against the sheriff for an escape. On behalf of the defendant, evidence that the debtor had acknowledged the debt, which arose out of a bill of exchange, was tendered as dispensing with the necessity of producing the bill.

Lord Kenyon said, "that whatever evidence would be sufficient to charge the original defendants, would do to charge a sheriff in such an action as the present;" and therefore admitted it.

WILLIAMS v. INNES, 1 Camp. 364.

So if a party to the suit has referred his opponent to another for information on the disputed matter, the declarations of the referee are admissible against him.[4]

Upon a plea of administravit. It appeared that the executors had written to the plaintiff, that if she wished for further information in regard to the assets she should apply to a certain merchant in the city: it was proposed to give in evidence the answer of the merchant, that she had received a certain sum.

Lord Ellenborough. "If a man refers another upon any particular business to a third person, he is bound by what the third person says or does concerning

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[1] On this ground, the admissions of persons interested in a policy effected in the name of another for their benefit have been received (*Bell v. Ansley*, 16 East, 143); those of shipowners in an action by the master for freight (*Smith v. Lyon*, 3 Camp. 465); those of the indemnifying creditor in an action against the sheriff (*Dowden v. Fowle*, 4 Camp. 38. *Proctor v. Lawson*, 7 Car. & P. 629. *Harwood v. Keys*, 1 M. & Rob. 204); those of the deputy-sheriff, tending to charge himself in an action against the high-sheriff for the misconduct of the deputy. *Snowball v. Goodricke*, 4 B. & Adol. 541. But unless there be an existing interest, the admission will not be admissible against the party on the record. Thus the admission of a bankrupt, after his estate has vested in the assignees, is not admissible. *Bateman v. Bailey*, 5 T. R. 513. *Deady v. Harrison*, 1 Stark. R. 60. *Smith v. Simmes*, 1 Esp. 330. So if an action be brought by trustees, who represent the interests of a variety of *cestuis que trust*, the statements of the person beneficially interested as tenant for life cannot be received as evidence for the defendant, so as to prejudice the rights of the remainderman in fee. *Doe v. Wainwright*, 8 Ad. & E. 691. *May v. Taylor*, 6 Man. & G. 261.

[2] Although the declaration invalidates the vote on the ground of the voter having received a bribe it is receivable. *See* the cases collected 2 Rog. on Elect. 139.

[3] *See* also *Williams v. Bridges*, 2 Stark. R. 42. *Keuplad v. Macaulay*, Peake's R. 65. *Rogers v. Jones*, 7 B. & C. 89. So the admission of joint liability by a third person has been admitted in support of a plea in abatement of non-joinder of such person. *Clay v. Langslers*, M. & M. 45. So the admissions of a bankrupt *before* the act of bankruptcy are admissible in support of the petitioning creditor's debt; but not if made after, although such admissions are receivable against himself. *Jarret v. Leonard*, 2 M. & S. 265. *Hoare v. Coryton*, 4 Taunt. 560. *Cook v. Braham*, 3 Ex. 185.

[4] In an action for goods sold, where the fact of delivery was disputed, and the defendant said, "If the carman says he delivered the goods I will pay for them," he was held bound by the affirmative reply of

it, as much as if that had been said or done by himself. This was agreed to be law by all the judges upon the trial of Mr. Hastings."

(*i*) *Wife of Party.*

MEREDITH v. FOOTNER, 11 Mee. & W. 202.

The admissions of the wife bind the husband only where she had authority to make them.[1]

Replevin, avowry for rent. Evidence was given that the plaintiff's wife, who carried on the business of a grocer in the house in question, by authority of her husband attending to all the receipts and payments, had admitted that rent would be due on a particular day, when she would pay it. A new trial was granted, on the ground of the reception of such evidence.

Parke, B. "Though the wife might be the agent of her husband to make payments, she is not necessarily his agent to make admissions of an antecedent contract; and therefore, if the admissibility of this statement be rested on the ground of its being evidence of an antecedent lease, it must fail. Then, although when coupled with the fact of her subsequent possession, it might be evidence to show a contract for taking the shop *in futuro*, the admission at the trial does not make her an agent to take a lease for the benefit of her husband, and on that ground also the evidence was inadmissible."

(*k*) *Attorney of Party.*

ELTON v. LARKINS, 1 M. & Rob. 196; 5 Car. & P. 385.

Admissions by the attorney made in the cause, and for the purposes of the trial, are receivable.[3]

Upon a second trial of an action on a policy of insurance, a written admission was put in, signed by the defendant's attorney,[2] of the execution of the policy, which had been given before the first trial.

Tindal, C. J. "I think the expression, 'it is agreed to admit on the trial,' applies to every trial which may take place by direction of the Court."

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the carman. *Daniel v. Pitt*, 6 Esp. 74; Peake's Add. R. 238; 1 Camp. 365 n. *Hood v. Reeve*, 3 Car. & P. 532. Upon an application of the principle illustrated by the case in the text, the opinion expressed by a person to whom the parties mutually agreed to refer a question in dispute has been admitted in evidence. Thus, where the parties have agreed to abide by the opinion of counsel on the construction of a statute (*Price v. Hollis*, 1 M. & S. 105); or have referred a question of mining to a miners' jury, the opinion of counsel and the decision of the miners will be evidence on the trial. *Sybray v. White*, 1 Mee. & W. 435; Tyr. & Gr. 746. *See* also *Downs v. Cooper*, 2 Q. B. 256; *Stevens v. Thacker*, Peake's R. 187. *Garnet v. Ball*, 3 Stark. R. 160.

[1] The law upon this subject is not, of course, affected by the circumstance that the wife is now a competent witness. In general, the authority or agency of the wife can only be shown by inference. Thus, if she have been repeatedly seen apparently conducting her husband's business, there will be ground for inferring authority to receive a direction in regard to it. *Plummer v. Sells*, 3 Nev. & M. 422. But even where the husband sues for wages earned by her, an unauthorised admission of payment by the wife will not bind him. *Hall v. Hill*, 2 Str. 1094. And her unsanctioned declarations cannot affect him, even where he sues with her in her right, for the right is his own, though acquired through her instrumentality. *Alban v. Pritchett*, 6 T. R. 680; *Kelly v. Small*, 2 Esp. 716; *Denn v. White*, 7 T. R. 112. As to the admissions of the wife to take a case out of the Statute of Limitations, *see* Limitations, Statute of.

The declarations of the wife may, perhaps, be evidence *for* the husband where they are part of the *res gestæ;* but on that ground only. See *Walton v. Green*, 1 Car. & P. 621.

[2] Statements by attorney or counsel in the course of a cause are presumably true, and to be taken as a fact, and binding on the parties. *Tanner v. Worman*, H. T. 1861, C. P.

[3] *See* also *Doe v. Bird*, 7 Car. & P. 6; *Langley v. Earl of Oxford*, 1 Mee. & W. 508; *Young v. Wright*, 1 Camp. 141. Admissions are sometimes made incidentally, or it may even be inadvertently, by an attorney, which are admissible, not as solemn admissions made for the purpose of dispensing with proof, but as some evidence from which the existence of the fact may be inferred. Thus where, in the notice to produce papers connected with a bill, it was described as "accepted by the said defendant," the statement was treated as *primâ facie* evidence of the defendant's acceptance. *Holt v. Squire*, R. & M. 282. And where in the undertaking to appear for defendants, sued as owners of a ship, they were described as such owners, it was taken as an admission from which their joint ownership might be inferred. *Marshall v. Cliff*, 4 Camp. 133. *See* also *Milwood v. Temple*, 1 Camp. 375. Admissions, however,

(*l*) *Counsel.*

STACY v. BLAKE, 1 Mee. & W. 168; S. P. TANNER v. WORMAN, H. T. 1861, C. P.

The admission of counsel at the trial dispenses with other evidence.[1]

Where it appears from the whole conduct of a cause that a particular fact is admitted between the parties, the jury have a right to draw the same conclusion from that fact as if it had been proved in evidence, and to draw such conclusion as to all the issues on the record.

(*m*) *Principal when Evidence against Surety.*

SMITH v. WHITTINGHAM, 6 Car. & P. 78.

In an action against a surety the admissions of the principal are admissible, if part of the *res gestæ*, otherwise not.[2]

In an action against a surety, the confession of the principal that he had committed embezzlement, made after his discharge from the situation, his good conduct in which had been guaranteed, was rejected.

Gurney, B. "This is not an account current; it is only an admission made by the principal after his discharge of what he had embezzled, and though it would have been evidence against him, it is not so against the defendant."

(*n*) *Third Party by reason of Privity.*

DOE v. PETTETT, 5 B. & A. 223.

The declarations of an ancestor that he held the land as tenant of a third person are receivable as evidence in an ejectment by

Ejectment. It appeared that J. H., the casual ejector, was the original purchaser of the premises, and that after his death, about thirty years previous to the commencement of the suit, his widow continued in possession for about twenty years and then died. The defendant was the heir-at-law of the widow. In order to show that the widow's possession was not adverse, the learned Judge admitted evidence of her declaration during her possession of the premises, and that after her death they would go to the heirs of J. H. A new trial being moved for,—

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contained in the mere conversation of an attorney, cannot be received against the client. *Young v. Wright*, 1 Camp. 139. *Doe v. Richards*, 2 C. & Kir. 216. *Parkins v. Hawkshaw*, 2 Stark. R. 239. See *Wilson v. Turner*, 1 Taunt. 398. And if a letter sent by an attorney to the opposite attorney purport to be "without prejudice," it cannot be received as an admission; neither can the reply to it be admitted, though not guarded in a similar manner. *Paddock v. Forrester*, 3 Scott, N. R. 374. It is no objection to the admission that it was made before suit, if the attorney was at the time retained; but that fact must be proved by the party seeking to avail himself of the admission. *Gainsford v. Grammar*, 2 Camp. 9. *Wagstaff v. Wilson*, 4 B. & Adol. 339. *Burkhart v. Angerstein*, 6 Car. & P. 695. After retainer, the admissions of the managing clerk or agent of the attorney are received as his own. *Taylor v. Williams*, 2 B. & Adol. 845. *Standage v. Creighton*, 5 Car. & P. 406. *Griffiths v. Williams*, 1 T. R. 710. *Truelove v. Burton*, 9 Moore, 64. As to admissions by the attorney of the signature, &c. of documents, *see* Notice to Admit.

[1] *See* also *Bolton v. Sherman*, 2 Mee. & W. 403, where a special case had been signed by the junior barrister on each side; but as a material fact had been omitted, a new trial was granted. The case was regarded by the Court as containing the admissions of the parties to the facts therein stated, and its production was held to dispense with any other proof of these facts. *Van Wart v. Wolley*, R. & M. 4. *Edmunds v. Newman*, id. 5. *See* also *Duncombe v. Daniell*, 8 Car. & P. 228. *Colledge v. Horn*, 3 Bing. 119; 10 Moore, 431.

[2] Unless the admission of the principal was made during the transaction of the business for which the surety was bound, it is not admissible against the surety. The surety is considered as bound only for the actual conduct of the party, and not for whatever he might say he had done; and therefore is entitled to proof of his conduct by original evidence, where it can be had, excluding all declarations of the principal made subsequent to the act to which they relate, and out of the course of his official duty. Thus, where one guaranteed the payment for such goods as the plaintiffs should send to another in the way of their trade, the admissions of the principal debtor that he had received goods, made after the time of their supposed delivery, were held inadmissible in evidence against the surety. *Evans v. Beattie*, 5 Esp. 26. *Bacon v. Chesney*, 1 Stark. R. 192. *See* also *Dunn v. Slee*, Holt's N. P. 401. Subsequent admissions of the principal have been received in the American tribunals. *Fenner v. Lewis*, 10 Johns. 38. *Mead v. M'Dowell*, 5 Burn. 195.

such person against the heir.[1]

Abbott, C. J. "All questions of evidence must be considered with reference to the particular circumstances under which it was offered. Here the question was, whether the widow had occupied the premises adversely for more than twenty years, and her declarations are offered in evidence to rebut the Statute of Limitations; and for that purpose I think they were admissible. They were not used to show the *quantum* of her estate, but only to explain the nature of her possession." Rule refused.

(B) *Rules respecting Admissibility, and Effect of.*

(*a*) *Whole must be taken together.*

SMITH v. BLANDY, R. & M. 257.

The whole statement containing the admission must be taken together.[2]

Evidence being given of a conversation in which the plaintiff made an admission against his interest, and likewise showed a written paper as the contract, which on his behalf it was proposed to put in evidence without further proof; the defendant objecting,—

Abbott, C. J. "The whole of what a party says at the same time must be given in evidence. What he says in his favour must not be taken as true, but

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[1] So the declarations of an intestate are admissible against his administrator, or any other claiming in his right. *Smith v. Smith*, 3 Bing. N. C. 29; 7 Car. & P. 401. And the declarations by a landlord in a prior lease, which is relative to the matter in issue and concerns the estate, have been received in evidence against a lessee who claimed by a subsequent title. *Crease v. Barrett*, 1 C., M. & R. 932. See *Doe v. Seaton*, 2 Ad. & E. 171. So the declarations of former owners and occupiers, made while in possession, have been admitted as evidence of the nature and extent of their title against those claiming in privity of estate. *Woolway v. Rowe*, 1 Ad. & E. 114; 3 Nev. & M. 849. *Doe v. Austin*, 9 Bing. 41. *Doe v. Jones*, 1 Camp. 367. *Gee v. Good*, 29 L. T. 123, Q. B. On the same principle admissions, whether evidenced by letters, receipts, cases drawn for the opinion of counsel, answers in Chancery, or verbal statements, if made by former bishops, rectors, curates, or vicars, with regard to their several rights, will be evidence against their successors in all cases where the same rights are in question. *Maddison v. Nuttall*, 6 Bing. 226. *Bishop of Meath v. Marquis of Winchester*, 3 Bing. N. C. 182. *Doe v. Cole*, 6 Car. & P. 359. And on this ground ancient maps, books of survey and the like, though private documents, are frequently admissible. *Bridgman v. Jennings*, 1 Ld. Raym. 734. In general, the mere declarations of a tenant are not admissible against a reversioner. *Tickle v. Brown*, 4 Ad. & E. 378. *Scholes v. Chadwick*, 2 M. & Rob. 507. Where there is identity of interest between the assignor and assignee of a chattel, that is, where the assignee must recover through the title of the assignor, the same principle holds. The assignee in such a case is bound by the previous admissions of the assignor in disparagement of his own apparent title. *Harrison v. Vallance*, 1 Bing. 45. *Ivat v. Finch*, 1 Taunt. 141. *See* also *Stotherd v. James*, 1 C. & Kir. 121. *Prosser v. Gwillim*, 1 C. & Kir. 95. *Cook v. Braham*, 3 Ex. 183; 18 L. J. Ex. 105. Thus, in an action by the indorsee of a bill or note, which has been taken by the plaintiff after it was due, or without consideration, and with notice of fraud in its original concoction, the declarations of the indorser, made while the interest was in him, are admissible in evidence for the defendant. *Beauchamp v. Parry*, 1 B. & Adol. 89. *Peckham v. Potter*, 1 Car. & P. 232. But, on the other hand, the declarations of a former holder of a note, showing that it was given without consideration, though made while he held the note, are not admissible against the indorsee, to whom the instrument has been transferred on good consideration and before it was overdue; for such an indorsee derives his title from the nature of the instrument itself, and not through the previous holder. *Woolway v. Rowe*, 1 Ad. & E. 116. See *Barrough v. White*, 4 B. & C. 325; 6 D. & R. 379. *Brooks v. Mitchell*, 9 Mee. & W. 15. *Phillip v. Cole*, 10 Ad. & E. 106; 2 Per. & D. 288.

[2] See *Thompson v. Austin*, 2 D. & R. 361; *Bermon v. Woodbridge*, 2 Dougl. 788. This rule applies equally to written as to verbal admissions. *Prince v. Sams*, 7 Ad. & E. 630. *Bermon v. Woodbridge*, 2 Dougl. 788. *R. v. Carr*, 1 Sid. 418. *Gof v. Quinton*, 3 Man. & G. 825. *Bissey v. Windham*, 6 Q. B. 166. Where a defendant has rendered a debtor-and-creditor account to the plaintiff, which the latter produces in proof of his demand, it will be equally admissible in evidence of the defendant's set-off, though the plaintiff will be at liberty, while relying on the creditor side of the account, to impeach items which appear on the debtor side. *Randle v. Blackburn*, 5 Taunt. 245. *Rose v. Savory*, 2 Bing. N. C. 245; 2 Scott, 199. In application, this rule entitles the party against whom admissions in books or documents are used to read such only telling in his favour as are connected with those used against him. Thus, although the whole of one document may be read by one party where the other has already put in evidence a partial extract, this rule will not warrant the reading of distinct entries in an account-book, unconnected

must be left, under all the circumstances, for the jury to say whether they believe it or not. I think this paper must be left to the jury without further proof."

(b) If an Offer or Proposition made "without prejudice" excluded.

CORY v. BRETON, 4 Car. & P. 462.

If the admission is contained in an offer or proposition made "without prejudice," it cannot be given in evidence.[1]

A letter purporting to be written without prejudice was tendered in evidence against the writer, on the ground that the other party had not assented to that stipulation.

Tindal, C. J. "If the plaintiffs did not like the letter with such a stipulation in it, they might have sent it back. I cannot make any distinction between a written and a verbal communication; and if it were a verbal communication I should certainly not admit it in evidence. It is clearly a conditional statement." His Lordship rejected the letter.

(c) Oral may be Evidence of Contents of Document.

SLATTERIE v. POOLEY, 6 Mee. & W. 664; S. P. NEWHALL v. HOLT, id. 662.

An admission of a fact which otherwise could only be proved by production of a deed or other instrument may dispense with its production.[2]

The question was, whether a debt for which an action had been brought by one J. T. against the plaintiff was included in the schedule to a certain composition deed. The schedule being inadmissible as evidence, for want of a proper stamp, a verbal admission by the defendant, that the debt in question was the same with that entered in the schedule, was rejected at Nisi Prius, on the ground that the contents of a written instrument, which is itself inadmissible for want of a proper stamp, cannot be proved by parol evidence of any kind. The plaintiff having been nonsuited, a new trial was granted, on the ground of the rejection of this evidence.

Parke, B. "We entertain no doubt that the defendant's own declarations were admissible in evidence to prove the identity of the debt sued for with that mentioned in the schedule, although such admissions involved the contents of a written instrument not produced; and I believe my Lord Abinger, who was not present at the argument, entirely concurs. The authority of Lord Tenterden at

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with the particular entry relied on by the opponent. *Catt v. Howard*, 3 Stark. R. 6. Nor a series of copies of letters in a letter-book, because one has been used on the other side. *Sturge v. Buchanan*, 10 Ad. & E. 598. Nor distinct paragraphs in a newspaper unconnected with the particular paragraph relied on by the opponent. *Darly v. Ouseley*, 1 H. & N. 1. But other documents expressly referred to in the extract put in may be read. *Sturge v. Buchanan, supra.* The same rule applies to conversations; if a part of a conversation is relied on as an admission, the adverse party can give in evidence only so much of the same conversation as may explain or qualify the matter already before the Court. *Prince v. Samo*, 7 Ad. & E. 627. *The Queen's case*, 2 B. & B. 297. With respect to letters, a party may put in such as were written by his opponent without producing those to which they were answers, or calling for their production. *Lord Barrymore v. Taylor*, 1 Esp. 326. See *Dalgleish v. Todd*, 5 Car. & P. 238. *Roe v. Day*, 7 id. 705.

[1] See *Healey v. Thatcher*, 8 Car. & P. 388; *Paddock v. Forrester*, 3 Scott, N. R. 734; *Jardine v. Sheridan*, 2 C. & Kir. 24. Perhaps, also, an offer of compromise, the essence of which is that the party making it is willing to submit to a sacrifice, or to make a concession, will be rejected, though nothing was expressly said at the time regarding its confidential character, if it clearly appear to have been made under the faith of a pending treaty, into which the party has been led by the confidence of an arrangement being effected. *Waldridge v. Kennison*, 1 Esp. 144. But in this case, if the admission be merely of a collateral or indifferent fact, such as the handwriting of a party, which is capable of easy proof by other means, and is not connected with the substantial merits of the cause, it will be received. *Waldridge v. Kennison, supra.* In the absence of a restriction as to confidence, an offer of compromise is *some* evidence of liability. *Wallace v. Small*, M. & M. 446. *Watts v. Lawson*, id. 447 n. *Nicholson v. Smith*, 3 Stark. R. 129. *Wayman v. Hilliard*, 7 Bing. 101; 4 M. & P. 729. *Cuming v. French*, 2 Camp 106 n. *Thomas v. Morgan*, 2 C., M. & R. 496; 5 Tyr. 1085.

[2] The doctrine, however, does not apply to and allow of the proof by such evidence of the insertion of a name in a particular book. *Darby v. Ousely*, 25 L. J. Ex. 227.

Nisi Prius, in the case of *Bloxam v. Elsie* (R. & M. 187; 1 Car. & P. 558) is, no doubt, to the contrary; but since that case, as well as before, there have been many reported decisions, that whatever a party says, or his acts amounting to admissions, are evidence against himself, though such admissions may involve what must necessarily be contained in some deed or writing. The reason why such parol statements are admissible without notice to produce or accounting for the absence of the written instrument is, that they are not open to the same objection which belongs to parol evidence from other sources where the written evidence might have been proved, for such evidence is excluded from the presumption of its untruth, arising from the very nature of the case, where better evidence is withheld; whereas what a party himself admits to be true may reasonably be presumed to be so. The weight and value of such testimony is quite another question. That will vary according to circumstances, and it may be in some cases quite unsatisfactory to a jury. But it is enough for the present purpose to say that the evidence is admissible." S. P. *Tupper v. Foulkes*, H. T. 1861, C. P.: but see *Howard v. Smith*, 3 Scott, N. R. 574; S. C. 10 L. J. C. P. 245.[1]

(*d*) *Admissions acted upon by others.*

Watson v. Threlkeld, 2 Esp. 637.

An admission acted upon by a third party is conclusive between such person and he who made it.[2]

Action for linen-drapery goods furnished to a woman who passed herself off, with the assent of the defendant, as his wife, and with whom he cohabited.

Lord Kenyon. "It is certain that if a man has permitted a woman, to whom he was not married, to use his name and pass for his wife, and in that character to contract debts, he is liable for her debts; and I am of opinion that he is liable, whether the tradesman who furnished the goods knew the circumstances to be so or not. He gives her a credit from his name and cohabitation, and it is not to be supposed that the tradesman would look to the credit of a woman of that description, and not to that of the man by whom she is supported."

ADMISSIONS by Deed. *See* Deed; Estoppel; Recital.

ADMISSIONS in Pleadings. *See* Payment into Court; Pleading.

ADMITTANCE. *See* Copyhold.

AD Proximum antecedens fiat relatio (nisi impediat sententia). *Relation should be made to the next antecedent* (*unless the sense forbid*).[3] Jenk. *Cent.* 180; Noy's *Max.* 4; Wing. *Max.* 15.

[1] See *Chappell v. Bray*, 9 W. R. 17; 3 L. T., N. S. 278. *Earl v. Picken*, 5 Car. & P. 542. *Newhall v. Holt*, 6 Mee. & W. 662. *Bethell v. Blencowe*, 3 Man. & G. 119. *Howard v. Smith*, id. 254, overruling *Bloxam v. Elsie*, 1 Car. & P. 558. *Slatterie v. Pooley* has been disapproved of in *Lawless v. O'Neale*, 1 Irish Law R. 382. Taylor on Ev. 293.

[2] *See* also *Robinson v. Mahon*, 1 Camp. 245; *Munro v. De Chemant*, 4 Camp. 215. So a woman who has solemnly declared that she was married to a particular man, and whose goods are thus admitted to belong to her husband in her right, will not be allowed, on his bankruptcy, to deny the marriage, and to lay claim to the goods as her sole property. *Mace v. Cadell*, 1 Cowp. 233. But a married woman who has represented herself to be single, and has in that character obtained credit, is not precluded from pleading coverture, and proving her marriage upon being sued. *Cannam v. Farmer*, 3 Ex. 698. This class of admissions are conclusive—in general admissions, are evidence merely—and they may be shown to be mistaken or false, or may be discredited by the jury. As pointed out by *Mr. Justice Bayley*, in *Heane v. Rogers* (9 B. & C. 577, 586), "There is no doubt but that the express admissions of a party to the suit, or admissions implied from his conduct, are evidence, and strong evidence, against him; but we think that he is at liberty to prove that such admissions were mistaken, or were untrue, and is not estopped or concluded by them, *unless* another person has been induced by them to alter his condition: in such a case the party is estopped from disputing their truth, with respect to that person and those claiming under him, and that transaction; but as to third persons he is not bound." See *Freeman v. Cooke*, 2 Ex. 663; 6 D. & L. 190. *Andrews v. Elliott*, 6 E. & B. 719. *See ante*, p. 128, n. [1].

[3] Thus, where a devise was to H. and the heirs of his body, remainder to T. C. of W. and the heirs male of his body, upon condition that *he or they*, or any of them, should

AD Questionem facti non respondent Judices: ad quæstionem legis non respondent Juratores. *Judges do not answer to a question of fact: Jurors do not answer to a question of law.*[1] Co. Litt. 295 b; 8 Co. 308.

AD quod Damnum.[2] *To what Damage.*

ADULTERATION of Food.

(A) *Persons selling Articles of Food or Drink adulterated with Injurious Ingredients, or selling them as Pure when not so, are subject to a Penalty*, p. 206.

(B) *If there be an Analyst under the Act in District, Complainant must give Seller notice*, p. 207.

(C) *Applies to all Eatables and Drinkables not being Medical Drugs*, p. 207.

(D) *But where Indictable, that course may be pursued*, p. 207.

(A) *Persons selling Articles of Food or Drink adulterated with Injurious Ingredients, or selling them as Pure when not so, are subject to a Penalty.*

Persons selling articles of food or drink adulterated with ingredient injurious to health, or selling as pure such articles,

By the 23 & 24 Vic. c. 84, provision is made for the repression of the sale of articles of food adulterated with ingredients injurious to health, or sold as pure, when, in fact, adulterated. This statute, by sect. 1, after reciting that the practice of adulterating articles of food and drink for sale, in fraud of her Majesty's subjects, and to the great hurt of their health, requires to be repressed by more effectual laws than those which were now in force for that pur-

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not alien, &c., the words he or they were held to refer not to H., but to T. C. of W. &c. 5 Co. 68 a.

In strict grammatical construction this is correct; yet there are numerous examples to show that the context may often require a deviation from the rule, and that the relative may be connected with nouns which go before the last antecedent, and either take from it or give to it some qualification. *See* Com. Dig. Parols, A. 14, 15. *Staniland v. Hopkins*, 9 Mee. & W. 192. As in Orders of Magistrates: *Rex v. St. Mary's, Leicester*, 1 B. & A. 327; and the remarks *per Curiam* on *Rex v. Moor Critchell*, 2 East, 66. *Baring v. Christie*, 5 East, 398. *Rex v. Chilverscoton*, 8 T. R. 178. Or Indictments: Noy, *Max.* 9th ed. p. 4. *Rex v. Wright*, 1 Ad. & E. 448. *Rex v. Richards*, 1 M. & Rob. 177. Or Pleadings: *Spyer v. Thelwall*, 1 Tyr. & Gr. 191; S. C. 2 C., M. & R. 692. *Branker v. Molyneux*, 1 Scott, N. R. 553. Steph. *Plead.* 5th ed. 418. Or Wills: *Deriemer v. Fenner*, 7 Mee. & W. 439. *Per Parke, B.: Spyer v. Thelwall*, 2 C., M. & R. 693.

[1] A maxim embodying the great leading principle of pleading, that a question or issue of law must be determined by the Court, and a question or issue of fact must be answered, that is, tried by a jury. "For if it be demanded, What is the fact? the Judge cannot answer it; if it be asked, What is the law? the jury cannot answer it." Vaugh. 149. Neither of these propositions is literally, or, without material qualification, true. For, without alluding to those Courts in which all issues, as well of fact as of law, are determined by the Judges, it constantly happens, even in common-law courts, that there are questions or matters of fact connected with the issue before the jury, which it is unquestionably the province of the Court to determine. Of this nature are questions as to the admissibility of evidence. Broom's *Max.* 82; 11 Mee. & W. 486. Questions of reasonableness —reasonable cause, reasonable time, and the like. Broom's *Max.* 82; 7 Scott, N. R. 280; Co. Litt. 566; 11 Mee. & W. 817.

So, although in all civil cases where the issue before the jury is compounded of questions of law and fact united, it is undoubtedly the province of the Court to decide the questions of law, or to declare to the jury what is the law of the case; yet the actual decision or response, which of course includes the law (as taken from the Court) as well as the fact, always rests with the jury.

[2] A writ directed to the sheriff, commanding him to inquire by the oath of jurors, whether a grant intended to be made by the king would be to his damage or prejudice, or to that of others, and if it be, then to what damage. It is required to be issued, before the Crown can grant certain liberties, as in fairs, markets, &c., which may be prejudicial to others; and it was also formerly had for the turning and changing of ancient highways, watercourses, &c. *See* Fairs; Highways; Markets; Watercourses; Ways.

pose, enacts, that "every person who shall sell any article of food or drink with which, to the knowledge of such person, any ingredient or material injurious to the health of persons eating or drinking such article has been mixed, and every person who shall sell as pure and unadulterated any article of food or drink which is adulterated or not pure, shall for every such offence, on a summary conviction of the same before two Justices of the Peace, at Petty Sessions in England; and in Scotland before two Justices of the Peace in Justice-of-the-Peace Court; or before the Sheriff-substitute of the county; or before Justices at Petty Sessions; or a Divisional Justice in Ireland; forfeit and pay a penalty not exceeding 5*l.*, together with such costs attending such conviction as to the said Justices shall seem reasonable; and if any person so convicted shall afterwards commit the same offence, it shall be lawful for such Justices to cause such offender's name, place of abode, and offence to be published, at the expense of such offender, in such newspaper or in such other manner as to such Justices shall seem desirable."[1]

notwithstanding they are adulterated, are subject to a penalty.

(B) *If there be an Analyst under the Act in District, Complainant must give Seller notice.*

Where complaint is made in a district in which an analyst[2] has been appointed, the complainant must give the seller an opportunity of being present at the analysis, it being provided by the second section that "on the hearing by the Justices of any complaint under this Act in any district, county, or borough, wherein any analyst shall have been appointed, the purchaser shall prove to the satisfaction of such Justices that the seller of the article of food or drink alleged to be adulterated, or his servants, had such notice of the intention of the purchaser to have such article analysed, and also such opportunity of accompanying the purchaser to any analyst appointed by this act as the Justices shall think reasonable, in order to secure such article from being tampered with by the purchaser."

If alleged adulterated article is sold in a district where there is an analyst, complainant must satisfy justices that seller had notice.

(C) *Applies to all Eatables and Drinkables not being Medical Drugs.*

By the 14th section it is enacted, that "in the construction of this Act the words 'articles of food or drink' shall, if not inconsistent with the context or subject-matter, include not only all alimentary substances, whether solids or liquids, but also all eatables and drinkables whatever, not being medical drugs, or articles usually taken or sold as medicines; but this Act shall not be construed so as to affect the ordinary reduction of the strength of foreign, British, or colonial spirits by persons licensed and paying duties under the Excise."

The act applies to all eatables and drinkables not being medical drugs, but it does not affect the ordinary reduction of the strength of spirits.

(D) *But where Indictable, that course may be pursued.*

Where the adulteration is of that nature or extent that an indictment would lie, that course may still be pursued, the 13th section providing that "nothing in this Act contained shall be held to affect the power of proceeding by indictment, or to take away any other remedy against any offender under this Act." As to indictment, *see* False Pretences.

But it does not affect the power of proceeding by indictment.

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[1] An appeal is given to the Quarter Sessions from the conviction of the Justices. Sect. 6; *see* also sect. 7.

[2] By the 3rd section provision is made for the appointment of one or more persons, possessing competent medical, chemical, and microscopical knowledge, as analysts of all articles of food and drink purchased within the city, county, or borough for which they act. Purchasers are entitled to have any article of food or drink they may have bought within the district analysed upon payment of a sum of not less than 2*s.* 6*d.* or more than 10*s.* 6*d.* The analyst must give a certificate, which is sufficient evidence before the Justices in the absence of any evidence to the contrary. Sect. 4. The Justices also have power to submit any article of food or drink complained of to analysis. Sect. 5.

ADVANCEMENT. *See* Distribution.

ADVERSE Claim. *See* Interpleader.

ADVERSE Possession.[1]

I. Generally, p. 209.

(A) *The Right to recover Land is restricted by Stat. 3 & 4 Wm. 4, c. 27, to the Period of Twenty Years after the Right first accrued*, p. 209.

(*a*) *Since the passing of which there can be no Non-adverse Possession*, p. 210.

(*b*) *Acknowledgments in Writing given to the Person entitled, or his Agent, are equivalent to Possession*, p. 211.

(*c*) *But such Acknowledgments must be unconditional*, p. 211.

(*d*) *If Possession be adverse to the Wife it will also be adverse to the Husband*, p. 211.

(*e*) *A Widow residing in a Freehold of her Husband more than Twenty Years is not an Adverse Possession, except, perhaps, against the Heir*, p. 211.

II. Between particular Persons, p. 212.

(A) *As against a Landlord*, p. 212.

(*a*) *The wrongful Receipt of Rent under a Lease may create an Adverse Possession in favour of the Party to whom it is paid*, p. 212.

(*b*) *But as against the Lessee, Receipt of the Rent is Receipt of the Profits of the Land*, p. 213.

(*c*) *In case of a Tenant from Year to Year without Lease in writing, the Right to Recover accrues at the end of the first Year of the Tenancy, or the last time Rent was paid, which has last happened*, p. 213.

(*d*) *The Right to Recover against a Tenant-at-Will accrues at the Expiration of such Tenancy, or a Year after it commenced*, p. 214.

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[1] This subject is an important branch of English law. The enactments in the 3 & 4 Wm. 4, c. 27 (the material clauses of which are copied in the text), have essentially modified and varied the rules, both at common law, as well as the earlier Statutes of Limitation. *See* 2 Smith, L. C. 307.

By an "adverse possession" is to be understood an adverse title based on the ouster, and, in the case of freehold, on the disseisin of the rightful owner. *Reading v. Rawsterne*, 2 Ld. Raym. 829; 2 Salk. 423. *See* Prest. Ab. 334. The latter is defined by Littleton (sect. 279) to be, "where a man enters into lands or tenements, where the entry is not *congeable*, and *ousts* him who hath the freehold," &c.; and the commentator says, "every entry is not a disseisin unless there be an ouster of the freehold." Lord Coke further says, "disseisin is putting a man out of seisin, and ever implies a wrong; but dispossession or ejectment is putting out of possession, and may be by right or wrong." However strict the notion of actual ouster may formerly have been, the exercise of adverse possession is now clearly equivalent to evidence of actual ouster (*Doe d. Pellatt v. Ferrars*, 2 B. & P. 542; and 1 Ld. Raym. 741); but the presumption of law is against adverse possession as between privies, and every adverse possession may be rebutted. *Doe d. Fenwick v. Reed*, 5 B. & A. 232. It is negatived when the parties claim under the same title (*Page v. Seefly*, Bull. N. P. 102 n. b.), or where the possession of one party is consistent with the title of the other (*Doe d. Milner v. Brightwen*, 10 East, 583), or where the party claiming has never been out of possession (*Reading v. Rawsterne*, 2 Ld. Raym. 829), or the possessor has acknowledged a title in the claimant. *Doe d. Pellatt v. Ferrars*, 2 B. & P. 542.

The stat. 21 Jac. 1, c. 16, limited the period for all writs of formedon to twenty years, and enacted, that no person should at any time thereafter make any entry into any lands, tenements, or hereditaments, but within twenty years next after his title should

III. As between Mortgagor and Mortgagee, p. 214.

IV. As between Trustee and Cestui que Trust, p. 214.

(A) *The Third Section does not apply to the case of a* Cestui que Trust *holding the Possession of the Lands under the Trustee*, p. 214.

V. As between Co-parceners, Joint-tenants, and Tenants-in-common, p. 215.

(A) *The Possession of one Co-parcener, &c. for his own Benefit, is not the Possession of the others*, p. 215.

VI. With Reference to Estates Tail and Reversions and Remainders on Estates Tail, p. 215.

(A) *Persons claiming Interest which Tenant-in-tail might have barred, cannot recover if Tenant-in-tail barred*, p. 215.

I. Generally.

(A) *The Right to recover Land is restricted by Stat. 3 & 4 Wm. 4, c. 27, to the Period of Twenty Years after the Right first accrued.*

The right to recover land is restricted by stat. 3 & 4 Wm. 4, c. 27,

By the 3 & 4 Wm. 4, c. 27, s. 2, it is enacted, that "after the 31st day of December, 1833, no person shall make an entry or distress, or bring an action to recover any land or rent,[1] but within twenty years[2] next after the time at which

first descend or accrue to the same, and in default thereof such persons so not entering, and their heirs, should be disabled from such entry after to be made.

The stat. runs against the lord of a manor as well as against any other person. *Greebey v. Preston*, Selw. N. P. 702. Hence, if a house, &c. be built upon the waste, the lord should take care to have some entry made of it in his books, and reserve some rent or service, otherwise he will lose his right. If a cottage is built upon waste in defiance of the lord of a manor, and quiet possession has been had of it for twenty years, it is within the statute; but if it were built at first by the lord's permission, or any acknowledgment have been since made (though it were 100 years since), the stat. of 21 Jac. would not have run against the lord. Bull. N. P. 104, cited 3 B. & C. 414. Payment of rent for a piece of waste land after an occupation of thirty years without paying any rent, was held conclusive evidence that the former occupation by the party was a permissive occupation. *Doe d. Jackson v. Wilkinson*, 3 B. & C. 413. *See* also *Doe d. Thompson v. Clark*, 8 B. & C. 717; *post*, Common.

As the stat. of James only operated in case of an adverse possession, where one person held an estate on the joint account of himself and another, or by the permission of the real owner, and without claiming any inconsistent right, the original title was not affected. Thus, where one holds lands as lessee, his possession is, in contemplation of law, that of the lessor. 1 Wils. Rep. 176; 3 id. 521. For length of possession during a particular estate, as under a lease for lives as long as the lives are in being, gives no title; but if the tenant hold over twenty years after the death of *cestui que vie*, such holding over will in ejectment be a complete bar to the remainderman or reversioner, because it was adverse to his title. Cowp. Rep. 218. Where the relation of landlord and tenant can be implied, the statute will not run (2 B. & P. 542), or where the party in possession is tenant at sufferance. 2 D. & R. 38.

The stat. 3 & 4 Wm. 4, c. 27, has for the most part put an end to questions of non-adverse possession; but cases will arise under the 9th sect. to which the old rules of adverse possession will be applicable.

[1] The word "rent" in the second section of the act does not include rents reserved on leases for years, but is confined to rents existing as an inheritance distinct from the land, and for which before the statute the party entitled might have had an assize, such as ancient rents' service, fee-farm rents, or the like. *Grant v. Ellis*, 9 Mee. & W. 113. See *Paget v. Toley*, 2 Bing. N. R. 679; 3 Scott, 135. And an additional rent in the nature of a penal rent reserved by indenture of demise between landlord and tenant, was held not to be within the second section. *Daly v. Lord Bloomfield*, 5 Ir. L. R. 65.

[2] If the person entitled is under disability at the time at which the right accrued by reason of infancy, coverture, idiocy, lunacy, unsoundness of mind, or absence beyond

to the period of twenty years after the right first accrued.

the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims, or if such right shall not have accrued to any person through whom he claims within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to the person making or bringing the same."

(*a*) *Since the passing of which there can be no Non-adverse Possession.*

NEPEAN v. DOE D. KNIGHT, 2 Mee. & W. 894, Ex. Ch.; S.C. in Q. B. 5 B. & A. 86.

Since the passing of the stat. 3 & 4 Wm. c. 27, there can be

In this case the Court said, We are all clearly of opinion that the 1st & 2nd sections[1] of the 3 & 4 Wm. 4 c. 27, have done away with the doctrine of non-adverse possession; and, except in cases falling within the 15th section of the act, the question is, whether twenty years have elapsed *since the right accrued*,[2]

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seas, such person, or the person claiming through him, may, notwithstanding the period of twenty years limited by the act has expired, make an entry, &c. at any time within ten years next after the cessation of the disability (sect. 16), provided it be within forty years of the first accruing of the right. Sect. 17. *See* also sect. 18.

[1] The effect of the 2nd section is to put an end to all questions and discussions whether the possession of the lands, &c. be adverse or not; and if one party has been in the actual possession for twenty years, whether adversely or not, the claimant, whose original right of entry accrued above twenty years before bringing the ejectment, is barred by this clause. *Doe d. Culley v. Taylerson*, 3 Per. & D. 548; 11 Ad. & E. 1008. It is generally only under the 15th section that the question whether the possession was adverse can arise. See *per Sir E. Sugden, L. C., in Incorporated Society v. Richards*, 1 Connor & L. 84; 1 D. & War. 289. For although, perhaps, no better expression than adverse possession can be adopted, yet it is not adverse in the sense in which the phrase was used before the act was passed. *Dean of Ely v. Bliss*, 2 De G., M. & G. 476, 477. The question is, whether twenty years have elapsed since the right accrued, whatever be the nature of the possession. *Nepean v. Doe d. Knight*, 2 Mee. & W. 911. *Doe d. Higginbotham v. Barton*, 3 Per. & D. 198. *Jack v. Walsh*, 4 Ir. L. R. 254. *Doe d. Curson v. Edmonds*, 6 Mee. & W. 295. *Holmes v. Newlands*, 11 Ad. & E. 44; 3 Per. & D. 128. *Newlands v. Holmes*, 8 Q. B. 679. *Doe v. Tomkins*, 11 East, 185. *Doe v. Wilson*, 4 B. & A. 303. *Doe d. Baverstockly v. Rolfe*, 3 Nev. & P. 64; 8 Ad. & E. 650. A plaintiff admitted to be in possession, and seeking to displace the title under which the defendants claim, on the ground that it is barred by the 3 & 4 Wm. 4, c. 27, s. 2, need not show what that title was, and how it was barred, but a general allegation, so as to bring the case within that section, is sufficient. As to tithes, the operation of the 2nd section is confined to cases of two parties claiming an adverse estate in them. A person who has received no tithes for twenty years cannot recover the possession of them from another who has for twenty years received them from the terre-tenant. *Dean & Chapter of Ely v. Cash*, 15 Mee. & W. 617. *Dean of Ely v. Bliss*, 2 De G., M. & G. 459.

[2] By sect. 3 it is enacted, that "in the construction of this act, the right to make an entry or distress, or bring an action to recover any land or rent, shall be deemed to have first accrued at such time as hereinafter is mentioned; (that is to say,) when the person claiming such land or rent, or some person through whom he claims, shall, in respect of the estate or interest claimed, have been in possession or receipt of the profits of such land, or in receipt of such rent, and shall, while entitled thereto, have been dispossessed, or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession, or discontinuance of possession, or at the last time at which any such profits or rent were or was so received; and when the person claiming such land or rent shall claim the estate or interest of some deceased person, who shall have continued in such possession or receipt in respect of the same estate or interest until the time of his death, and shall have been the last person entitled to such estate or interest who shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time of such death; and when the person claiming such land or rent shall claim in respect of an estate or interest in possession granted, appointed, or otherwise assured by any instrument (other than a will) to him, or some person through whom he claims, by a person being, in respect of the same estate or interest, in the possession or receipt of the profits of the land, or in the receipt of the rent, and no person entitled under such instrument shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time at which the person claiming as aforesaid, or the person through whom he claims, became entitled to such possession or receipt by virtue of such instrument; and when the estate or interest claimed shall have been an estate or interest in reversion or remainder, or other future

whatever be the nature of the possession. The 15th[1] section applies only where the possession was not adverse, according to the former state of the law at the time of the passing of the act; that is, the 24th July, 1833.

no non-adverse possession, except in cases provided for by the 15th section.

(b) Acknowledgments in Writing given to the Person entitled, or his Agent, are equivalent to Possession.

The 14th section enacts: "Provided always, that where acknowledgment of the title of the person entitled to any land or rent shall have been given to him or his agent in writing, signed by the person in possession, or in receipt of the profits of such land, or in receipt of such rent, then such possession or receipt of or by the person by whom such acknowledgment shall have been given shall be deemed, according to the meaning of this act, to have been the possession or receipt of or by the person to whom or to whose agent such acknowledgment shall have been given at the time of giving the same; and the right of such last-mentioned person or persons claiming through him to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued at, and not before the time at, which such acknowledgment, or the last of such acknowledgments, if more than one, was given."[2]

Acknowledgments in writing given to the person entitled, or his agent, are equivalent to possession of such person, and the right of entry accrues from the time of the giving of such acknowledgments.

(c) But such Acknowledgments must be unconditional.

Doe d. Curson v. Edmonds, 6 Mee. & W. 295.

In ejectment, the defendant, a party in possession adversely of certain land, on being applied to by the lessor of the plaintiff to pay rent, accompanied with an offer of a lease, replied—"Although, if matters were contested, I am of opinion that I should establish a legal right to the premises, yet, under all circumstances, I have made up my mind to accede to the proposal you made of paying a moderate rent on an agreement for a term of twenty-one years." Ultimately the arrangement was not completed, and no rent paid or lease executed. On the question whether the facts amounted to an acknowledgment of title, the Court held that it was no acknowledgment of title, because there was no final bargain.

But an admission of possession being adverse, must be unconditional.

(d) If Possession be adverse to the Wife, it will also be adverse to the Husband.

Doe d. Wilkins v. Wilkins, 5 Nev. & M. 434.

In this action of ejectment, *Lord Denman, C. J.*, said, "If the possession was adverse to the wife, it was also adverse to the husband. The question was, in fact, identical with the question whether it was adverse to the husband. He must be taken to have left her in possession, in order to manage the property for him."

If possession be adverse to the wife, it will also be adverse to the husband.

(e) A Widow residing in a Freehold of her Husband more than Twenty Years is not an Adverse Possession, except, perhaps, against the Heir.

Doe d. Hickman v. Haslewood, 1 Nev. & P. 352.

Ejectment. It appeared that a testator, after making his wife residuary

A widow residing in a

estate or interest, and no person shall have obtained the possession or receipt of the profits of such land or the receipt of such rent in respect of such estate or interest, then such right shall be deemed to have first accrued at the time at which such estate or interest became an estate or interest in possession; and when the person claiming such land or rent, or the person through whom he claims, shall have become entitled, by reason of any forfeiture or breach of condition, then such right shall be deemed to have first accrued when such forfeiture was incurred, or such condition was broken."

[1] The 15th section allows five years after the passing of the act for the recovery of lands, where at the time of its passing the possession was non-adverse.

[2] Before the statute, there could be no adverse possession where the party had acknowledged his adversary's title. *Doe d. Pellat v. Ferrars*, 2 B. & P. 542.

freehold more than twenty years is not an adverse possession, except, perhaps, against the heir.[1]

legatee, proceeded thus: "I do likewise make my wife full and sole executrix of the freehold house situate in Great Queen Street, in the parish of St. Giles." The widow continued to reside in the freehold house, of which she was seised, for more than twenty years after her husband's death. The Court held that her possession was not adverse, except, perhaps, against the heir, as her possession might be intended to be in respect of dower.

II. Between particular Persons.

(A) *As against a Landlord.*

(*a*) *The wrongful Receipt of Rent under a Lease may create an Adverse Possession in favour of the Party to whom it is paid.*

The wrongful receipt of rent under a lease may create an adverse possession in favour of the party to whom it is paid.

By sect. 9 it is enacted, "that when any person shall be in possession or in receipt of the profits of any land, by virtue of a lease in writing, by which a rent, amounting to the yearly sum of twenty shillings, or upwards, shall be reserved, and the rent reserved by such lease shall have been received by some person wrongfully claiming to be entitled to such land or rent in reversion immediately expectant on the determination of such lease, and no payment in respect of the rent reserved by such lease shall afterwards have been made to the person rightfully entitled thereto, the right of the person entitled to such land or rent, subject to such lease, or of the person through whom he claims, to make an entry or distress, or to bring an action after the determination of such lease, shall be deemed to have first accrued at the time at which the rent reserved by such lease was first so received by the person wrongfully

[1] An adverse possession for twenty years is not only a negative bar to the plaintiff's recovery in ejectment, but takes away his right of possession, and gives a positive title to the opposite party; therefore, where a plaintiff in ejectment proved twenty years' possession immediately preceding that for ten years by the defendant, it was held that the former was entitled to recover, as his earlier possession must prevail. *Doe d. Harding v. Cooke*, 7 Bing. 846.

Possession for twenty years, though gained by manifest wrong, and though liable to be defeated by the entry of the rightful owner, is a title as against strangers (*Doe d. Payne v. Payne and Webber*, 1 Ad. & E. 119; 3 Nev. & M. 746. *Doe v. Parke*, 4 Ad. & E. 816); and consequently confers on the possessor, on ouster or trespass by a stranger, the ordinary remedies for such injuries, notwithstanding it may be apparent to the Court that the rightful title is in another. A party who has a possession for twenty years has a good title against any one coming in after, unless the latter shows title. *Doe d. Danson v. Parke*, 4 Ad. & E. 818. *Doe d. Smith v. Webber*, 1 Ad. & E. 119. In *Doe d. Carter v. Barnard* (18 L. J. Q. B. 306; 12 Jur. 915), the lessor of the plaintiff relied on her own possession for thirteen years, and her husband's before her for eighteen years; but in so doing showed that her husband died, leaving children. The defendant, in whom the legal estate was before the twenty years, had turned the lessor of the plaintiff out of possession. The Court held that the possession of the lessor of the plaintiff not being connected by right with that of her husband, the 3 & 4 Wm. 4, c. 27, did not give her the right of possession against the defendant. Possession is *primâ facie* evidence of title, and, no other interest appearing, evidence of a seisin in fee. But in this case, the lessor of the plaintiff not only proved her own possession, but that of her husband before her for eighteen years, which was *primâ facie* evidence of his seisin in fee; and as he died in possession, and left children, it was *primâ facie* evidence of the title of the heir, against which the possession of the lessor of the plaintiff for thirteen years could not prevail, and therefore she had proved the title to be in another, of which the defendant was entitled to take advantage.

By sect. 13 it is enacted, "that when a younger brother or other relation of the person entitled as heir to the possession or receipt of the profits of any land, or to the receipt of any rent, shall enter into possession or receipt thereof, such possession or receipt shall not be deemed to be the possession or receipt of or by the person entitled as heir."

Statements made by a deceased person while in possession of property are in themselves original evidence, if they go to cut down his interest in it. A declaration by a possessor of land that he held "for life interest" does not necessarily admit that the right of possession would immediately on his death accrue to the reversioner, for one or more life interests might subsist consistently with the words used. *Doe d. Welsh v. Longfield*, 16 Mee. & W. 497.

See further, as to what constitutes adverse possession, *Doe d. Willes v. Birchmore*, 1 Per. & D. 448; 9 Ad. & E. 662. *Roe d. Wilkins v. Wilkins*, 4 Ad. & E. 86; 5 Nev. & M. 434. *Doe d. Linsey v. Edwards*, 5 Ad. & E. 95.

claiming as aforesaid, and no such right shall be deemed to have first accrued upon the determination of such lease to the person rightfully entitled."

(*b*) *But as against the Lessee, Receipt of the Rent is Receipt of the Profits of the Land.*

By sect. 35 it is enacted, "that the receipt of the rent payable by any tenant from year to year, or other lessee, shall, as against such lessee, or any person claiming under him (but subject to the lease), be deemed to be the receipt of the profits of the land for the purposes of this act."[1]

The receipt of the rent is, against the lessee or any person claiming under him, the receipt of the profits for the purposes of the act.

(*c*) *In case of a Tenant from Year to Year without Lease in writing, the Right to Recover accrues at the end of the first Year of the Tenancy, or the last time Rent was paid, which has last happened.*

In the case of a tenant from year to year without lease in writing, the right to recover is, by the 8th section, to be deemed to have first accrued "at the deter-

In case of a tenant from year to year

[1] Prior to the passing 3 & 4 Wm. 4, c. 27, s. 3, the mere non-payment of rent was not alone sufficient to render possession of the tenant adverse to that of his landlord. And the mere receipt of rent by a stranger, without colour of title, was not evidence of adverse possession against one who had the legal title; for it was no disseisin, but at the option of the latter, even although the stranger made a lease by indenture reserving rent, unless he made an actual entry. Bull. N. P. 104; 1 Roll. Abr. 659; and see *Smith v. Parkhouse*, Andr. 324. *Jayne v. Price*, 5 Taunt. 326; 1 Marsh. 68; 1 Roll. Abr. 659 c. pl. 11. If a tenant-at-will made a lease for years, and the lessee entered, though the estate-at-will did not warrant the lease, it was only a disseisin at election. *Blunden v. Baugh*, Cro. Jac. 302. *See* 2 Sch. & Lef. 622; 1 Taunt. 599.

Where a lessor permits his lessee, during the continuance of the lease, to pay no rent for twenty years, the lessor is not therefore barred by the statute 3 & 4 Wm. 4, c. 27, s. 2, from recovering the premises in ejectment; but the case comes within the latter branch of the 3d section. *Doe d. Davey v. Oxenham*, 7 Mee. & W. 131. *Doe d. Thompson v. Thompson*, 6 Ad. & E. 72.

Before the statute, even the adverse receipt of rent for more than twenty years did not deprive the party of his right of entry on the determination of the lease. *Doe v. Danvers*, 7 East, 299.

But by the above section, if the rent has been received by some person wrongfully claiming to be entitled to the reversion, and no rent has been subsequently received by the rightful landlord, the landlord's right is deemed to have first accrued when the wrongful receipt commenced.

In *Doe d. Angell v. Angell*, 9 Q. B. 328. John Angell, the testator, demised certain lands and premises in 1776 for sixty-one years, and died in 1784, from which time to 1837, when the action was brought by the lessor of the plaintiff claiming as devisee of the testator, the rent under the lease had been received by the defendant's father and himself, claiming also as devisees. It was held the case was within the 9th section, and that the lessor of the plaintiff would have been barred had he not brought his action, under the 15th section, within five years after the passing of the act.

Where a landlord had set apart a portion of his property, and built a school-house upon it, and appointed a schoolmaster, who was paid an annual stipend by the landlord, and was also paid by subscription and by the scholars, and the schoolmaster was permitted to occupy these premises for the purpose of the school, it was held that such occupation for upwards of twenty years did not give the schoolmaster an adverse right against the landlord, for the occupation was the occupation of the landlord, he being in the situation of a servant. *Lessee of Moore v. Doherty*, 5 Ir. L. R. 449. In the case of mere non-payment of rent for twenty years the landlord does not, under sect. 2, lose his right to recover arrears less than twenty years old. *Grant v. Ellis*, 9 Mee. & W. 113. See *Doe d. Bennett v. Turner*, 7 Mee. & W. 226; 9 Mee. & W. 643. *Doe d. Stanway v. Rock*, 4 Man. & G. 30. *Doe d. Evans v. Page*, 5 Q. B. 767. *Doe d. Goody v. Carter*, 9 Q. B. 863. *Doe d. The Birmingham Canal Co. v. Bold*, 11 Q. B. 127. *Randall v. Stevens*, 2 E. & B. 641; and 4 Ad. & E. N. S. 601.

With regard to the cases between landlord and tenant, where the lease is in *writing* but the *rent less than twenty shillings*, and the rent has not been paid to any tortious claimant, though the rightful landlord may have discontinued the possession of it, those cases stand upon the general rule laid down by sect. 3, and the reversioner's right to enter accrues on the determination of the particular estate. See *Doe d. Davey v. Oxenham*, 7 Mee. & W. 131. *Fulton v. Creagh*, 3 Jones & Lat. 329. *Drew v. E. of Norbury*, 3 Jones & Lat. 280. *Doe d. Newman v. Gopsall*, 4 Q. B. 603 b. *Chadwick v. Broadwood*, 3 Beav. 308. The reason for this, where a rent of less than twenty shillings is reserved,

without lease in writing, the right to recover accrues at end of the first year of the tenancy or the last time rent was paid, which has last happened.

mination of the first of such years, or other periods, or at the last time when any rent payable in respect of such tenancy shall have been received, which shall last happen." [1]

(d) The Right to Recover against a Tenant-at-Will accrues at the Expiration of such Tenancy, or a Year after it commenced.

The right to recover against a tenant-at-will accrues at the expiration of such tenancy, or a year after it commenced.

The 7th section provides, "that when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent as tenant-at-will, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined: Provided always, that no mortgagor or *cestui que trust* shall be deemed to be a tenant-at-will within the meaning of this clause to his mortgagee or trustee." See *Doe d. Bennett v. Turner*, 7 Mee. & W. 226; 9 Mee. & W. 643. *Doe d. Stanway v. Rock*, 4 Man. & G. 30. *Doe d. Evans v. Page*, 5 Q. B. 767. *Doe d. Angell v. Angell*, 9 Q. B. 328. *Doe d. Dayman v. Moore*, 9 Q. B. 555. *Doe d. Birmingham Canal Cy. v. Bold*, 11 Q. B. 127. *Randall v. Stevens*, 2 E. & B. 641.

III. As between Mortgagor and Mortgagee.[2]

IV. As between Trustee and Cestui que Trust.

(A) *The Third Section does not apply to the case of a* Cestui que Trust *holding the Possession of the Lands under the Trustee.*

Garrard v. Tuck, 8 C. B. 231.

The 3d section does not apply to the case of a *cestui que trust* holding the possession of the landsunder the trustee.

Per Cur. "We do not think the case of a *cestui que trust* holding possession of land under the trustee falls within the 3d section (see *ante*, p. 210), which is meant to apply to cases where the person holding the land does not hold it under or in privity with the person in whom the right of entry is supposed to be. The *cestui que trust*, in such a case, holds possession under the trustee, and under the protection of the instrument by which the estate is conveyed to the

is, that the sum is of so small importance that the true landlord may possibly neglect to enforce payment of it, and the tenant in possession may not think it worth his while to look strictly into the title of the person demanding it from him. 2 Sm. L. C. 526, 4th ed.; and 3 Beav. 308.

[1] As to what is not a lease in writing within the section, see *Doe d. Lansdell v. Gower*, 17 Q. B. 589. In order to take a case out of its operation, a verbal admission of the fact by the occupier, or any person under whom he claims, is evidence. *Doe d. Earl Spencer v. Beckett*, 4 Q. B. 601.

[2] The 28th section limits the time for redeeming a mortgage to within twenty years next after the mortgagee shall have obtained possession of the land, or receipt of the profits, unless in the meantime a written acknowledgment of the title of the mortgagor shall have been given; then, within twenty years after the giving thereof. See *Hyde v. Dallaway*, 2 Hare, 528. *Trulock v. Robey*, 12 Sim. 402. *Lucas v. Dennison*, 13 Sim. 584. *Batchelor v. Middleton*, 6 Hare, 75. *Stansfield v. Hobson*, 16 Beav. 236. And by the 7 Wm. 4, and 1 Vic. c. 28, it is enacted, "that it shall and may be lawful for any person entitled to or claiming under any mortgage of land, to make an entry or bring an action at law, or suit in equity, to recover such land, at any time within twenty years next after the last payment of any part of the principal money or interest secured by such mortgage, although more than twenty years may have elapsed since the time at which the right to make such entry or bring such action or suit in equity shall have first accrued." See *Doe d. Baddeley v. Massey*, 17 Q. B. 373. *Doe d. Roylance v. Lightfoot*, 8 Mee. and W. 564. *Doe d. Palmer v. Eyre*, 17 Q. B. 366.

A mortgagee may by sale, either under a power or direction of the mortgagor, convey all the rights which he possesses to a purchaser, who will then be a person claiming under a mortgage, and entitled to the same time as the mortgagee was entitled at the time of sale. See *Doe v. Massey*, *supra*.

trustee. It cannot, therefore, be said that it is a case in which 'no person entitled under the instrument' has been in possession; for the *cestui que trust* has virtually been in possession under the instrument. If we proceed to the consideration of the provision contained in the 7th section respecting trustees, that provision appears to us to reflect light on the nature of their estate, and on the provisions of the 2d and 3d sections, as far as their estate is concerned. The object of that section appears to us to be to fix a definite period, at the end of which the right of entry of the lessor as against his tenant-at-will shall be deemed to have accrued, and it provides that no *cestui que trust* shall be deemed to be a tenant-at-will within the meaning of that clause; which is equivalent to saying that the right of entry of a trustee against his *cestui que trust* shall not be deemed to have first accrued at the expiration of one year next after the commencement of the tenancy, and the exception seems to be introduced in order to prevent the necessity of any active steps being taken by a trustee to preserve his estate from being destroyed, as in the case of an ordinary tenancy-at-will, by mere lapse of time. The intention appears to be to put the estate of a trustee in a better state in this respect than that in which the estate of an ordinary lessor is, as against his tenant-at-will; whereas his situation would be worse than that of an ordinary lessor, on the construction contended for on behalf of the demandant in this case: for the time of limitation, on the construction contended for, would run against the trustee from the first commencement of the estate; whereas, as against an ordinary lessor, the time would only run from the actual determination of the tenancy, or from the first year of the tenancy." [1]

V. As between Co-parceners, Joint-tenants, and Tenants-in-common.

(A) *The Possession of one Co-parcener, &c. for his own Benefit, is not the Possession of the others.*

The possession of one co-parcener, &c. for his own benefit, is not to be the possession of the others.

The 12th section provides, "that when any one or more of several persons entitled to any land or rent as co-parceners, joint-tenants, or tenants-in-common, shall have been in possession or receipt of the entirety, or more than his or their intended share or shares of such land, or of the profits thereof, or of such rent, for his or their own benefit, or for the benefit of any person or persons other than the persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such last-mentioned person or persons, or any of them." [2]

VI. With Reference to Estates Tail and Reversions and Remainders on Estates Tail.

(A) *Persons claiming Interest which Tenant-in-tail might have barred, cannot recover if Tenant-in-tail barred.*

Person claiming interest which tenant-in-tail might have barred, cannot recover if tenant-in-tail barred.

Sect. 21 enacts, "that when the right of a tenant-in-tail of any land or rent to make an entry or distress, or to bring an action to recover the same, shall have been barred by reason of the same not having been made or brought within the period hereinbefore limited, which shall be applicable in such case, no such entry, distress, or action, shall be made or brought by any person claiming

[1] *See* further on this point the notes to *Nepean v. Doe*, 2 Sm. L. C. 566 et seq. 4th ed. Watk. on Conv. by Morley & Cook, 16, 6th ed. And see *Doe d. Jacobs v. Phillips*, 10 Q. B. 130; 16 L. J. Q. B. 269; and *James v. Salter*, 3 Bing. N. C. 345.

[2] The 2nd section of the act, taken in connexion with the 12th, applies to co-parceners, joint-tenants, and tenant-in-common, so as to make their possession separate from the time when the act came into operation. *Culley v. Taylerson*, 3 Per. & D. 550; 11 Ad. & E. 1008. *Woodroffe v. Daniell*, 15 Mee. & W. 769.

any estate, interest, or right, which such tenant-in-tail might lawfully have barred."[1]

ADVERSE Witness.[2]

See also Evidence; Witness.

ADVERTISEMENT.

See Libel; Reward.

FINDEN v. WESTLAKE, M. & M. 461.

Advertisements published *bonâ fide* for the apprehension

This was an action for a libel in publishing a hand-bill offering a reward for the recovery of certain bills of exchange, and stating that A. B. is suspected of having embezzled them.

Tindal, C. J., held it to be a good defence on the general issue that the handbill was published solely with a view to the protection of persons liable

[1] See sections 22 & 23. With regard to the issue-in-tail, first, where no conveyance has been made by their ancestor, if a tenant-in-tail remain out of possession for twenty years his neglect bars the issue in-tail, the same as if he had executed a disentailing deed, and conveyed away the estate. *Austin v. Llewellyn*, 9 Ex. 276. Secondly, if the ancestor has executed an innocent conveyance, the effect of that is merely to pass to the purchaser such an interest as the tenant-in-tail could lawfully grant, leaving the rights of the issue untouched, who will therefore be entitled to bring his action within twenty years of his ancestor's death. For the discontinuance of possession in the 3rd section, is the ceasing to possess when the party so ceasing has a right to possess, which a tenant-in-tail cannot have after he has conveyed his estate to another. *Rimmington v. Cannon*, 12 C. B. 18. *See* also *Goodall v. Skerratt*, 3 Drew, 216; 24 L. J. Chan. 323. *Doe d. Smith v. Pike*, 3 B. & Adol. 738. *Doe d. Daniell v. Woodrooffe*, 10 Mee. & W. 608; in error, 15 Mee. & W. 769; 2 H. of L. C. 811.

As to the Remainderman or Reversioner.—First, where there has been no conveyance by the tenant-in-tail, it has been held that if the statute once begin to run against the tenant-in-tail, and he die before the lapse of twenty years without issue inheritable under the entail, the remainderman, though under disability, will, notwithstanding the 16th section, have only what is then left of the twenty years to make his entry under the 22nd section; and it has likewise been decided that the 22nd section is retrospective. *Goodall v. Skerratt*, 3 Drew, 216; 24 L. J. Chan. 323. Secondly, where there has been a conveyance by the tenant-in-tail, it seems that wherever a voidable fee-simple is created by the tenant-in-tail, whether by a tortious or an innocent conveyance, the right of the remainderman or reversioner is to a future estate within the meaning of the 3rd section, and is governed thereby. *See* 2 Sm. L. C. 554, 4th ed. *Doe d. Curson v. Edmonds*, 6 Mee. & W. 295.

[2] A suitor, prior to 17 & 18 Vic. c. 125, could not, in general, discredit or contradict his own witness; but by the 22d section, "a party producing a witness shall not be allowed to impeach his credit by general evidence of bad character; but he may, in case the witness shall, in the opinion of the Judge, *prove adverse*, contradict him by other evidence, or, by leave of the Judge, prove that he has made at other times a statement inconsistent with his present testimony: but before such last-mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such a statement."

The words "adverse witness," in this section, do not mean merely because his testimony is unfavourable to the party calling him. To be "adverse," within the meaning of the section, so as to entitle the party calling him to prove that he has made at another time a statement inconsistent with his present testimony, such witness must, in the opinion of the Judge, be adverse in the sense of showing a hostile mind. *Greenough v. Eccles*, 5 C. B., N. S. 786; 28 L. J. C. P. 160; 5 Jur. N. S. 766. See *Melhuish v. Collier*, 15 Q. B. 878; 19 L. J. Q. B. 494; 14 Jur. 641.

By sect. 23, "if a witness, upon cross-examination as to a former statement made by him relative to the subject-matter of the cause, and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement."

Independently of the statute, where a witness, on his examination in chief, shows himself decidedly adverse to the party calling him, the Judge usually allows the examination to assume the form of a cross-examination; and if the witness stands in a situation which of necessity makes him adverse to the party calling him, the counsel may, as a matter of course, so examine him. *Clarke v. Saffery*, R. & M. 126; and see *Dickinson v. Shee*, 4 Esp. 56. At all events, the presiding Judge has a discretion as to the mode of examination in order best to answer the purposes of justice. *Per Abbott, C. J.*, in *Bastin v. Carew*, cited R. & M. 127. Phil. Ev. 902, 8th ed.

on the bills, or to obtain the detection and conviction of the offender. The introduction, however, his Lordship said, of the plaintiff's name could not be necessary for the protection of the defendant, or for the information he might wish to give to bill-brokers or other persons, to state that the plaintiff was the party whom he suspected. Verdict for plaintiff. See *Lay v. Lawson*, 4 Ad. & E. 796.

of a suspected person, or for the prevention of fraud, are privileged.[1]

DELANY v. JONES, 4 Esp. 191.

An advertisement was inserted to ascertain whether plaintiff had been married previously to a certain time, intending, as the innuendo stated, to insinuate that he had been guilty of bigamy; but it appearing that the advertisement had been inserted with the authority of the plaintiff's wife, *Lord Ellenborough* held it to be privileged, and left the question of malice to the jury: his Lordship observing, "I conceive the law to be this, though that which is spoken or written may be injurious to the character of the party, yet if it be done *bonâ fide*, or with the view of *investigating a fact in which the party making it is interested*, it is not libellous."

But the party inserting them must be interested in the subject of inquiry.

BROWNE v. CROOME, 2 Stark. 297.

The defendant, who had acted as solicitor to a commission against Browne, upon a petition to the Chancellor to supersede the commission, published an address to the creditors in a public newspaper, charging the bankrupt with having committed a gross fraud against his creditors, and calling on the latter to resist the proceedings. *Lord Ellenborough* held, that as the communication might have been made in a manner less injurious, it was to that extent libellous. His lordship observed, that if the publication in question had merely suggested doubts without alleging the facts, as in the case of *Delany v. Jones*, the main grievance would have been wanting. *See* 1 Starkie on Libel, 327; Cooke on Defamation, 44.

And the language used must not exceed the necessity of the legitimate object to be attained.[2]

PARIS v. LEVY, 9 W. R. 71.

This was an action of libel against the proprietor of a newspaper. The libel was contained in an article commenting upon a handbill of the plaintiff, a marine-store dealer, stating that the handbill held out an inducement for servants to steal from their masters. The Judge directed the jury, that if they were of opinion that the comments were fair criticisms upon the handbill, and did not go out of it to attack the character of the plaintiff, they ought to find for the defendant. A rule for a new trial being obtained, on the ground of misdirection,—

Per Cur. There is no distinction between a handbill issued by a tradesman and a book published by an author. It is open to the same criticism, and the direction of the learned Judge was correct. Rule discharged. *See* 1 Camp. 350; id. 355 n.

An advertisement of a tradesman is open to the same critical comments by the press as any ordinary literary publication.

ADVICE. *See* Bills and Notes; Malicious Prosecution.

ADVOCATE.[3] *See* Barrister; Counsel; Libel; Slander; Smith's *Bar Education; Hortensius*, by Forsyth; *Quintilian*, by Best.

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[1] *See* 6 & 7 Vic. c. 96, s. 3, as to threatening to publish a libel, &c. to extort money.

[2] The following publication was held to be no libel:—"Notice. Any person giving information where any property may be found belonging to H. G., a prisoner in the King's Bench Prison, but residing within the rules thereof, at 34 & 5 Portland Place, Borough Road, shall receive 5 per cent upon the goods recovered for their trouble, by applying to Mr. Levy, Fetter Lane, Fleet Street." *Gompertz v. Levy*, 1 Per. & D. 214.

[3] Until recently, this was the proper designation of those who practised in the Probate and Admiralty Courts, and still is descriptive of those who practise in the Spiritual Courts. In Scotland, all counsel practising at the bar are so called; and in Aberdeen, the procurators are called advocates. This note will only refer to the cases connected with parties acting as advocates; not barristers or authorised professional counsel. In *Cobbett v. Hudson*, 19 L. T. 208, *Lord Campbell* at Nisi Prius held that a

ADVOCATES in the County Court. The 15 & 16 Vic. c. 54, s. 10, enables the following persons to appear and conduct cases in the County Courts: viz. the party to the suit or other proceeding; or an attorney of one of her Majesty's Superior Courts of Record, being an attorney acting generally in the action for such party, but not an attorney retained as an advocate by such first-mentioned attorney; or a barrister, retained by or on behalf of the party on either side; or, by leave of the Judge, any other person allowed by the Judge to appear instead of the party: but none of the persons thus entitled to address the Court are to have any exclusive right or pre-audience.

ADVOCATES in the Probate, Matrimonial, and Admiralty Courts. All persons admitted to practise as advocates or proctors respectively in any Ecclesiastical Court in England, and all barristers, attorneys, and solicitors, entitled to practise in the Superior Courts at Westminster, shall be entitled to practise in the Court of Divorce and Matrimonial Causes: and such advocates and barristers shall have the same relative rank and precedence which they now have in the Judicial Committee of the Privy Council, unless and until her Majesty shall otherwise order. 20 & 21 Vic. c. 85, s. 15; id. c. 77, ss. 40, 41, 42.

ADVOCATES in Quarter Sessions. Justices in Quarter Sessions may, in their discretion, make an order that barristers, provided as many as four attend, shall have exclusive audience in their court, though until such order was made no barristers have attended the court, except on special retainer, and the business of advocates has always been performed by attorneys only. *Evan, ex-parte*, 9 Q. B. 279; S. C. *non Reg. v. Denbighshire Justices*, 2 New Sess. Cas. 422; 10 Jur. 542; 15 L. J. Q. B. 335. See *Bessell v. Wilson*, 1 E. & Bl. 489.

ADVOCATES in Universities. A party charged with infringing a rule of the University is not entitled to appear before the Vice-Chancellor by

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plaintiff or defendant who conducts his own case cannot also be a witness; but subsequently, after full discussion, it was settled, that however objectionable and inconvenient it may be in practice, there is nothing in the present state of the law to prevent a plaintiff acting both as advocate and witness in his own cause. S. C. 1 E. & B. 11; 22 L. J. Q. B.; S. C. 17 Jur. 488. See *Dunn v. Packwood*, 1 C. B. Rep. 312; 11 Jur. 242. *Stones v. Byscon*, 4 D. & L. 393; 16 L. J. Q. B. 32. But the wife of a plaintiff in a civil suit has no right to appear and conduct the case of her husband at Nisi Prius. *Cobbett v. Hudson*, 15 Q. B. 988; 14 Jur. 982. Where the judge refused in such a case to hear the wife as advocate, and the husband not appearing in person, or by attorney, a nonsuit was directed, the Court refused to set the nonsuit aside. But *per Ld. Campbell, C. J.*, in an application directly concerning liberty, as a motion for a writ of *habeas corpus*, the wife may be heard on behalf of her husband. There is no rule of law requiring that counsel appearing in court for a party who pleads in person should be instructed by an attorney. *Doe d. Bennett v. Hale*, 15 Q. B. 171; 14 Jur. 830; 19 L. J. Q. B. 353. Therefore, where a judge at Nisi Prius had ruled that counsel appearing for such party, and not instructed by an attorney, could not cross-examine or address the jury, the Court granted a new trial. But the usage which has prevailed at the bar, that counsel, unless in some excepted cases, should take their instructions from attorneys only, is beneficial, and ought to be maintained. After counsel have addressed the Court, a party in the cause will not be allowed to do so, though he be a barrister. *Newton v. Chaplin*, 19 L. J. C. P. 374.

As to authority of advocate to compromise a suit, see *Swinfen v. Ld. Chelmsford*, 1 F. & F. 689; 36 L. T. 406; 29 L. J. Ex. 382. *Chambers v. Mason*, 28 L. J. C. P. 10, and authorities there cited; or to refer, see *Filmer v. Delter*, 3 Taunt. 486. *Jarvall v. East. Counties*, 2 Ex. 344. *Smith v. Troup*, 7 C. B. 757. Russell on Arbitration, 32, 2d ed. *See* Arbitration. But not where party is an infant. *Biddell v. Dowse*, 6 B. & C. 255; or lunatic, *Cumming v. Ince*, 11 Q. B. 112.

By 13 & 14 Wm. 3, c. 6, ss. 2, 3, advocates are required to take the oath of allegiance and abjuration, and by 1 Wm. & M. stat. 1, c. 8, s. 3, the oath of supremacy: but *see*, as to Catholics, 10 Geo. 4, c. 7, and the oaths now to be taken by the 21 & 22 Vic. c. 8; and by Jews, 21 & 22 Vic. c. 49, s. 2.

counsel or attorney, that not being a judicial proceeding. *Ex-parte Death*, 21 L. J. Q. B. 337; 17 Jur. 112. *See* 6 T. R. 89.

ADVOCATION, Note of. In Scotland, a mode of removing a cause from an inferior to the supreme court; and the cause may be advocated either before or after final judgment. Pater. *Comp.* 482.

ADVOWSON. *See* Bishop; Ecclesiastical Law; Mortmain; Simony.

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I. Origin and Nature of, and of the Right to generally.[1]

[1] An advowson is a right of presenting or nominating a proper person to fulfil the duties, and to receive the profits, of an ecclesiastical benefice. Anciently, the bishop had the sole cure of souls throughout his whole district, and received all the profits, which he and the clergy distributed into four parts: one to the bishop, to maintain hospitality and support the clergy residing with him; one for the building and repairing of churches; one for the poor; and one to support the inferior clergy, whom the bishop used to send to particular places as his deputies, and to remove or recall at his pleasure. As soon, however, as tithes were established, about the end of the eighth century (Selden, 82), it was usual for the bishop to allocate to his vicar or curate, in any district, the whole or part of the tithes or other profits arising there. When the feudal lords, for the sake of having divine service performed in their districts, were willing to alienate part of their lands to the church, for the purpose of building houses for the parson, and providing a competent glebe for him, and for building new churches where they were wanted, they were allowed in return to nominate a clergyman to the bishop, who, if he was qualified, was obliged to admit him. These grants being insufficient alone for the maintenance of an incumbent, were not made without the consent of the bishop to allocate, in aid of the glebe, the tithes of that precinct to the use of the clergyman, who now had a permanent interest for life in his parish.

This was the origin of presentative advowsons, in which, though a matter ecclesiastical, the lay patron was allowed to have a temporal and valuable interest, inasmuch as it might serve as a provision for one of his children, or any other relation who was qualified for it; and, as at the time that these glebes were granted most fiefs were hereditary, this right of advowson presentative descended to the heir. *See* Roger's *Ecc. L.* 4.

He in whom the right of presentation vested was called *advocatus ecclesiæ*, hence the name *advocatio*, or advowson. Gibs. 797; 2 Bl. Com. 21. *Presentation* is the offering of the clerk to the *bishop*. *Nomination* is the offering of the clerk to the person who has the right of presentation. Such rights may exist in different persons at the same time. Thus, when the legal estate in an *advowson* is in trustees, they have the right of presentation, though the right of nomination is in the *cestui que trust*. 3 Com. Dig. 4.

II. Of Presentative Advowsons, Appendant,[1] and in Gross.[2]

(A) *On the Partition of a Manor, if an Advowson be excepted it becomes in Gross.*

Reynolds v. Blake, 3 Salk. 25 ; 1 Ld. Raym. 198; S. C. 3 Lev. 437.

On the partition of a manor, if an advowson be excepted it becomes in gross.

Where there are two co-parceners of a manor, to which an advowson is appendant, and they make partition of the manor without taking notice of the advowson, at every other turn it is still appendant; but if there had been any express exception of the advowson it would then be in gross.

So if co-parceners make a partition of the manor, and the demesnes are assigned to one and the services to another, the manor is destroyed, and the advowson becomes in gross; but if on partition the advowson is allotted to one co-parcener, and the manor to which it is annexed to another, and after one dies without issue, by which the law unites them again, the advowson, which was once severed, and became in gross, is now become again appendant. *See* 1 Inst. 1224; 6 Rep. 64; 8 Rep. 796.[3]

(B) *So it does if Reversioner of Manor to which Advowson is appendant usurp upon Tenant for Life; but on Death of Tenant for Life it again becomes appendant.*

Sir William Elvis's Case, Hob. 323.

And if the reversioner usurps upon the tenant for life of a manor to which an advowson is appendant, the advowson becomes in gross; but if tenant for life dies, it becomes appendant again.

If there is a tenant for life of a manor to which an advowson is appendant, the reversion in fee to B., B. usurps upon the tenant for life, the advowson is become in gross; but if the tenant for life dies, it becomes appendant again.

(C) *So if severed conditionally, as in case of a Mortgage, it will be re-united when the Condition is performed.*

The King v. The Bishop of Chester, 3 Salk. 24; S. C. 1 Ld. Raym. 294; Skin. 651.

Or where severed only conditionally, as in the case of a mortgage, it will be re-united again if the condition is performed.

In a *quare impedit* it was holden by *Lord Holt*, *C. J.*, and assented to by the Court, that where an advowson is appendant to a manor, and the patron mortgages the manor in fee, excepting the advowson, the advowson is in gross, unless the money is actually paid at the day, in which case it becomes again appendant; and if it is paid after the day, though it may be appendant in reputation, and may pass by the name of an advowson appendant in grants or other conveyances, yet in fact the appendancy is destroyed, the advowson having been once legally severed from the manor by the act of the party.[4]

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[1] The right of presentation, which was originally allowed to the person who built or endowed a church, became by degrees annexed to the manor in which it was erected, for the endowment was supposed to be parcel of the manor, and therefore it was natural that the right of presentation should pass with the manor from whence the advowson was said to be appendant, being so closely annexed to the manor that it will pass as incident thereto by a grant of the manor without any other words.

An advowson is appendant to the demesnes of the manor, which are of perpetual subsistence and continuance, and not to the rents or services, which are subject to extinguishment and destruction. *See* Mirehouse on Advowsons, 7, *et seq.*

[2] Advowsons in gross are when they exist as personal rights, independent of any corporeal hereditaments. *Hill v. Grange*, Plow. Rep. 170. Except in a few cases, an advowson in gross can never be appendant again. *See* 1 H. Black. 426; 1 Salk. 24; 2 Salk. 560; and Mirehouse, 15. An advowson in fee in gross is assets for payment of debts. Co. Lytt. 374 b. *Robinson v. Tonge*, 2 Str. 879; 3 Bro. P. C. 556; 3 P. Wms. 401. *Westfaling v. Westfaling*, 3 Atk. 464. An advowson in gross cannot be extended on an elegit, because a moiety cannot be set out, neither can it be valued at any certain rent towards payment of the debt. Gilb. Exec. 39; but *see* 1 & 2 Vic. c. 110, s. 11.

[3] *Rex v. The Bishop of Chester*, 1 Lord Raym. 302.

[4] But when an advowson appendant has been presented to by the patron as an advowson in gross, it cannot ever be appendant again. *See* Wats. C. C. L. 768. *Rex v. The Bishop of Rochester*, 1 Mod. 195; S. C. 2 Mod. 1; 3 Keb. 412.

III. Of Donative Advowsons.[1]

(A) *A Presentation may destroy an Impropriation, but not a Donative.*

Ladd v. Widdows, 2 Salk. 541; S. C. 3 Salk. 140; S. C. 2 Ld. Raym. 989: not S. P.

A presentation may destroy an impropriation, but not a donative.

Upon a motion for a new trial in a *quare impedit*, whether the church was a donative or presentative, evidence was offered of several presentations, and the Court (*Holt, C. J.*, and *Powell, J.*) held, that though a presentation might destroy an impropriation, yet it could not destroy a donative, because the creation thereof was by letters patent, whereby land is settled to the parson and his successors, and he to come in by donation. *See* 1 Inst. 344; F. N. B. 35; Cro. Jac. 63.

(B) *Donatives never lapse, but the Ordinary may compel the Patron to fill the Church.*

Donatives, 3 Salk. 140.

Donatives never lapse, but the ordinary may, by ecclesiastical censures, compel the patron to fill the church.

Donatives are either by royal foundation or by royal license, or by original agreement with the ordinary, but after it is established the ordinary hath nothing to do with it; it is visitable by the patron's commissioners; it must be resigned to the patron; no lapse can occur.

But, *per Holt, C. J.* "The ordinary hath a power as to the parson, though not the place; for if the parson marries without a license, or commits any misdemeanour, the ordinary may punish him in that respect, but he cannot regulate the seats in the church; and if the patron will not present, the ordinary may compel. The parson is exempted from attendance at visitations." *See* 1 Inst. 344; 3 Inst. 122; Cro. Jac. 63, 515. *Rex v. The Bishop of Chester*, 1 T. R. 396; 1 Geo. 1, st. 2, c. 10.

(C) *Right of Donation descends to Heir where Vacancy occurs in Lifetime of the Testator.*

Repington v. The Governor of Tamworth School, 2 Wils. 150.

In donatives, the right of donation descends to the heir-at-law where a vacancy has occurred in the life time of the testator.

A. B. being seised of the advowson of a donative, the church in his lifetime becomes void, then A. B. dies (the church being still void), having first made his will; the plaintiff, his executor, brought a *quare impedit*, supposing himself entitled to his turn as an executor in the case of a presentative benefice. After two arguments, the Court was clearly of opinion that the right of donation descended to the heir of A. B., and that his executor had no title, which he would have had if it had been a presentative benefice.[2]

IV. Of the Transfer of Advowsons.[3]

(A) *During a Vacancy the Grant of an Advowson, not the next Presentation, is valid.*

Holt v. The Bishop of Exeter, 2 Taunt. 69.

During a vacancy the grant of an advowson, not the next presentation, is valid.

The pleadings in this case raised the question, whether the vacancy of a living vitiates a grant of the advowson, exclusive of the then vacant turn. The point was not argued or noticed by the Court. *See* Skin. 90; 3 Lev. 116; 3 Burr. 1511; 2 Bl. Rep. 1055.

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[1] Where the benefice is conferred by the patron's deed of donation, without presentation, institution, or induction. 2 Bl. Com. 23.

[2] Where a prebendary having the advowson of a rectory in right of his prebend dies whilst the church is vacant, his personal representatives have the right of presentation from that time. *Rennel v. The Bishop of Lincoln*, 7 B. & C. 113; 9 D. & R. 810. *Mirehouse v. Rennell*, 8 Bing. 490; 1 M. & Scott, 683.

[3] The sale of any advowson will not include the right to the next presentation,

(B) *There may be a previous Agreement for the Clerk to resign in favour of Relative of Patron.*[1]

There may be previous agreement for the clerk to resign in favour of relative of patron.

Where the patron is entitled to the advowson as his private property, he is empowered by the 9 Geo. 4, c. 94, to present any clerk, under a previous agreement with him for his resignation, in favour of any one person named, or in favour of one of two persons, each of them being by blood or marriage an uncle, son, grandson, brother, nephew, or grand-nephew of the patron, or one of the patrons beneficially entitled. One part of the instrument by which the engagement is made must be deposited within two calendar months in the office of the registrar of the diocese, and the resignation must refer to the engagement, and state the name of the person for whose benefit it is made. Sects. 4, 5.

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unless made when the church is full; that is, before the right to present has actually arisen by the death, resignation, or deprivation of the former incumbent. *Alston v. Atlay*, 7 Ad. & E. 289. For the immediate right to present is regarded as a personal duty of too sacred a character to be made the subject of bargain and sale, and the sale of such a right would fall within the offence of simony. Bac. Abr. Simony, 31 Eliz. c. 6. But before a vacancy has actually occurred, the next presentation, or right of presenting at the next vacancy, may be sold, either together with, or independently of, the future presentation of which the advowson is composed. *Fox v. Bishop of Chester*, 6 Bing. 1. By the 12 Anne, stat. 2, c. 12, s. 2, a clergyman is, however, prohibited from procuring preferment for himself by the purchase of a next presentation: but this statute is not usually considered as preventing the purchase by a clergyman of an entire advowson, with a view to presenting himself to the living. When the next presentation is sold independently of the rest of the advowson, it is considered as mere personal property, and will devolve, in case of the decease of the purchaser before he has exercised his right, to his executors, and cannot descend to his heir-at-law. See *Rennell v. Bishop of Lincoln*, 7 B. & C. 113; 8 Bing. 490; Wms. *Law of Real Prop.* 294, 5th ed.; and *post*, Simony.

By the 19 & 20 Vic. c. 50, provision is made for authorising the sale of advowsons in cases where the same are vested in, or in trustees for, inhabitants, ratepayers, freeholders, or other persons forming a numerous class, and deriving no pecuniary advantage therefrom, in order that the monies arising from such sales may be applied to the erecting, rebuilding, or improvements where necessary, of parsonage-houses, and to the augmentation of the livings (where the same are small), and to other beneficial purposes therein provided.

[1] The following cases have been decided with respect to the transfer of advowsons:—

In *Rex v. The Bishop of Rochester* (2 Mod. R. 1), the king, being seised of a manor to which an advowson was appurtenant, and which were before held by an abbot, grants the manor, without the advowson, to a bishop, who re-grants both the manor and advowson to the king. A grant afterwards made by the king of the manor, with the appurtenances, naming the advowson, and describing the whole as formerly belonging to the abbot, and lately to the bishop, was held to pass the advowson.

In *Gully v. The Bishop of Exeter* (4 Bing. 290) it was held, that in a devise an advowson in gross passes under the description of a tenement. *See* further, as to devises of advowsons, *Sparrow v. Hardcastle*, 1 Ken. 67; 3 Atk. 798, S. C. *Pocock v. Bishop of Lincoln*, 3 B. & B. 27; S. C. 6 Moore, 159.

In *Rex v. The Bishop of Durham, the Chancellor, Master, and Scholars of Cambridge* (1 Comyn, 360), it was held, that the grant of a manor, with all advowsons, &c. thereunto attached, does not include an advowson severed in ancient times, notwithstanding it was appendant to the manor three hundred years since.

In *Wolferstan v. The Bishop of Lincoln and Whithead* (2 Wils. 174; in error, 3 Burr. 1504; S. C. 1 Black. 490), it was held, that the grant of the next presentation, or of an advowson made after the church is actually vacant, is a void grant *quoad* the fallen vacancy, but no lapse incurs till after induction to a second benefice. And in *Barret v. Glubb* (2 Black. 1052), that although a grant of an advowson made after the church has actually fallen vacant is void *quoad* the fallen vacancy, yet it is good as to the advowson itself, unless it be a corrupt purchase. And in *Bennet College, Cambridge, v. The Bishop of London* (2 Black. 1182), a devise of an advowson to a college in the university was held to be valid. *See* Mortmain.

An exception in a Crown grant of a rectory, of "all churches and vicarages thereto belonging," does not include a perpetual curacy. *Arthington v. The Bishop of Chester*, 1 H. Black. 418.

The royal prerogative of presenting to a church vacant by the incumbent being promoted to a bishopric, does not destroy the effect of a prior grant of the next presentation by the owner of the advowson. *Calland v. Troward*, 2 H. Black. 324; in error, 6 T. R. 439; id. 778. *See* Prerogatives of the Crown.

V. Of Appropriations.

(A) *Can be made only to a Body Politic or Corporation.*

3 Salk. 43.

Can be made only to a body politic or corporation.

An appropriation, in contradistinction to impropriation, means the annexing a benefice to the proper and perpetual use of some spiritual corporation, either sole or aggregate, being the patron of a living, which is bound to provide for the service of the church, and thereby becomes perpetual incumbent; the whole appropriation being only an allowance for the spiritual patrons to retain the tithes and glebe in their own hands, without presenting any clerk, they themselves undertaking to provide for the service of the church.

And at common law it could not be made to a lay person; for as he could not be an incumbent by a presentation, so he shall not by an appropriation, which is but a more lasting incumbency.

At the dissolution of monasteries, the appropriations belonging to the religious houses would at common law have been disappropriated, had not a clause been inserted in the statutes 27 Hen. 8, c. 28, and 21 Hen. 8, c. 13, to give them to the king, and from them has originated all the lay impropriations and secular parsonages which have been from time to time granted out by the Crown. *See* 2 Inst. 584; 1 Bl. Com. 384; Rogers, *Ecc. L.* 58.

(B) *It cannot be granted over.*

An appropriation cannot be granted over, for it is an incumbency, which is a spiritual thing; it is included in the spiritual function, which, being of the highest trust, cannot be transferred.

(C) *It must be made by the Patron, and with the Concurrence of the Crown.*

It cannot be made without the patron, for his advowson being a lay inheritance, cannot be divested without his consent; neither can it be made without the consent or concurrence of the king, because the advowson itself is held of him mediately or immediately, and he shall not lose his possibility of escheat or lapse without his consent: but an appropriation may be made by the patron and the king, acting as supreme ordinary, without the bishop; and the reason is, because, before the Reformation, it might have been made by the king, by the patron, and the pope, and whatever the pope might have done is now vested in the king by the statute of Henry 8.[1] *See* Plow. 496, 497; 1 Bl. Com. 384; 1 Burn, *Ecc. L.* 66; *Doctor and Student*, 312; Gibs. *Cod.* c. 13, 75 n.; Degge, P. C. part 1, c. 13, 195, 199; F. N. B. 223; Hob. 149; 10 Co. Rep. 11; 1 Rol. Abr. 239; Wats. Cl. L. c. 17, 189, 195; 2 Vin. Ab. 87; 1 Com. Dig. Advowson, D. 1; 1 Hagg. Rep. 163.

VI. Of the Uniting and Disuniting of Benefices.

(A) *Of Unions.*

a) The Union of Churches, but not Parishes, might be at Common Law.

[1] It has been held that a statute creating a rectory, by directing that a prebend shall be given to the rector, and on his vacating shall remain united and annexed to the rectory for ever, does not make the rectory an appropriate benefice within the stat. 31 Hen. 8, c. 13, s. 31, which provides that no deanery, archdeaconry, chancellorship, treasurership, chantership, or prebend in any cathedral or collegiate church, nor parsonage that hath a vicar endowed, nor any benefice perpetually appropriate, be taken or comprehended under the name of benefice, having cure of souls, in any article afore specified. *Brasenose College v. The Bishop of Salisbury*, 4 Taunt. 831.

HARMAN v. RENEW, K. B. 1 Salk. 165. S. P. REYNOLDSON v. BLAKE, K. B. 1 Ld. Raym. 192.

The union of churches, but not parishes, might be at common law.

On a motion for a prohibition to the Consistory Court of London, on the statute 22 Car. 2, c. 11, which united the parish of St. M. B. to the parish of St. S. against the parishioners of the parish of St. M. B. to have contribution to the repair of the church of St. S.,—

Holt, C. J., said, that at common law, by the concurrence of parson, patron, and ordinary, churches might be united to one another, but not parishes. And *Powell, J.*, observed, that union was of spiritual conusance till 37 Hen. 8, c. 21; and that since this act the spiritual court had exercised jurisdiction over it. See *Austyn v. Twyne*, Cro. Eliz. 500.

(*b*) *But now Unions can be effected only under* 1 *&* 2 *Vic. c.* 106.

But now unions can be effected only under 1 & 2 Vic. c. 106.

But now unions can be effected only by stat. 1 & 2 Vic. c. 106, it being enacted by the 20th section of that act, "that from and after the passing of this act it shall not be lawful to unite two or more benefices into one benefice in any other form or manner, or under any other circumstances, than is therein provided; and that if any such union shall be made in any other form or manner, or under any other circumstances, the same shall be void to all intents and purposes whatsoever, any statute law, common custom or usage, to the contrary notwithstanding."

(*c*) *By the Statute, Provision is made for the Union of Benefices in certain Cases where it appears to the Archbishop to be expedient.*

Where it appears expedient that benefices should be united, archbishop may inquire.

By the 1 & 2 Vic. c. 106, s. 14, the statutes of the 37 Hen. 8, c. 21, and 17 Car. 2, c. 3, are repealed; and by the 16th and following sections the provisions of these statutes are re-enacted and amended. By the 16th section it is enacted, "that whenever it shall appear to the archbishop of the province, with respect to his own diocese, or whenever it shall be represented to him by the bishop of any diocese or the bishops of any two dioceses, that two or more benefices, or that one or more benefice or benefices, and one or more spiritual sinecure rectory or rectories, vicarage or vicarages, in their or his diocese or dioceses, being either in the same parish or contiguous to each other, and of which the aggregate population shall not exceed 1500 persons, [*and the aggregate yearly value shall not exceed* 500*l.*][1] may, with advantage to the interests of religion, be united into one benefice, the said archbishop shall inquire into the case."

(*d*) *He certifying his Consent to her Majesty in Council.*

And if the archbishop is satisfied, he certifies his consent to her Majesty in council.

"If upon such inquiry it appear to him that such union may be usefully made and will not be of inconvenient extent, and that the patron has consented thereto by writing under his hand, the archbishop may certify such inquiry and consent to her Majesty in council." Sec. 16.

(*e*) *Having previously given Public Notice.*

Having previously given public notice.

"Six weeks before his so certifying, however, he must publish and give notice of the previous proceedings, by causing a statement of the facts, upon his own

[1] By virtue of the 13th & 14th Vic. c. 98, s. 8, the words within brackets are expunged. That section enacts, "that the said provision of the said act (1 & 2 Vic. c. 106) shall extend and be applicable to one or more benefice or benefices, and one or more spiritual sinecure rectory or rectories, vicarage or vicarages, in the same parish, or contiguous to each other, and of which the aggregate population shall not exceed 1500 persons, notwithstanding the aggregate yearly value shall exceed 500*l.*, in like manner, and with like preliminaries and consequences, as if the words 'and the aggregate yearly value shall not exceed 500*l.*' had not been inserted in the provisions lastly hereinbefore referred to: Provided always, that it shall be lawful for the bishop to direct that there shall be two full services in each church of such consolidated livings."

inquiry, and in other cases a copy of the aforesaid representation, to be affixed on or near the principal outer door of the church, or on some public or conspicuous place in each of such benefices, &c., with notice to any person or persons interested that he, she, or they may, within six weeks, show cause in writing against such union; and if no sufficient cause be shown, the archbishop is empowered to certify such inquiry and consent." Sec. 16.

(*f*) *Whereupon, by Order in Council, the Benefices may be united.*

It is further provided, "that thereupon her Majesty in council may issue an order or orders in council for uniting such benefices, &c. into one benefice, with cure of souls, for ecclesiastical purposes only." Sec. 16.

Whereupon, by order in council, the benefices may be united.

(*g*) *And Directions be given to regulate the course of Presentation.*

"And further, her Majesty in council, may give directions for regulating the course and succession in which the patrons, if there be more than one patron, shall present or nominate to such united benefice from time to time, as the same shall become vacant, and for determining, if such united benefice be in two dioceses, to which of such dioceses such benefice shall belong. Such order to be registered in the registries of the dioceses in which any of the benefices belonged when separate." Sec. 16.

And directions be given to regulate the course of presentation.

(*h*) *Incumbent of Benefice ordered to be united, is entitled to be presented to other of the Benefices upon Avoidance.*

"If at the time of the order being so registered all the benefices, &c. ordered to be united shall not be holden by the same incumbent, then, if any of the benefices, &c. be vacant, or if not then vacant, then upon every avoidance, until all but one shall come to be holden by the same incumbent, the patron of the vacant benefice, &c. shall be bound to present, and the bishop to institute or license, to a benefice then vacant, the incumbent of the other, or one of the other, benefices, &c. ordered to be united." Sec. 16.

Incumbent of benefice ordered to be united, is entitled to be presented to other of the benefices upon avoidance.

(*i*) *If both Benefices are holden by one Incumbent, or one is vacant, the Union is immediate; otherwise it is not until after Avoidance.*

(*k*) *But the Parishes continue Distinct as to all secular Rates and Taxes.*

If both benefices are holden by one incumbent, the union is immediate on registration of the order, so it will be if all are vacant except one; but if held by different incumbents, the union is not effected until after an avoidance. This is by virtue of the 16th section, which further enacts, that "if both or all, as the case may be, shall be holden by the same incumbent at the time of the registration of such order or orders, or all but one of the said benefices, &c. shall at such time be vacant, then immediately, or otherwise on the first avoidance of either or any of such benefices, &c., after all but one shall come to be holden by the same incumbent, the said benefices, &c. shall become permanently united together, and shall be and be deemed and taken to be one benefice, with cure of souls, to all intents and purposes, unless and until the same shall be disunited in the manner hereinafter enacted: Provided always, that notwithstanding any such union, the parishes or places of which such united benefice shall consist shall continue distinct as to all *secular* rates, taxes, charges, duties, and privileges, and in all other respects, except as hereinbefore specified."[1]

If both benefices are holden by one incumbent, or one is vacant, the union is immediate, otherwise it is not until after avoidance.

But the parishes continue distinct as to all secular rates and taxes.

[1] The effect of a union of benefices before the statute is very much the same as under the statute. In *Reynoldson v. Blake*, 1 Ld. Raym. 196; S. P. *The King v. the Archbishop of Armagh*, 1 Stra. 519; it was said *per Cur.* that unions were generally made in time of vacancy of the church; for if the church was full, the act of the ordinary could not pre-

(*l*) *In construing Deed of Union regard is had to the Intention.*

Daniel v. Morton, 16 Q. B. 198; 20 L. J. Q. B. 98; 15 Jur. 699.

In construing deed of union, regard is had to the intention.

A., being perpetual curate of W. S., a benefice with cure of souls, was subsequently presented, instituted, and inducted to a rectory, C., also with cure of souls, both benefices being in the diocese of N., and fifty miles apart from each other. Concurrently with his presentation and institution to the latter benefice, the Bishop of N., by an instrument under his episcopal seal, addressed to A., as perpetual curate of W. S. and rector of C., which recited that good causes had been alleged and allowed, united, annexed, and incorporated the rectory with the perpetual curacy during the incumbency of A. in the latter, and so long as he should be perpetual curate there, and no longer, by the bishop's ordinary authority, provided that A. should keep a sufficient curate to instruct and teach the people of the parish in which he should not reside. A. having brought an action to recover a sum of money, being the fruits of his benefice seized under a sequestration, and in which the question arose as to the validity of the supposed instrument of union,—

Lord Campbell, C. J., delivering the judgment of the Court, said, "On examination of the instrument on which the plaintiff relies, it does not appear to us that its effect is or was intended to create a union of the benefices in the proper sense of the term; it is true that it uses the terms 'unite, annex, and incorporate,' which are the proper words for that purpose, and that it authorises the holding the rectory with the perpetual curacy as one benefice; but we are to look to the legal effect of the whole instrument. In the case of the *Queen v. Page*,[1] there were the same words of union, annexation, and incorporation, and there were not the words of dispensation; and yet the Court, looking to the whole instrument, gave effect to it, not as a union, but as a dispensation. Now, we here find that the benefices were not intended to be so entirely one, that any third benefice of any value, however small or however near, or under any circumstances whatever, could be held at the same time; and, what is more important, that it was a condition precedent to the continuing operation of the instrument that a curate, to be licensed by the ordinary, should be kept in that parish of the two in which the incumbent should not reside. By its very provisions, therefore, residence in the one was considered to produce no residence in the other; so that, though for certain purposes the two were to be held as one—that is, that the incumbent might retain the fruits, income, and increase of both, without impeach-

judice the incumbent, for by the union the incumbency would be destroyed; therefore, if the church was full, the consent of the incumbent was necessary. But if the church was full, and the incumbent would not consent, the union could not be made *de verbis in præsenti*, but it might be made *de verbis in futuro, quando vacaverit*, &c. 6 Hen. c. 7, 14. And after the union the ordinary might compel the parishioners to come to the church to which the union was made, and to pay their tithes by process in his court, and no prohibition was grantable. And this was no prejudice to the parishioners, because their *modus* continued good, but the parish, as to taxes, duties, rates, reparations of the church, &c. continued distinct. *See* 2 Rol. Abr. 351; Degge, P. C. c. 14, 205. Though the incumbency of churches is united, the tithes, boundaries, and profits continue as before, for there can be no union of parishes though there is of churches. *Felldown v. Beale*, Carth. 238.

Per Holt, C. J. "Upon an union at common law, or by the statute of Hen. 8, though one church be united to another, yet this does not unite the parishes, but it is only an appropriation of one church to the other, so that the incumbent and his successors of the other church shall be parsons of the church united." *The Case of the Parish of St. Swithin's*, Skin. 616.

Where two churches are united by act of Parliament after the next avoidance of both, the patron cannot present to the united vicarage upon the next avoidance of one. *Harding v. the Bishop of Winchester*, 2 Bl. 1162. But if several churches are united, and the presentation is given by turns to the several patrons, showing a presentation in his own turn before the union will be sufficient. *Grocers' Co. v. the Archbishop of Canterbury*, Black. 770.

Parish churches, after they are united by the statute, may be described in pleading as one rectory. *Wilson qui tam v. Van Mildert*, 2 B. & P. 394. See *Robinson v. Marquis of Bristol*, 11 C. B. 208; 20 L. J. C. P. 208; 15 Jur. 926; S. C. 19 L. T. 230.

[1] Cro. Eliz. 500.

ment by any ecclesiastial ordinances — yet this was so qualified, especially as to the matter of residence, that it would be doing violence to the language as well as spirit of the instrument to hold, that by virtue of it the plaintiff was otherwise than a non-resident on that benefice of the two from which he was *de facto* absent."

(B) *Of the Disuniting of United Benefices.*

By the same statute, 1 & 2 Vic. c. 106, s. 21, provision is made by a similar process for disuniting benefices which have been heretofore united, or which may be hereafter united into one benefice under the provisions of the act. Where united for more than sixty years before the passing of the act, the benefices cannot be disunited without the consent in writing of the patron or patrons.

VII. Of Presentation,[1] Admission,[2] Institution,[3] and Induction.[4]

[1] Presentation is the offering a clerk by the patron of an advowson to the ordinary to be instituted. By the Statute of Frauds, all presentations must be in writing; and even whilst it was permitted to be done by parol, common reputation was not admissible evidence to prove the presentation. *Tillard v. Shebbeare*, 2 Wils. 366. *The King v. Eriswell*, 3 T. R. 723. The right of presentation and the right of nomination to a church are distinct things. Presentation is the offering a clerk to the bishop; nomination is the offering a clerk to the patron. These rights may exist in different persons at the same time. Thus, a person seised of an advowson may grant to A. and his heirs, that whenever the church becomes vacant he will present to the bishop such person as B. or his heirs shall nominate. Where the legal estate in an advowson is vested in trustees the right of presentation, as incident to the legal estate, is in them, but the right of nomination as the really beneficial right is in the *cestui que trust*. So in the case of a mortgage of an advowson, the mortgagee has the right of presentation but the mortgagor has the right of nomination. 3 Cruise, T. 21, c. 1, ss. 6, 7. If the right of nomination is in one person and that of presentation in another, the latter is to judge of the qualification of the person nominated in the same manner as a bishop does; but if a person refuse to present on the ground of immorality, that must be tried by a jury: hence if, on an application for a *mandamus* against the presenter for not presenting a nominee, the question is, whether the presenter acts ministerially in allowing the nomination of the presentee, or whether he may approve or reject it, the Court will not determine it upon affidavits. *Rex v. The Marquis of Stafford*, 3 T. R. 646. *See* 3 Burr. 1265; Dougl. 506; 1 T. R. 396; Co. Litt. 344.

[2] Admission is the approval of the presentation by the ordinary, and is thus declared:—"I., A. B., by virtue of this instrument, from John, Lord Bishop of L., in his triennial visitation to all clerks, rectors, vicars, ministers, chaplains, and curates, whatsoever, within this diocese directed, do admit F. G. into real, actual, and corporeal possession of this church of R. together with all the profits, dues, members, and appurtenances, whatsoever thereunto belonging, in the presence of those whose names are underwritten." Mirehouse, 183.

[3] Institution is the commitment to the clerk of the cure of souls. The form and manner of it is thus: the clerk kneels before the ordinary whilst he reads the words of the institution out of a written instrument, drawn for this purpose, with the episcopal seal appendant, which he holds in his hand during the ceremony. 1 Inst. 344 a; Wats. 155; 3 Cruise, Dig. 18; Mirehouse, 184. By the Stamp Acts (see *post*, 233), the instruments of presentation, &c., are subject to an *ad valorem* duty. The conveyance of a manor, *primâ facie*, includes an advowson, but it may be reversed. *Mosely v. Mathews*, 10 Mee. & W. 544. Where the testatrix devised her advowson of F. to her trustees upon trust for sale upon the death of H. (the then incumbent), but on no account to sell it to any one of his family, the proceeds of the sale to fall into the general residue, the residuary legatee asked that the next presentation might be sold, as a thing undisposed of by the will; but *Held*, that the next presentation was vested in the trustees, and that they must present. *Bristow v. Skirrow*, 1 L. T. (N. S.) 180, Ch. *See* Lewin on Trustees, 208. When the advowson belongs to the bishop, the forms of presentation and institution are supplied by an act called "collation." 2 Bl. Com. 22.

[4] Induction is necessary to complete the possession of the incumbent. This is performed by the ordinary issuing a mandate, directed in general to the archdeacon, or if the church be within a peculiar to the dean or judge, commanding the induction of the clerk; the ceremony is performed, according to the tenor and language of the mandate, by vesting the incumbent with full possession of all the profits belonging to the church. Accordingly, the person who inducts usually takes the clerk by the hand, and lays it upon the ring of the church door, or if the church is in ruins, then upon any part of the wall of the church or churchyard, and says to this effect: "By virtue of this mandate I do induct you into the real, actual, and corporeal possession of the church of C., with all the rights, profits, and appurtenances thereunto belonging." After which

(A) *When the Queen has an Interest in the Presentation, and creates the Incumbent a Bishop, she shall present as Patron.*

Rex v. The Bishop of London, K. B. 1 Ld. Raym. 26.

When the king has an interest in the presentation, and creates the incumbent a bishop, he shall present as patron.[2]

Per Cur. When the king hath interest in the presentation, and the prerogative happens at the same time, the interest shall be preferred; as if the king be seised in fee of an advowson, and he creates the incumbent bishop, he shall present as patron, that being a title precedent to that of the prerogative.[1]

(B) *The Right will be Presentative and not Donative, if given in such a way that the Incumbent cannot be removed at pleasure.*

Reg. v. Foley, 2 C. B. 664; 15 L. J. C. P. 108.

Where by statute the right to present to a new church was vested in the patron of a rectory, but so that the minister should not be removable at pleasure, the right so created was presentative and not donative.[3]

A private act of parliament, after providing for the sale of glebe land and the erection of an additional church with part of the proceeds, directed that the curate of the new church should, during the incumbency of the then rector, be appointed by him; and that after his death, avoidance, or resignation, the new church should become the principal church, with all the rights, immunities, and privileges appertaining to a mother church, and the then church should become and be deemed a chapel of ease thereto, to be served by a minister capable of having cure of souls; and that the patronage of or right of presentation to the chapel, as well as the patronage of or right of presentation to the new church, should be vested in the patron of the rectory, his heirs and assigns, so, nevertheless, that the minister of the chapel should not be removable at pleasure.

The Court held that the chapel of ease thus created by the act was thereby made presentative and not donative, saying, that even if it had been at first donative, it would have ceased to be so upon a presentation being once made by the patron to the ordinary, followed by the institution and induction of the presentee.

(C) *Where an Advowson was vested in Trustees, who were to present the Person so elected by the Majority of the Inhabitants of a Parish, the Court refused a* Mandamus *requiring them to present the Person so elected.*

Reg. v. Orton, 14 Q. B. 139; 18 L. J. Q. B. 321.

Where an advowson was vested in

An advowson was vested in feoffees, in trust upon every avoidance to present to the ordinary such person as should be elected by a majority of the land-

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the inductor opens the door and puts the person inducted into the church, who usually tolls a bell to make his induction public, and known the parishioners; which being done, the clergyman who has inducted the clerk endorses a certificate of his induction on the mandate, which is witnessed by the persons present. *See* 1 Burn, *Ecc. Law*, 156. Where the same person is both patron and incumbent, upon his death the right of presentation is in his heir. *Hall v. The Bishop of Winchester*, 3 Lev. 47. *Harris v. Austen*, 3 Bulst. 47. *See* 2 Bac. Abr. 419; Cro. Jac. 371. It has been held that a lay patron may revoke his presentation. *Rogers v. Holled*, 2 Black. 1039.

[1] The 10 Hen. 7 did not pass advowsons to the king, but he takes them *de jure privato.*

[2] 2 Com. Dig. tit. Esglise, H. 8, it is suggested that a presentation by the king ought to state by what title he presents.

[3] An advowson donative (*see* p. 223) is when the king, or any subject by his license, founds a church or chapel, and ordains that it shall be merely in the gift or disposal of the patron, subject to his visitation only, and not to that of the ordinary, and vested absolutely in the clerk by the patron's deed of donation, without presentation, institution, or induction. Lord Coke says, that if the patron of a donative doth once present to the ordinary, and his clerk is admitted and instituted, the church is by that means become presentative, and shall never after be donative. *See* 1 Inst. 344; F. N. B. 42; 2 Bl. Com. 22, 25; Seld. on Tithes, c. 12, 392; Cro. Jac. 63; 3 Salk. 140; 3 Wils. 355. They are not visitable by the bishop. 3 Salk. 141. *See* 1 Mod. 90. And although, if the parson of a donative be guilty of any misdemeanour, the Ecclesiastical Court may punish him, as for omitting part of the liturgy or preaching without a license, yet it cannot proceed to deprivation.

owners in a parish. On a motion for a *mandamus* to the trustees to present a clerk, on the ground that he had been so elected,—

The Court refused to grant a *mandamus*, holding that the remedy of the landowners against the trustees was in equity for a breach of trust; or if they had a legal right, their remedy was by *quare impedit:* and in either case a *mandamus* would not lie.

trustees, who were to present the person elected by the majority of the inhabitants of a parish, the Court refused a *mandamus* requiring them to present the person so elected.

(D) *But where the Advowson was in Majority of the Brethren of a Hospital, a* Mandamus *went to compel the Master to affix the Corporate Seal to the Presentment.*

Reg. v. Kendall, 4 Per. & D. 603; 1 Q. B. 366; S. C. 1 Q. B. 361; 10 L. J. 137.

In pursuance of an act of Elizabeth, the Earl of Leicester by deed founded an eleemosynary hospital, and made it a corporation, by the name of the "Master and Brethren of the Hospital." By ordinances for the constitution and government of it he fixed the number of the brethren, who were to be chosen by preference from poor persons disabled in the wars. The appointment of master he vested in his heirs, directing them, however, to appoint, if fit, the vicar of a neighbouring church. By deed he gave to the master and brethren, to hold to their use and their successors for ever, lands and possessions, among which was the advowson of a vicarage. By several ordinances he vested the government and control of the brethren in the master.

The Court granted a *mandamus*, requiring the master to affix the corporate seal to the presentation of the brethren, holding that he had no veto in the election of a presentee to the vicarage by the majority, and that his concurrence was not necessary to the validity of an election by the majority. *See* Tapping, 118.

But where by a deed in pursuance of an act of parliament an endowment was given to the majority of the brethren of an hospital, a *mandamus* was granted, requiring the master to affix the corporate seal to their presentment.

(E) *Joint-tenants may make Partition to present by Turns.*

Bishop of Salisbury v. Philips, 1 Lord Raym. 536; S. C. 1 Salk. 43.

Per Holt, C. J. Doubtless, joint-tenants of an advowson may make partition to present by turns, which would divide the inheritance *aliquatenus*, and create separate rights, so that the one shall present in the one turn and the other in the other, which is a sufficient partition; for partition of the profits is a partition of the thing, where the thing and the profits are identified. It cannot make two advowsons out of one, but it can create distinct rights to present in several turns; and in this case each of the parties is said to have *advocationem medietatis ecclesiæ* (*see* Inst. 186 b.; 4 Rep. 75; id. 686; *Doctor and Student*, c. 30, 19, 9; 1 Ves. 413, 415; 3 Cruise, Dig. 25; 7 Bro. *Parl. Cases*, 296; 2 Atk. 482; Smith, R. & P. P. 34): otherwise all must join.

Joint-tenants may make partition to present by turns.[1]

Colefall v. Newcomb, 2 Ld. Raym. 1205. *See* 12 Mod. 640; 3 Wils. 361. And the presentation on an incumbent of a donative being made a bishop does not devolve to the king. *Attorney-General v. The Bishop of London*, 4 Mod. 213. *See* Vaugh. 18; 2 Rol. Abr. 344; Winch. 91; Hob. 143; 1 T. R. 1399.

[1] And by the stat. 7 Anne, c. 18, it is enacted, "that if co-parceners or joint-tenants, or tenants in common, be seised of any estate of inheritance in the advowson of any church or vicarage, or other ecclesiastical promotion, and a partition is or shall be made between them to present by turns, that thereupon every one shall be taken and adjudged to be seised of his or her separate part of the advowson to present in his or her turn, as if there be two, and they make such partition, each shall be said to be seised, the one of the one moiety to present in the first turn, the other of the moiety to present in the second turn; in like manner if there be three, four, or more, every one shall be said to be seised of his orher part, and to present in his or her turn.

Several assignees of every co-parcener, whether they acquire the estate by conveyance or by act of law, as tenant by the courtesy, shall have the same privilege by presenting in turn as the sisters had. *See* Plow. 336; 1 H. Black. 412. Where a papist is seised alone, the right of presentation is given to the universities. 3 Jac. 1, c. 5; 5 Bing. N. S. 652; *see* 232 n.; and 11 Geo. 2, c. 7, s. 5.

(F) *Which may be either by Record, by Deed, or by Parol between Privies in Blood, but between Strangers by Deed alone.*

Bishop of Salisbury v. Philips, 1 Salk. 43. S. C. 1 Ld. Raym. 535. S. C. Carth. 505. S. C. 12 Mod. 321.

A composition to present by turns may either be by record, by deed, or by parol, between privies in blood, but between strangers it can only be by deed.

The *Chief Justice* said that a composition might be either by record or by parol; that if either privies in blood, as co-parceners, or strangers in blood, as tenants-in-common, or joint-tenants, agree by record to present by turns, and one present, the other is not by usurpation put to a *quare impedit*, and that whether the presentation be by one privy to the agreement or by a stranger. (*See* West, 2; 5 Inst. 362.) 2ndly, That if either privies in blood, as parceners, or strangers, as tenants-in-common, or joint-tenants, agree by deed to present by turns, the composition is good; and if it be once executed on all sides, he that brings a *quare impedit* need not mention the composition, which shows the very right and inheritance to be severed, and that a separate interest is vested in each of them to present alternately, and that the plaintiff needed not have declared of the composition or indenture in this case. (*See* Dy. 29.) 3dly. By parol, for so a composition may be between parceners; but between strangers in blood, composition cannot be without deed. *See* F. N. B. 60, 62 a. f.; 11 Hen. 4, 3 b.

(G) *Usurpation in one Co-parcener does not occasion the Loss of a Turn.*

Arthington v. The Bishop of Chester, 1 H. Black. 418.

Usurpation in one co-parcener does not occasion the loss of a turn.[1]

Per Cur. If there are four co-parceners, the eldest and second present; a stranger usurps on the third, this usurpation will only affect that turn; and the fourth may present when her turn comes, and if disturbed, she may bring a *quare impedit*, for the usurpation only displaced the turn of the third *See* Bro. *Qua. Imp.* pl. 118; 1 Inst. 18 a.; Plow. 333. *Anon.* 2 Vent. 39.

(H) *The Right of Presentation passes under a Will, notwithstanding it is directed to be sold at a future day, which has not arisen.*[2]

Johnston v. Baber, 25 L. J. Ch. 829; 2 Jur. N. S. 1053.

The right of nomination to an advowson directed by will to be sold at a future day, the proceeds of the sale to be held in trust for the testator's children, is in the children previous to the sale.

A testator bequeathed all his real and personal estate to trustees, upon trust to sell the same as soon as conveniently might be after his decease, except his advowson of the rectory of C., and certain hereditaments in the same parish, the sale of which he directed should be postponed until after the death of his eldest son, W., who was then incumbent. The proceeds of the sale were to be held in trust for his children therein named as tenants-in-common.

The Court held that the right of presentation previous to the sale passed by the will, and did not descend to the heir of the testator. And that if the children could not agree whom to nominate for presentation by the trustees, the question was to be decided by lot, and that being tenants-in-common, they were

[1] If co-parceners cannot agree to present, the eldest sister shall have the first turn, the second shall have the next turn, and so of the rest according to their seniority; and this privilege extends not only to their heirs, but to the several assignees of every co-parcener, whether they acquire the estate by conveyance or by act in law, as tenant by the courtesy, who shall have the same privilege by presenting in turn as the sisters had. See *Thrale v. Bishop of London*, 1 H. Black. 411; Plowd. 338; Cro. Eliz. 18; 1 Inst. 18 a, 166 b, 243 a. A Roman Catholic who is a co-patron of an advowson cannot join in the presentation. *Edwards v. The Bishop of Exeter*, 5 Bing. N. S. 652; 7 Scott, 652.

The prerogative presentation to a church, the advowson of which is held by several in common, does not supply the turn of the patron otherwise entitled to present. *The Grocers' Cy. v. The Archbishop of Canterbury*, 2 Black. 770. *Calland v. Trower*, 2 H. Black. 333.

[2] 1 Vic. c. 26, s. 1, provides that the words "real estate" in a devise shall include advowsons, but a presentation is excepted out of s. 30. Rogers, *Ecc. L.* 1009.

not entitled to present successively according to seniority, as in the case of co-parceners.

(I) *A Parish Church will be rendered Void by the Incumbent presenting himself to a District Church within the Parish, if the combined Annual Value exceed 1000l.*

Stone v. Bishop of Winchester, 9 C. B. 62; 19 L. J. C. P. 217.

A parish church will be rendered void by the incumbent presenting himself to a district church within the parish, if the combined annual value exceed 1000*l.*

The Court held, that where the incumbent of a parish church presents himself to a district church within the parish, created under the 58 Geo. 3, c. 45, and 59 Geo. 3, c. 134, the annual value of the two livings exceeding 1000*l.*, the parish church becomes, under the provisions of 1 & 2 Vic. c. 106, ss. 4, 11, *ipso facto* void.

(K) *A Collation from the Registry of a Bishopric is Evidence of the Exercise of the Right.*

Irish Society v. Derry, 12 Clark & Fin. 642.

A collation from the registry of a bishopric is evidence of the exercise of the right.

On error in the House of Lords. It was held that an original collation from the registry of a bishopric, and appearing on the face of it to be *pleno jure*, is admissible to show that the right claimed has been exercised; and that entries in the book kept at the First-Fruits' Office were admissible to show the fact of a collation to a living made by a bishop at a particular time.

(L) *The Instruments by which Presentation and Institution or Collation are carried into effect are subject to Stamp-duty.*

The instruments by which presentation and institution or collation are carried into effect are subject to stamp-duty.

By the statutes 5 & 6 Vic. c. 79, sched., and 6 & 7 Vic. c. 72, the instruments by which presentation and institution, or collation, are carried in effect, are subject to an *ad valorem* duty, according to the net yearly value of the benefice. The duty is 7*l.*, and when the net yearly value shall amount to 300*l.* or upwards then for every 100*l.* thereof over and above the first 200*l.* a further sum of 5*l.* Ireland, 5 & 6 Vic. c. 82.

VIII. Of the Remedies connected with Advowsons : Quare Impedit.

(A) *Within what Time it must be brought.*

(*a*) *Must be brought within Three Incumbencies, or Sixty Years, if they do not amount to that time.*

Must be brought within three incumbencies, or sixty years, if they do not amount to that time.

By the 3 & 4 Wm. 4, c. 27, s. 30, the time for bringing an action or suit to enforce the right of presentation to a benefice is limited to three successive incumbencies, all adverse to the right of presentation claimed, or to the period of sixty years, if the three incumbencies do not together amount to that time.

(*b*) *And cannot be brought after* 100 *Years from the first Adverse Possession.*

And no *quare impedit* can be brought after the expiration of one hundred years from the first adverse possession, unless the adverse possession has been broken.

By the 33rd section it is provided, that "after the 31st day of December, 1833, no person shall bring any *quare impedit* or other action, or any suit, to enforce a right to present to or bestow any ecclesiastical benefice as the patron thereof, after the expiration of one hundred years from the time at which a clerk shall have obtained possession of such benefice adversely to the right of presentation or appointment of such person, or of some person through whom he claims, or of some person entitled to some preceding estate, or interest, or undivided share, or alternate right of presentation or gift, held or derived under the same title, unless a clerk shall subsequently have obtained possession of such benefice on the presentation or gift of the person so claiming, or of some person through whom he claims, or of some other person entitled in respect of an estate, share, or right, held or derived under the same title."

(c) By Expiration of the Time limited the Right is extinguished.

By expiration of the time limited the right is extinguished.

By the expiration of the time limited by the act for enforcing the right, the right itself is extinguished. This is by virtue of the 34th section, which enacts, "that at the determination of the period limited by this act to any person for making an entry or distress, or bringing any writ of *quare impedit*, or other action or suit, the right and title of such person to the land, rent, or advowson for the recovery whereof such entry, distress, action or suit respectively, might have been made or brought within such period, shall be extinguished."

(d) Collation by the Crown upon a Lapse after Possession of a Clerk adversely to the Right of the Patron is within the Act.

Collation by the Crown upon a lapse after possession of a clerk adversely to the right of the patron is within the act.

By sect. 31 it is provided, that "when on the avoidance, after a clerk shall have obtained possession of an ecclesiastical benefice adversely to the right of presentation or gift of the patron thereof, a clerk shall be collated thereto by his Majesty or the ordinary, by reason of a lapse, such last-mentioned clerk shall be deemed to have obtained possession adversely to the right of presentation or gift of such patron as aforesaid; but when a clerk shall have been presented by his Majesty upon the avoidance of a benefice, in consequence of the incumbent thereof having been made a bishop, the incumbency of such clerk shall, for the purposes of this act, be deemed a continuation of the incumbency of the clerk so made a bishop."

(e) A Person claiming as Patron by virtue of an Estate which an Owner of an Estate Tail might bar, is a Person claiming through the Person entitled.

A person claiming as patron by virtue of an estate which an owner of an estate tail might bar, is a person claiming through the person entitled.

By sect. 32 it is enacted, that "in the construction of this act every person claiming a right to present to or bestow any ecclesiastical benefice as patron thereof, by virtue of any estate, interest, or right, which the owner of an estate tail in the advowson might have barred, shall be deemed to be a person claiming through the person entitled to such advowson, and the right to bring any *quare impedit* action, or suit, shall be limited accordingly."

(B) *Of the Writ, when it lies,*[1] *of the Process,*[2] *and of the Parties.*

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[1] The action of *quare impedit* was the only one commonly in use in case of the disturbance of patronage. Since 10th October, 1860, it must be commenced by an ordinary writ of summons in the C. P., with a notice indorsed that the plaintiff intends to declare in *quare impedit* (23 & 24 Vic. c. 126, s. 26), and all the proceedings thereupon are to be the same as in other actions (s. 27). To maintain the action there must be a disturbance in the presentation. A purchaser may allege a presentation in the vendor. *Thrale v. Bishop of London*, 1 H. Black. 376, 530. The action lies by the grantee of the next avoidance against the patron who granted it (2 Roll. Abr. 375); by a husband, where the church of his wife becomes void during coverture, or by her afterwards; by an infant, claiming by descent during his minority, notwithstanding his ancestor purchased and never presented to the advowson (2 Inst. 358; Owen, R. 85); by the chapter against the dean of their several possessions; or by an executor, for a disturbance in the time of his testator. One co-parcener, upon an agreement to present by turns, may have this action against another. Bro. Abr. *Qua. imp.* 139. And if the right of nomination is in one, and the presentation in another, the *quare impedit* will be by the former against the latter, who disturbs his right before presentation or against the incumbent after. *R. v. Marquis of Stafford*, 3 T. R. 651.

[2] The usual proceeding, anterior to the issuing the writ, is as follows:—Upon the vacancy of a living, the patron, on notice being given him by the ordinary (stat. 44 Geo. 3, c. 43), is bound to present within six calendar months, otherwise it will lapse to the bishop. But if the presentation be made within that time, the bishop is bound to admit and institute the clerk if found sufficient, unless the church be full, or there be notice of any litigation. For if any opposition be intended, it is usual for each party to enter a *caveat* with the bishop to prevent his institution of his antagonist's clerk. An institution after a *caveat* entered is void by the ecclesiastical law (1 Burn, 107); but this the temporal courts pay no regard to, and look upon a *caveat* as a mere nullity (1 Roll. Rep. 191). But if two presentations be offered to the bishop upon the same avoidance, the church is then said to become

litigious; and if nothing farther is done, the bishop may suspend the admission of either, and suffer a lapse to incur; yet if the patron or clerk on either side request him to award a *jus patronatus*, he is bound to do it. A *jus patronatus* is a commission from the bishop, directed usually to his chancellor and others of competent learning, who are to summon a jury of six clergymen and six laymen, to inquire into and examine who is the rightful patron (1 Burn, 16, 17); and if upon such inquiry made, and certificate thereof returned by the commissioners, he admits and institutes the clerk of that patron whom they return as the true one, the bishop secures himself at all events from being a disturber, whatever proceedings may be had afterwards in the temporal courts. The clerk refused by the bishop may also have a remedy against him in the spiritual court, denominated a *duplex querela;* which is a complaint in the nature of an appeal to the ordinary or his next immediate superior; as from a bishop to the archbishop, or from an archbishop to the delegates; and if the superior court adjudges the cause of refusal to be insufficient, it will grant restitution to the appellant.

Thus far matters may go on in the mere ecclesiastical course, but in contested presentations they seldom go far; for upon the first delay or refusal of the bishop to admit his clerk, the patron issues his writ of summons against the bishop for the temporary injury done to his property in disturbing him in his presentation. And if the delay arises from the bishop alone, as upon pretence of incapacity or the like, then he only is named in the writ; but if there be another presentation set up, then the pretended patron and his clerk are also joined in the action: or it may be brought against the patron and clerk, leaving out the bishop; or against the patron only.

Immediately on the suing out of the writ of summons, if the plaintiff suspects that the bishop will admit the defendant or any other clerk pending the suit, he may have a prohibitory writ, called a *ne admittas* (F. N. B. 37); which recites the contention begun in the king's courts, and forbids the bishop to admit any clerk whatsoever till such contention be determined. And if the bishop does, after the receipt of this writ, admit any person, even though the patron's right may have been found on a *jure patronatus*, then the plaintiff, after he has obtained judgment on the *quare impedit*, may remove the incumbent, if the clerk of a stranger, by a writ of *scire facias* (2 Sid. 94); and shall have a special action against the bishop, called a *quare incumbravit*, to recover the presentation, and also satisfaction in damages for the injury done him in incumbering the church with a clerk pending the suit, and after the *ne admittas* received. F. N. B. 48. But if the bishop has incumbered the church by instituting the clerk before the *ne admittas* issued, no *quare incumbravit* lies, for the bishop has no legal notice till the writ of *ne admittas* is served upon him.

[1] In the pleadings the plaintiff must set out his title at length, and prove at least one presentation in himself, his ancestors, or those under whom he claims; for he must recover by the strength of his own right, and not by the weakness of the adversary's (Vaugh. 7, 8); and he must also show a disturbance before action brought. Hob. 199. Upon this the bishop and the clerk usually disclaim all title, save only the one as ordinary, to admit and institute, and the other as presentee of the patron, who is left to defend his own right. And upon failure of the plaintiff in making out his own title the defendant is put upon the proof of his, in order to obtain judgment for himself, if needful. But if the right be found for the plaintiff on the trial, three further points are to be inquired. 1st. If the church be full; and if full, then of whose presentation; for if it be of the defendant's presentation, then the clerk is removable by writ brought in due time. 2d. Of what value the living is, and this in order to assess the damages, which are directed to be given by the Statute of Westminster. 3d. In case of plenarty upon an usurpation, whether six calendar months have passed between the avoidance and the time of bringing the action; for then it would not be within the statute, which permits an usurpation to be divested by a *quare impedit* brought *infra tempus semestre*. So that plenarty is still a sufficient bar in an action of *quare impedit* brought above six months after the vacancy happens, as it was universally by the common law, however early the action was commenced. If it be found that the plaintiff has the right, and has commenced his action in due time, then he shall have judgment to recover the present action; and if the church be full, by institution of any clerk, to remove him, unless it were filled *pendente lite* by lapse to the ordinary, he not being party to the suit, in which case the plaintiff loses his presentation *pro hac vice;* but shall recover two years' full value of the church from the defendant, the pretended patron, as a satisfaction for the turn lost by his disturbance, or in case of insolvency the defendant shall be imprisoned for two years. (Stat. West. 2, 13 Edw. 1, c. 5, s. 3.) But if the church remains still void at the end of the suit, then, whichever party the presentation is found to belong to, whether plaintiff or defendant, shall have a writ directed to the bishop *ad admittendum clericum* (F. N. B. 38), reciting the judgment of the Court, and ordering him to admit and institute the clerk of the prevailing party; and if upon this order he does not admit him, the patron may sue the bishop in a writ of *quare non admisit* (F. N. B. 49), and recover ample satisfaction in damages. 3 Bl. Com. 249, 250. *See* Form of Writ of Summons and Pleadings, Stephens, C. L. P. Act, 62–65.

(*a*) *Where the Patron is not disturbed, and has no Prejudice by the Suit, the Writ may be against the Incumbent alone.*

Rex v. The Archbishop of York, 3 Lev. 16.

Where the patron is not disturbed, and has no prejudice by the suit, the writ may be against the incumbent[1] alone, as *on quare impedit* by simony of incumbent.

Quare impedit, in which the plaintiff made title that the defendant was presented upon a simoniacal agreement; the archbishop pleaded that he claimed nothing but as ordinary; and the defendant Sowton pleaded in abatement that the patron was not named in the writ; and upon demurrer it was adjudged that he need not, because his title is not in question, but is admitted; and the king claims in affirmance of his title and in his right, but by the offence of the defendant; and the patron shall not be put out of possession by the recovery in this action, for he has had the fruit of his presentation: but his clerk shall be removed for his simony, and therefore the patron need not be made a party. But *Charlton*, *J.*, doubted, because the patron is not only to have his clerk admitted, but likewise to continue; and a *respondeas ouster* was awarded.

(*b*) *The giving of Notice of Refusal to present must be pleaded by the Bishop.*

Rex v. The Bishop of Hereford, 1 Com. R. 358.

Notice of refusal to present must be given by the bishop to the patron, and be pleaded to a *quare impedit*.

The bishop pleaded that he claimed nothing but as ordinary, and it was holden bad for want of alleging notice of the refusal.[2]

(*c*) *The Ordinary cannot Counterplead the Patron's Title in the Queen, by lapse.*

Storie v. Richards, 9 C. B. 62; 19 L. J. C. P. 217.

The ordinary cannot counterplead the patron's title by setting up title in the Queen, by lapse.

The following are cases relating to the pleadings.

If the plaintiff alleges that he was seised in fee of such a manor, to which the advowson was appendant, he need not in stating the presentation allege that it was *tempore pacis*. *Shade v. The Bishop of Bath and Wells*, 1 Mod. 230. Where brought by a *cestui que trust*, a profert of the grant of the advowsons need not be made. *Reynell v. Long*, Carth. 315. Though it be confessed in the pleadings that the advowson once vested in the Crown, the plaintiff must, notwithstanding, prove at the trial that it was so. *Rex v. Jarvois*, 5 Mod. 336.

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[1] But it is most advisable to bring it against all three; for, 1st. If the bishop be left out, and the suit be not determined till the six months are past, the bishop is entitled to present by lapse, as he is not a party to the suit; but if he be named, and there has been a disturbance before the action, no lapse can possibly accrue till the right is determined. 2dly. If the patron be left out, and the writ be brought only against the bishop and the clerk, the suit is of no effect, and the writ shall abate, for the right of the patron is the principal question in the cause. 3dly. If the clerk be left out, and has received institution before the action brought (as is sometimes the case), the patron by this suit may recover his right of patronage, but not the present turn, for he cannot have judgment to remove the clerk, unless he be made a defendant and party to the suit, to hear what he can allege against it. For which reasons it is always safer to insert all three in the writ.

[2] Lord Coke, in his second *Institute*, p. 632, says, "If the cause of refusal be for default of learning, or that he is an heretic, schismatic, or the like, belonging to the knowledge of ecclesiastical law, there the bishop must give notice thereof to the patron; but if the cause be temporal, as a felon or homicide, or other temporal crime; or if the disability grow by any act of parliament, or other temporal law, there no notice ought to be given, unless notice be prescribed to be given thereby." But Dr. Burn, in the first volume of his *Ecclesiastical Law*, p. 142, declares, that in all cases it is fair and equitable to give notice to the patron of the refusal, whatever the cause may be, for it is very possible that the person presented may be many ways unfit, and the patron not know it.

To entitle the plaintiff to judgment, the process must have been regularly and duly served. Ibid. If a *quare impedit* is brought against one archbishop, the writ should be directed to the other. *Rex v. Warrington*, 1 Show. 329. It is not necessary to allege the exact

(C) *Of Damages, Judgment, and Costs.*

(*a*) *Damages, how recoverable.*

Damages are recoverable in *quare impedit* by virtue of the statute 13 Edw. 1, c. 5, s. 3, which enacts, that from henceforth in writs of *quare impedit* and *darrien presentment* damages shall be awarded, that is, to wit, if the time of six months[1] pass by the disturbance of any, so that the bishop do confer to the church, and the very patron loseth his presentation for that time, damages shall be awarded for two years' value of the church. And if the six months be not passed, but the presentment be deraigned within the said time, then the damages shall be awarded to the half-year's value of the church. And if the disturber be not able to render damages, he shall in the first case have imprisonment of two years, and in the other of half a year.[2] *See* Mayne on D. 200–1.

Damages are recoverable by virtue of 13 Edw. 1, c. 5.

(*b*) *Plaintiffs recovering have Costs.*

(*c*) *And Defendants succeeding have Costs.*

(*d*) *Unless the Judge certify, in the case of an Ecclesiastical Patron, that he had probable Cause for defending the Action.*

Costs are recoverable in *quare impedit* by virtue of the 4 & 5 Wm. 4, c. 39,

Plaintiffs recovering in *quare impedit* have costs.

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time the party was seised of the advowson. *The King and Queen v. The Bishop of Chester and others*, 1 Ld. Raym. 298; S. C. 5 Mod. 297; S. C. 2 Salk. 560; S. C. Show. 212; S. C. 3 Salk. 40. By 23 & 24 Vic. c. 126, s. 27, the appearance of defendant, proceedings in default of appearance, pleadings, judgment, execution, and all other proceedings and costs upon writ of summons, shall be subject to the same rules and practice, as nearly as may be, as the proceedings in an ordinary action commenced by writ of summons; and the provisions of the Common Law Procedure Act, 1852, and of the Common Law Procedure Act, 1854, shall apply to the writ and pleadings and proceedings thereupon.

In *Rex v. The Archbishop of Armagh*, 2 Str. 837, the declaration having set forth that B., the late archbishop, was seised as of fee, in right of his archbishopric, of the advowson of the church of A. &c., the archbishop in his plea admitted this seisin, and a vacancy by promotion as alleged in the declaration; but insisted that the Crown by patent granted to D. the deanery of A. with all its rights, members, &c., by virtue whereof he was possessed of the church of A. as a member of the deanery, &c.; this was held ill, as it neither showed a presentation nor that the church was a member of the deanery. In pleading a vacancy, it ought to be stated that the parson was made a bishop, or advanced to a living incompatible, &c., *per quod ecclesia præd' vacavit*. *Rex v. The Bishop of Meath*, 10 Mod. 308.

Where the declaration contained six counts founded on the same title, but taking it up from different periods, the Court refused to put the plaintiff to his election upon which he would rely. *Tolson v. The Bishop of Carlisle*, 3 C. B. 41. *See* further, as to the pleadings in *quare impedit*, *The Grocers' Company v. The Archbishop of Canterbury*, 3 Wils. 214. *Powell v. Milburn*, 3 Wils. 355; 2 Black. 851. *Reg. v. The President and College of Exeter*, 12 Ad. & E. 512.

The remedy between co-parceners who have entered into a partition deed to present by turns is by action on the covenant. Thus, in *Crossman v. Sir John Churchill*, 2 Mod. 97, A. B. and C., who had a right to an advowson, had entered into an agreement to present by turns, the Court said that they would have had no remedy against each other but upon the covenants; but an act of parliament having passed confirming this indenture, and ordaining that they should be tenants-in-common, an interest was vested in each till partition made, and *quare impedit* was maintainable. *See* 12 Mod. 321; 6 Co. 12; 2 Roll. Rep. 253; F. N. B. 52; 2 Inst. 365.

By *quare impedit* a man shall not recover the advowson, but the presentment; but if he has execution, all other and besides the incumbent are thereby out of possession. If a man recover in *quare impedit* and die, his heir shall not have execution, and therefore it is not a real action.

[1] The six months are six calendar months. *Tullet v. Linfield*, 3 Burr. 1455.

[2] Prior to the 13 Edw. 1, the plaintiff in *quare impedit* was not entitled to recover damages, but any profit the patron might obtain, though the verdict should savour of simony; and this is the reason that the king, in a *quare impedit*, recovers no damages, because he could recover none by the common law; and the king is not within the provisions of the act conferring this right. *Boswell's case*, 6 Rep. 51; 2 Inst. 362; Co. Litt. 176. And see further as to the king's right, Bro. Damages, pl. 15; id. Prerogative, pl. 18; Fitz. *Quare impedit*, 161; Jenk. 281, pl. 9; cites *Brooke's case*, 22 Hen. 8, 17. It appears that, under the statute, the damages or penalty thereby given may be recovered, notwithstanding the church has remained void. *Bishop of Exeter v. Freake*, 1 Lutw. 901; *contra*, *Holt v. Halland*, 3 Lev. 59.

by which it is enacted, "that in all writs and actions of *quare impedit* issued or brought from and after the passing of this act in England, Wales, or Ireland, where a verdict shall pass or be given for the plaintiff or plaintiffs in any such writ or action, the plaintiff or plaintiffs in every such writ or action, in addition to the damages to which they or he is or are by law now entitled, shall also have judgment to recover his or their full costs and charges against the defendant or defendants therein to be assessed, taxed, and levied in such manner and form as costs in personal actions are now by law assessed, taxed, and levied. And where in any such writ or action the plaintiff or plaintiffs therein shall discontinue or be nonsuited, or a verdict shall be had against him or them, that then the defendant or defendants shall have judgment to recover his or their full costs and charges against the plaintiff or plaintiffs therein, to be assessed, taxed, and levied in manner aforesaid: Provided always, that no judgment for costs shall be had against any archbishop, bishop, or other ecclesiastical patron or incumbent, if the Judge who shall try the cause, or if there be no trial by a jury, the Court in which judgment shall be given, shall certify that such archbishop, bishop, or other ecclesiastical patron or incumbent had probable cause for defending such action; but in no case, when the defence to any such action shall be grounded upon a presentation or presentations, collation or collations, previously made to any benefice, shall such presentation or presentations, collation or collations, be deemed or considered probable cause for defending such action."

And defendants succeeding have costs.

Unless the judge certify, in the case of an ecclesiastical patron, that he had probable cause for defending the action.

ÆDIFICARE in tuo proprio solo non licet quod alteri noceat. *It is not lawful to build on your own land what may injure another.* 3 Inst. 201.

ÆDIFICATUM Solo, Solo cedit. *What is built upon the Soil belongs to or goes with the Soil.* Co. Litt. 4 a. See *Cujus est Solum ejus est usque ad Cœlum*; and Broom's *Max.* 172; 2 Bl. Com. 18.

ÆQUITAS est correctio Legis generaliter latæ, quâ parte deficit. *Equity is a correction of Law, when too general in the respect in which it is defective.* Plowd. 375.

ÆQUITAS est correctio quædam Legi adhibita, quia ab ea abest aliquid propter generalem sine exceptione comprehensionem. *Equity is a kind of correction applied to Law, since from its wide and unqualified sense something in the way of exception is wanting.* Plowd. 467.

ÆQUITAS est quasi Equalitas. *Equity is a kind of Equality.* Co. Lytt. 24.

ÆQUITAS sequitur Legem. *Equity follows the Law.*[1]

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[1] Courts of equity must follow, not lead, the law, in all cases to which the rules of common law apply: they cannot, for instance, establish a different rule of property from that which the law has recognised; but where the law is ineffectual, equity steps in to give redress, following, however, the rules of law. 2 Bl. Com. 330; Dougl. 21; Lord Kenyon, C. J., 4 T. R. 650; Broom's *Max.* 88; Amb. 200; 2 Eden. 316; 1 Spence's *Equitable Jurisdiction*, b. 2, c. 2. Mr. Smith, in his useful manual, p. 13, thus expounds and comments upon the doctrine:—"The true meaning of this maxim would seem to be, that equity is governed by legislative enactments and the rules of law in regard to legal estates, rights, and interests; and that it is regulated by the analogy of such legal estates, rights, and interests, and the legislative enactments and rules of law affecting the same in regard to equitable estates, rights, and interests, where any such analogy plainly subsists; if, in each case, there are no peculiar circumstances rendering it absolutely necessary to deviate from this rule, or creating an equitable obligation in one of the litigant parties, and an equitable correlative right in favour of another litigant party, and

ÆQUUM et Bonum est lex legum. *Justice and Right is the law of laws.* Hob. 224.

ÆSTIMATIO præteriti delicti ex postremo facto nunquam crescit. *A subsequent fact never increases the weight of a past offence.* Bacon.

AFFIDAVIT.[1] *See* Affidavit of Debt, and Motions and Rules.

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requiring a different course to be taken in the particular case without overturning or destroying the general application of any legislative enactments or rules of law that may, in terms or by analogy, apply to the case."

[1] An oath in writing, sworn before some judge or officer of a court, or other person legally authorised to administer it. The party making an affidavit is usually described as "the deponent." In making his statements he is said to "depose." An affidavit is distinguished from a deposition, properly so called, by the circumstance that it is always made *ex parte* and without any cross-examination. The term "affidavit" is also applied (though not with strict propriety) to statements made on affirmation. It is the practice to regard an affidavit as imperfect unless it be signed by the deponent; and in ordinary forms the signature constitutes a part; but in America it has been held not essential when there is no positive rule of court or statute requiring it. *See* 1 Burr. 68.

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I. Of the General Requisites and Qualities of.

(*a*) *Must purport to be on Oath.*[1]

Oliver v. Price, 3 Dowl. 261.

Motion on an affidavit, "maketh and saith," omitting the word "oath." Rule refused.

Every affidavit must purport on the face of it to be on oath.

(*b*) *And Allegations be Positive and Distinct.*

Reg. v. Manchester Railway Comp. 3 Nev. & P. 439.

In an affidavit in support of a motion for a *certiorari* to remove an inquisition to assess compensation for lands taken under a railway act, the inquisition was not set out, nor the omission accounted for, and only stated that the deponent objected that it did not contain the requisite notice to treat, and no matter of fact was distinctly alleged from which a question of law might arise. The Court held the affidavit insufficient, merely containing suggestions and no distinct allegations of the circumstances.[2]

It must contain distinct and positive allegations, not suggestions merely.

(*c*) *And not Scandalous or Libellous.*[3]

Bury v. Clench, 1 Dowl. N. S. 848.

An application was made for leave to reply to certain matters stated in an affidavit, for the purpose of showing they were the subject of a communication without prejudice. The Court said that the rule should be to require the other side to show cause why the objectionable affidavit in question should not be taken off the file, or why certain parts of it should not be read.

If details are given which have been obtained in professional confidence, or are scandalous or libellous, the Court may grant a rule to take such affidavit off the file, or to prevent the parts complained of from being read.

[1] *See* to the same effect *Doe v. Clark*, 2 Dowl. N. S. 393. *Prentice v. Phillips*, 12 L. J. Ch. 497. An affidavit has been held bad for using the word "said" for say, in the formal commencement. *Howarth v. Hubbersty*, 3 Dowl. 455. The affidavit by one person commences thus:—"I, A. B., of gentleman, make oath, and say," &c. If there are several persons it runs thus:—"We, A. B. of gentleman, C. D. of gentleman, &c. severally make oath, and say. And first, I, A. B., for myself, say that, &c. And as to the facts known to both, we, A. B. and C. D., severally say that," &c. *See* 2 L. T. (N. S.) 342, Chanc.

[2] The facts in an affidavit should be stated with great precision as to time and place. The word "about" should be avoided, as much too vague (*Willes v. James*, 1 Dowl. 498. *Basket v. Barnard*, 4 M. & S. 331); and the expression, "as I verily believe," unless the fact be such that the deponent knows it only from the information of others. *West v. Eyles*, 2 W. Black. 1059. *Maton v. Hayter*, 3 Jur. 769. *Joynes v. Collinson*, 13 Mee. & W. 558; 2 D. & L. 449. A fact should be stated directly and positively, and not argumentatively. Thus, "I object that there has been no notice given," &c., is not the same as "I say that no notice has been given," &c. *Reg. v. Manchester Railway Co.* 3 Nev. & P. 439. *Classey v. Drayton*, 6 Mee. & W. 17. Sums of money ought to be written in words at full length and not in figures. *Crook v. Crook*, 24 L. J. Ch. 504. In case of the service of a rule, it should state "rule annexed;" the "rule in this cause" has been held not to be sufficiently specific (*Fidlett v. Bolton*, 4 Dowl. 282); but the word "true," without saying "copy," suffices. *The King v. Sheriff of Stafford*, 5 Dowl. 238. Where the affidavit is in support of a motion to set aside proceedings for irregularity, it must distinctly show that the step objected to has been taken. *Classey v. Drayton*, 6 Mee. & W. 17. It is not necessary, however, that an affidavit to rescind a judge's order should literally set forth the order; if it state the substance it will be sufficient. *Shirley v. Jacobs*, 1 Scott, 67 n. And where the affidavit upon an application for an attachment for non-performance of an award had annexed to it a copy of the award, from which, and from the submission which had been made a rule of Court, it appeared that the award had been made within the time limited by the submission, it was held that it was not a fatal objection that the affidavit did not state the execution within that time. *Higgins v. Street*, 25 L. J. Ex. 285. But an affidavit was held insufficient which, being in support of a rule for a writ of revivor to revive a judgment more than twenty years old, did not state that any part of the principal or interest had been paid within twenty years, or that there had been an acknowledgment in writing within that time. *Loveless v. Richardson*, 2 Jur. N. S. 716.

[3] An action on the case does not lie, however, against a deponent for untrue statements in an affidavit, even though made maliciously and without probable cause; but he may be indicted for perjury. *Hodgson v. Scarlett*, 1 B. & A. 232. *Revis v. Smith*, 18 C. B. 126.

(d) If translated from a Foreign Language must be verified.

RE EADY, 6 Dowl. 615.

A verified translation of an affidavit in a foreign language, sworn according to the law of the country where taken, is receivable.

On an application being made under the 3 & 4 Wm. 4, c. 74, it was held to be no objection to an affidavit sworn before a native Court, that it was originally in the German language, if it be translated and the translation verified; and the oath may be administered in the German language, if it be translated by an interpreter to the deponent; and it is sufficient that the affidavit should be signed by the judge of the country, and the deponent's signature need not be attached; the judge's signature being verified, and an affidavit being produced that such is the course of practice in Germany.[1]

(e) No Stamp necessary.

No stamp necessary.

By the 4 & 5 Vic. c. 34, the duty imposed by the 55 Geo. 3, c. 184, upon affidavits filed, read, or used in the Courts of Law or Equity at Westminster, or the counties palatine of Chester, Lancaster, and Durham, was thereby repealed.[2]

II. OF THE FORMAL REQUISITES OF AN AFFIDAVIT.

(A) *Title of Affidavit.*

(a) Must be Entitled of the Court.

The affidavit must be entitled of the court.

By Reg. Gen. (Pr.) H. T. 1853, r. 144, it is ordered, that "an affidavit sworn before a Judge of any of the Courts shall be received in the Court to which such Judge belongs, though not entitled of that Court, but not in any other Court, unless entitled of the Court in which it is to be used.[3]

(b) And in the Cause.

TOMKINS v. GEACH, 5 Dowl. 509.

And also if there be one in the cause.

An affidavit was held defective which was entitled "T. G. and others," without naming the others.[4]

(c) The Names of all Parties stated.

ANDERSON v. BAKER, 5 Dowl. 107.

The names of all the parties to the cause must be stated.

The title of the cause, and the names of the parties, should be correctly stated if a cause be actually pending; and the Christian as well as surname of all the parties should be given.[5] S. P. 2 East, 182.

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[1] If the affidavit is made in English, having been previously translated by a sworn interpreter, and that fact is stated, no affidavit from the interpreter is necessary. *Bosc v. Solliers*, 6 D. & R. 514; 4 B. & C. 358. *Marzetti v. Jouffroy*, 1 Dowl. 41. And an affidavit signed by the deponent in a foreign character, although illegible, may be received without an affidavit stating that the person was a foreigner. *Nathan v. Coken*, 3 Dowl. 370.

[2] *See* also 5 Geo. 4, c. 41; 55 Geo. 3, c. 184. A fee of one shilling is, however, payable to the officer of the court.

[3] Subject to the above exception, every affidavit requires to be entitled in the court in which it is used (*Wigden v. Birt*, 1 Dowl. N. S. 92. *Re Cardross*, 5 Mee. & W. 545. *Osborne v. Tatum*, 1 B. & P. 271), or in which the cause is (*Molling v. Poland*, 3 M. & S. 157). Any trifling error in the title of the court, such as a misspelling, is immaterial. *Rolfe v. Burke*, 4 Bing. 101 (*Hands v. Clements*, 11 Mee. & W. 816). It is not essential that the title of the court should be formally stated in its usual place at the head of the affidavit, if it can be implied from other parts of the instrument, as from its being sworn before an officer of the court. *Howell v. Wilkins*, 7 B. & C. 783. *Bland v. Drake*, 1 Chit. R. 165. *Hands v. Clements*, 11 Mee. & W. 816; 1 D. & L. 379.

[4] The affidavit, on a motion for a *sci. fa.* against a shareholder in a railway company, will be properly entitled in the original action. *Edwards v. Kilkenny, &c. Railway Co.* 3 C. B. (N. S.) 786.

[5] *Fores v. Diemar*, 7 T. R. 661. *Cohen v. Williams*, 8 Dowl. 418. *Bodley v. Reynolds*, 15 L. J. Q. B. 152. The names should be the same as stated in the cause. *Joll v. Lord Curzon*, 5 C. B. 205. *Munden v. Duke*

(*d*) *And the Character in which they Sue.*[1]

WRIGHT v. HUNT, 1 Dowl. 457.

If the party sue or is sued *en autre droit*, this should be stated as part of the title.

And the character in which they sue where *en autre droit.*

(*e*) *Unless in Proceedings collateral or preliminary.*[2]

HARGREAVE v. HAYES, 5 E. & B. 272.

Where there is no action pending no title of a cause is necessary; and to add the intended cause before it is commenced, as formerly in an affidavit to hold to bail, is mere surplusage.

But in proceedings preliminary or collateral to the suit, the affidavit need not be entitled in the cause.

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of Brunswick, 4 C. B. 321. *Tagg v. Simmons*, 4 D. & L. 582. And the affidavit should clearly show which are plaintiffs and which defendants. *Harris v. Griffith*, 4 Dowl. 289. *Richard v. Isaacs*, 2 id. 710. After a cause is removed from an inferior court by *certiorari* it should still be entitled in the cause. *Francks v. Wicks*, 9 id. 489. After writ of error to the Exchequer Chamber the affidavit should be entitled in the cause in error. *Gandell v. Rogier*, 4 B. & C. 862. Or after a writ of false judgment. *Watson v. Walker*, 8 Bing. 315; 1 M. & Scott, 437. An affidavit in two different actions may be entitled in both. *Barrack v. Newton*, 1 Q. B. 525. *Pitt v. Evans*, 2 Dowl. 226. *Pocock v. Cockerton*, 7 id. 21. *Bosanquet v. Graham*, 7 Jur. 831. Where there are several defendants, an affidavit may, before declaration, be entitled against the defendant making it, or it may say, "A. B. *v.* C. D. sued with E. F." Where a party is misnamed or sued by initials for his Christian name, his affidavit should follow the misnomer. *Borthwick v. Ravenscroft*, 5 Mee. & W. 31; 7 Dowl. 393. *Swift v. Knight*, 5 Mee. & W. 863; 7 Dowl. 563. *Baldwin v. Banerman*, 12 C. B. 152. *Sims v. Prosser*, 15 Mee. & W. 151. *R. v. Sheriff of Surrey*, 8 Dowl. 510. Or it may set forth his real name in full, adding "sued as" so and so. *Hodgson v. May*, 7 D. & L. 4. *Lomax v. Kilpin*, 16 Mee. & W. 94. *Jones v. Eldridge*, 1 Dowl. N. S. 710. *Franklin v. Hodykinson*, 3 D. & L. 554. See *Shrimpton v. Carter*, 3 Dowl. 648. In setting aside a bail-bond for a mistake as to the defendant's name in the *capias* and summons, the right name should be stated, adding "sued as," &c. &c. &c. *Finch v. Cocker*, 2 Dowl. 383. *Shaw v. Robinson*, 8 D. & R. 423. In staying proceedings on a bail-bond, the title of the original action, or that against the bail, may be used. *Roberts v. Giddins*, 1 B. & P. 337. *Kelly v. Wrother*, 2 Chit. R. 109. *Stride v. Hill*, 4 Dowl. 709. But if the judgment in the original action is irregular, it should be entitled in the original action only.

[1] *See* also *Steyner v. Cottrell*, 3 Taunt. 377. To subjoin "assignee," "executor," &c. without saying of whom, is bad. *Casley v. Smith*, 4 Dowl. 477. *Engler v. Twysden*, 6 Scott, 580. *Fletcher v. Lechmere*, 2 Dowl. N. S. 848; 5 Man. & G. 265. It is enough, however, in an action by an infant, to add, "suing by his next friend," without naming the latter. *Abrahams v. Taunton*, 1 D. & L. 319. It is bad to affix "deceased" to a party's name. *Bland v. Dox*, 15 L. J. Q. B. 1. Nor need "*qui tam*" be added. *Dale v. Beer*, 7 East, 333. Sometimes an erroneous addition to the name may be treated as surplusage. *Reeves v. Crisp*, 6 M. & S. 274; 2 Dowl. 710.

[2] If there be no proceeding or cause actually pending, the affidavit should only be entitled in the court as applying for a *mandamus* or *quo warranto*, or civil information.

In moving for an attachment in an action, the title of the suit must be used up to the rule being made absolute. *Masters v. Lowther*, 11 C. B. 948. *Wood v. Webb*, 3 T. R. 253. *Whitehead v. Frith*, 12 East, 165. After which the title must be the "Queen *v.* A. B." *R. v. Sheriff of Middlesex*, 7 T. R. 439, 527. *Brown v. Edwards*, 2 D. & L. 520. Where the sheriff is attached in a cause, the name of the cause is generally added. *R. v. Sheriff of Middlesex*, 8 D. & R. 149; 5 B. & C. 389. In moving to enter up judgment on a warrant of attorney the title of the cause is not necessary, though it may be inserted. *Bell v. Fisk*, 12 C. B. 493. *Sowerby v. Woodroffe*, 1 B. & A. 567. *Ex-parte Gregory*, 8 B. & C. 409. *Thompson v. Vaux*, 5 Dowl. 691. On moving for a *certiorari* no title of a cause is necessary (*Ex-parte Wallwork*, 4 D. & L. 403); nor is it required, it seems, in a *procedendo* (*Jameson v. Schonswar*, 1 Dowl. 175); a prohibition (*Ex-parte Evans*, 2 Dowl. N. S. 410); or a criminal information (*R. v. Harrison*, 6 T. R. 60, 642). Neither is any title stating the parties' names essential where a submission to a reference is agreed out of court. *Bainbridge v. Houlton*, 5 East, 21. *Bevan v. Bevan*, 3 T. R. 601. *Re Houghton*, 2 M. & P. 452. *Re Imeson v. Horner*, 8 Dowl. 651. But if the award is under an order of Nisi Prius, rule of Court, or Judge's order, the title of the action must be used. *Doe d. Clarke v. Stillwell*, 6 Dowl. 305. *Bainbridge v. Houlton*, *supra*. In an application against an attorney no title is necessary (*Re Grantham*, 4 D. & L. 427), unless the matter is incidental to a cause, when the title may either be in the cause or in the matter of the attorney. *Simes v. Gibbs*, 6 Dowl. 310. *Re Wood*, 6 D. & L. 154. *Ex-parte Randall*, 2 B. C. R. 294. *Stephens v. Hill*, 10 Mee. & W. 28. *Re Hair*, 7 Man. & G. 510; 8 Scott, N. R. 231; 2 D. & L. 269. *Re Vallance*, 7 Man. & G. 511.

(f) And so of Affidavits in answer.

Re Grantham, 4 D. & L. 427.

Affidavits on showing cause are entitled same as those on which rule obtained.

The affidavits used on showing cause ought to be entitled in the same way as those used for the rule *nisi*.

(g) Defect in Title cannot be waived.

Owen v. Hurd, 2 T. R. 644.

Defect in cannot be waived.

The opposite party cannot waive the objection of a defect in the title of the affidavit.

(h) But Rule discharged on ground of such Defect is, in general, without Costs.

Joll v. Lord Curzon, 5 C. B. 205.

But if rule discharged on ground of such defect, it is in general without costs.

A rule discharged on the ground of a defect in the title of an affidavit is generally discharged without costs.[1]

(i) Exhibits should be entitled in same way.

Robinson v. Robinson, 14 L. J. Q. B. 303.

Exhibits should be entitled in same way as affidavit.

An exhibit ought to be entitled in the same way as the affidavit to which it is annexed.[2]

(B) *Formal Requisites in the Body of the Affidavit.*

(a) Must be expressed in the first Person, and divided into Paragraphs.

Must be expressed in the first person, and divided into paragraphs.

By the 2d Rule of Reg. Gen. M. V. 1854, it is ordered, that "every affidavit to be hereafter used in any cause or civil proceeding in any of the superior courts of common law shall be drawn up in the first person, and shall be divided into paragraphs, and every paragraph shall be numbered consecutively, and as nearly as may be shall be confined to a distinct portion of the subject. No costs shall be allowed for any affidavit, or part of an affidavit, substantially departing from this rule."

(b) The Deponent's Addition and Place of Abode must be stated.

The deponent's addition and place of abode must be stated.

By Reg. Gen. (Pr.) H. T. 1853, r. 138, it is ordered, that "the addition and true place of abode of every person making an affidavit shall be inserted therein."[3] *See* Addition, p. 161.

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[1] *See* also *Doe d. Neville v. Lloyd*, 2 Dowl. N. S. 330. *Harris v. Matthews*, 4 id. 608.

[2] There should be on the face of the exhibit some certificate by the commissioner, &c. that the exhibit annexed is the document mentioned in the affidavit. *Re Allison*, 10 Ex. 561.

[3] (1) *Certainty as to Addition.*

This rule does not apply to the party in the cause, and it is enough for him to say "the above-named plaintiff," or "defendant." *Shirer v. Walker*, 2 Man. & G. 917; 3 Scott, N. R. 235. *Angell v. Ihler*, 5 Mee. & W. 163. *Brooks v. Farlar*, 5 Dowl. 361. *Sharp v. Johnson*, 4 Dowl. 324; 2 Scott, 407. *Jervis v. Jones*, 4 Dowl. 610. *Loutreuil v. Philippe*, 1 B. C. R. 157. The omission is only an irregularity. *Seymour v. Maddox*, 1 L., M. & P. 543. The addition means the business, or profession, or rank of life of the deponent, and should be stated precisely. It has been held enough to add "attorney of the above-named plaintiff" (*Luxford v. Groombridge*, 2 Dowl. N. S. 332. *Matthewson v. Baistow*, 3 D. & L. 327); "managing clerk to the plaintiff" (*Short v. Cambell*, 3 Dowl. 487. *Graves v. Browning*, 6 Ad. & E. 805. *Simpson v. Drummond*, 2 Dowl. 473. *Cooper v. Foulkes*, 2 Scott, N. R. 200; 1 Man. & G. 942); "merchant" (*Vassier v. Alderson*, 3 M. & S. 165); "manufacturer" (*Smith v. Younger*, 3 B. & P. 550). But it is not sufficient to say "clerk," or "articled clerk," without adding to whom. *Graves v. Browning*, 6 Ad. & E. 805. *R. v. Reeve*, 4 Q. B. 211. Other parties mentioned in the affidavit, besides the de-

(*c*) *Must be signed by Deponent.*

SIFFIN v. PITCHER, 1 Dowl. N. S. 767.

The affidavit must be signed by the deponent.

An affidavit must be signed by the deponent; but if re-sworn, it need not be signed a second time.[1]

(C) *Of the Jurat.*

(*a*) *Must state Names of all Deponents.*

The jurat must state the names of all the persons making the affidavit.

By Reg. Gen. (Pr.) H. T. 1853, r. 139, it is ordered, that "in every affidavit made by two or more deponents, the names of the several persons making such affidavit shall be written in the jurat."

(*b*) *The Day on which sworn.*

BLACKWELL v. ALLEN, 7 Mee. & W. 146.

And the day on which it is sworn.

The jurat must state directly and positively the day of the swearing.[2]

(*c*) *The Place at which sworn.*

GRANT v. FRY, 8 Dowl. 234.

And the place at which it was sworn.

The place at which the affidavit was sworn should also be distinctly stated in the jurat. If mentioned in the body of the affidavit, the place may be stated with such reference.[3]

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ponent, should in general be described by their Christian and surnames (*Reynolds v. Hawkins*, 4 B. & A. 536), though the addition need not be given. *Waters v. Joyce*, 1 D. & R. 150.

(2) *Certainty as to Abode.*

The true place of abode ought to be stated. *Jarrett v. Dillon*, 1 East, 18. And it is insufficient to say "late of" (*Sedley v. White*, 11 East, 529. *Collins v. Goodyer*, 2 B. & C. 563; 4 D. & R. 44), though the Court will not try the question of the real abode on an affidavit (Tidd, 179). The residence should be stated of each deponent. *R. v. Carnarvonshire*, 5 Nev. & M. 364. See *Ex-parte Edmonds*, 5 Dowl. 702. *Cobbett v. Oldfield*, 16 Mee. & W. 469. *Nathan v. Cohen*, 3 Dowl. 370. The place should be described with some minuteness. It has, however, been held enough to say "of the city of London, merchant" (*Vassier v. Alderson*, 3 M. & S. 165); "of Bath, in the county of Somerset" (*Coppin v. Potter*, 4 M. & Scott, 272; 2 Dowl. 785); "of Kennington, in the county of Surrey" (*Wilton v. Chambers*, 1 Hurl. & W. 116; id. 520); "in Dublin Castle" (*Stewart v. Gavereau*, 1 Hurl. & W. 699); "of Lawrence Pountney, in the city of London" (*Miller v. Miller*, 2 Scott, 117). A clerk may, it seems, give the place of business of his employer (*Alexander v. Milton*, 2 C. & J. 424; 1 Dowl. 570. *Bottomley v. Bellchambers*, 4 Dowl. 26. *Strike v. Blanchard*, 5 Dowl. 216); but to say "clerk to the defendant," or "to the defendant's attorney," without any residence, is not enough. *Elton v. Martindale*, 5 D. & L. 248. *Winch v. Williams*, 12 C. B. 416. *Daniels v. May*, 5 Dowl. 83. A foreigner temporarily here may give his residence abroad (*Bouthet v. Kiltoe*, 3 East, 154); and a prisoner may state in whose custody he is. *Jervis v. Jones*, 1 Hurl. & W. 657; 4 Dowl. 610. *Sharp v. Johnston*, 4 Dowl. 324; 2 Bing. N. C. 246.

[1] If the deponent cannot sign his name he must make his mark. A marksman's hand must not be guided. —— *v. Christopher*, 11 Sim. 409. A signature, "Charles E. Pownall," was held sufficient, although the affidavit described him "Edward Charles Pownall." *Hands v. Clements*, 1 D. & L. 379; 11 Mee. & W. 816. *See* p. 239 n.

[2] *See* also *Doe v. Roe*, 1 Chit. R. 228; 7 Mee. & W. 146. *Duke of Brunswick v. Harmer*, 1 L., M. & P. 505; and not inferentially: thus, "Sworn by, &c. at, &c. dated this, &c.," has been held bad. *Re Lloyd*, 15 Q. B. 682.

[3] *R. v. Burn*, 7 Ad. & E. 190; and *vice versâ*, the date of a fact in the body of the affidavit may be supplied from the jurat. *Holmes v. London and South-Western Ry. Co.* 13 Q. B. 211. *Craig v. Lloyd*, 3 Ex. 232. If sworn abroad, or before a country commissioner, the place, or the place and county, should be stated. *R. v. Cockshaw*, 2 Nev. & M. 378. *R. v. West Riding*, 3 M. & S. 493. *Cass v. Cass*, 1 D. & L. 698. *Thomas v. Stanway*, 2 D. & L. 111. But if no place be mentioned, it may sometimes be implied from the officer before whom it was sworn, as before a judge in Ireland. *French v. Bellew*, 1 M. & S. 302.

(d) It must not contain Interlineation or Erasure.

The jurat must not contain any interlineation or erasure.

By Reg. Gen. (Pr.) H. T. 1853, r. 140, it is ordered, that "no affidavit shall be read or made use of in any matter depending in court on the jurat of which there shall be any interlineation or erasure.[1]

(e) Form of, where Sworn before a Judge.

GRAHAM v. INGLEBY, 5 D & L. 737; 1 Ex. 651.

Form of, where sworn before a judge.

When sworn before a judge, the words "before me" need not be put, but otherwise if before a commissioner. *Empey v. King*, 2 D. & L. 375; 13 Mee. & W. 519. *R. v. Bloxham*, 2 D. & L. 168; 6 Q. B. 528. *Thorne v. Jackson*, 3 C. B. 661.

(f) Where before a Commissioner.

BELL v. PORT OF LONDON ASSURANCE COMP. 1 L., M. & P. 691.

Where before a commissioner.

When sworn before a commissioner, it must appear he is a commissioner for taking affidavits in the particular court.[2]

(g) Statement in, where Deponent illiterate.

And the clerk of the judge or commissioner must state in jurat that deponent, if illiterate, heard the affidavit read and seemed to understand it.

By Reg. Gen. (Pr.) H. T. 1853, r. 141, "where any affidavit is sworn before any judge or any commissioner by any person who, from his or her signature, appears to be illiterate, the judge's clerk or commissioner taking such affidavit shall certify or state in the jurat that the affidavit was read in his presence to the party making the same, and that such party seemed perfectly to understand the same, and also that the said party wrote his or her mark or signature in the presence of the judge's clerk or commissioner taking the said affidavit."

(h) How matter disposed of where Jurat defective.

RE LLOYD, 15 Q. B. 682.

The Court, on the ground of a defect in the jurat, in some cases discharges the rule with or without costs, and in others enlarges it to allow of the defect being amended.

Upon application to discharge a rule on the ground that it was drawn up on an affidavit with a defective jurat, the cases of *Blackwell v. Allen*, 7 Mee. & W. 146, and *Cobbett v. Oldfield*, 16 id. 469, were cited, as showing an established practice to discharge such rules with costs. But the Court negatived the existence of any such rule of practice, and in that instance discharged the rule without costs.[3]

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[1] But notwithstanding this rule, where, although an erasure appeared in the jurat of an affidavit, the Court were satisfied that the substance of the statute which required the affidavit had been complied with, they allowed it to be filed. *Re Denton*, 28 L. J. C. P. 255. The rule does not apply where the whole jurat is erased and a fresh one written; nor, it seems, where the words "before me" are erased, and by the Court substituted (*Austin v. Grange*, 4 Dowl. 576); nor if there is an erasure over the jurat. *Atkinson v. Thompson*, 2 Chit. R. 19. *Houlden v. Fassen*, 6 Bing. 236; 4 M. & P. 127. But the rule is applicable if words in the jurat are scored through, however immaterial to the sense. *Williams v. Clough*, 1 Ad. & E. 376. But see *Dawson v. Wills*, 10 Mee. & W. 662; 2 Dowl. N. S. 465.

[2] This has been held to be sufficiently indicated by "a commissioner, &c." (*Burdekin v. Potter*, 9 Mee. & W. 13; 1 Dowl. N. S. 134. *Munden v. Duke of Brunswick*, 4 D. & L. 807; 4 C. B. 321); "by commission" (*Faubrass v. Pettit*, 1 D. & L. 622; 12 Mee. & W. 453. *Hopkins v. Pledger*, 1 D. & L. 119); "by virtue of a commission for the." *Daly v. Mahon*, 6 Dowl. 192. But the affidavit has been held bad where the word "commissioner" only was used (*Hill v. Royston*, 7 Jur. 930); or where it was expressly stated that he was a commissioner for some other court. *Frost v. Hayward*, 2 Dowl. N. S. 566; 10 Mee. & W. 673. *Shaw v. Perkin*, 1 Dowl. N. S. 306. *Griffin v. Smythe*, 8 Dowl. 490. The person before whom the affidavit is sworn must, in all cases, sign the jurat. *Bell v. Bament*, 8 Mee. & W. 317; 9 Dowl. 810.

[3] *See* also *Holmes v. London and South-Western Ry. Co.* 13 Q. B. 211. *Frost v. Hayward*, 10 Mee. & W. 673; 2 Dowl. N. S.

III. Before whom Affidavits may be Sworn.

(A) *In England and Wales.*

(*a*) *Before a Judge or Commissioner.*

Before a Judge, or before a Commissioner appointed to take affidavits.

Under the authority of stat. 29 Car. 2, c. 5, commissioners are appointed in every place of any importance in England for the taking of affidavits in all matters or causes depending, or to be depending, in the superior courts.[1]

(*b*) *But not before Plaintiff's Attorney, if it be an Affidavit of Service.*

But no affidavit of the service of process is sufficient, if sworn before the plaintiff's attorney or his clerk.

By Reg. Gen. (Pr.) H. T. 1853, r. 142, "no affidavit of the service of process shall be deemed sufficient if sworn before the plaintiff's own attorney or his clerk."

(*c*) *Nor in any case before the Attorney in the Country where there is a Town Agent, except it be an Affidavit to hold to bail.*

Nor any affidavit sworn before the clerk in the country, principal of a town agent, attorney on the record, except affidavits to hold to bail.

And by Reg. Gen. (Pr.) H. T. 1853, r. 143, "where an agent in town of an attorney in the country is the attorney on the record, an affidavit sworn before the attorney in the country shall not be received; and an affidavit sworn before an attorney's clerk shall not be received in cases where it would not be receivable if sworn before the attorney himself. But this rule shall not extend to affidavits to hold to bail."[2]

(B) *In Scotland and Ireland.*

(*a*) *Commissioners are appointed to take.*

Commissioners are appointed for taking affidavits in.

By the 3 & 4 Wm. 4, c. 42, s. 42, Commissioners are appointed for taking affidavits in Scotland and Ireland.[3]

(C) *In Foreign Countries.*

(*a*) *Affidavit receivable if made Abroad before proper Authority.*

O'Mealey v. Newell, 8 East, 364.

An affidavit made before a person authorised by the law of the place is receivable.

An affidavit of debt made by the plaintiff residing in a foreign country before a foreign magistrate, whose signature to the jurat, and his authority in that country to administer oaths and take affidavits, were verified by a proper affidavit in this country, was held to be a sufficient foundation for a judge's order to hold the defendant to special bail.[4]

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566. In general the Court refuses time to amend the defect. *Re Cockshaw*, 2 Nev. & M. 278. *Anon.* 2 Chit. R. 20. See *Goodricke v. Farley*, 4 Dowl. 392. *R. v. Justices of Warwick*, 5 Dowl. 382. It has, however, enlarged the rule, on payment of the costs of enlargement, to allow an amendment as to the place of swearing. *Cass v. Cass*, 1 D. & L. 698. So where the judge's clerk inadvertently omitted the names of the deponents. *Ex parte Smith*, 2 Dowl. 607. *Wilson v. Blakey*, 9 Dowl. 352. It has been held that an affidavit to hold to bail unsigned by the judge cannot, after the *capias* issues, be amended. *Bill v. Bament*, 8 Mee. & W. 317.

[1] *See* also 22 Vic. c. 16, and Reg. Gen. (Pr.) H. T. 1853, r. 148. Affidavits to hold to bail may be made before the officer who issues the process, or his deputy. 12 Geo. 1, c. 29. The clerk of the papers in the Queen's prison may take affidavits of all prisoners within the prison. 5 & 6 Vic. c. 22, s. 20.

[2] An affidavit made before the deponent becomes a party to the cause seems to come within this rule. *Re Gray*, 21 L. J. Q. B. 380. *Doe d. Grant v. Roe*, 5 Dowl. 409.

[3] By the law of Scotland, an affidavit taken before a Scotch justice of the peace out of his county, or anywhere in the United Kingdom, is admissible in the Court of Session. See *Kerr v. Marquis of Ailsa*, 27 Scot. Jur. 525; 1 Macq. Ap. C. 736; where an affidavit made before a Scotch justice of the peace in London was admitted in Scotland. Here an affidavit of the signature would still be necessary, or a notarial certificate of the same by a Scotch notary (see *Cole v. Sherrard*, 11 Ex. 482), unless sworn before a Scotch or Irish Judge. 8 East, 464.

[4] Affidavits may still be sworn before notaries public in foreign countries (having

(*b*) *Or before British Ambassador, Envoy, Minister, &c. or Consul.*

Or if taken before a British ambassador, envoy, minister, *chargé d'affaires*, or secretary of embassy or of legation, or a British consul.

By the 18 & 19 Vic. c. 42, s. 1, it is enacted, that it shall "be lawful for every British ambassador, envoy, minister, *chargé d'affaires*, or secretary of embassy or of legation, exercising his functions in any foreign country; and for every British vice-consul, acting consul, pro-consul, or consular agent, as well as every consul-general or consul,[1] exercising his functions in any foreign place, whenever he shall be thereto required, and whenever he shall see necessary, to administer in such foreign country or place an oath, or to take an affidavit or affirmation from any person whomsoever, and also to do and perform in every such foreign country and place all and every notarial acts or act which any notary public could or might be required, and is by law empowered to do within the United Kingdom of Great Britain and Ireland; and every such oath, affidavit or affirmation, and every such notarial act administered, sworn, affirmed, had, or done, by or before such ambassador, envoy, minister, *chargé d'affaires*, secretary of embassy or of legation, vice-consul, acting consul, pro-consul, or consular agent, shall be as good, valid, and effectual, and shall be of like force and effect, to all intents and purposes, as if such oath, affidavit or affirmation, or notarial act respectively, had been administered, sworn, affirmed, had, or done before any justice of the peace or notary public in any part of the United Kingdom of Great Britain and Ireland, or before any other legal or competent authority of the like nature." By sect. 2, affidavits and affirmations so taken "shall and may be received, read, and made use of in and before any court of law or equity, or other judicature whatever, in any part of the United Kingdom, &c. in like manner, and shall be of the same force and effect, as affidavits and affirmations taken" in England. By sect. 3, "any document purporting to have affixed, impressed, or subscribed thereon, or thereto, the seal and signature of any British ambassador or envoy, minister, *chargé d'affaires*, secretary of embassy or of legation, consul-general, consul, vice-consul, acting consul, pro-consul, or consular agent, in testimony of any such oath, affidavit, affirmation, or act having been administered, sworn, affirmed, had, or done, by or before him, shall be admitted in evidence, without proof of any such seal and signature being the seal and signature of the person whose seal and signature the same purport to be, or of the official character of such person."

IV. When Affidavit should be Sworn, and of the Re-swearing of Affidavits.

(*a*) *Must be Sworn before Motion.*

It must be sworn before motion.

By Reg. Gen. (Pr.) H. T. 1853, r. 146, it is ordered, that "no rule which the Court has granted on the foundation of any affidavit shall be of any force, unless such affidavit shall have been actually made before such rule was moved for, and produced in Court at the time of making the motion."[2]

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authority there to administer oaths) according to the old practice, which is not altered in this respect by 15 & 16 Vic. c. 86, s. 22. *Haggett v. Juiff*, 5 De G. M. & G. 910. *See* also to the same effect, *Dalmer v. Barnard*, 7 T. R. 251. *Turnbull v. Moreton*, 1 Chit. R. 721. It is, however, necessary for some person in this country to make an affidavit of the signature and authority of such person (*French v. Bellew*, 1 M. & S. 302. *Picardo v. Machado*, 7 D. & R. 478; 4 B. & C. 886. *Cross v. Cheshire*, 7 Ex. 43), or at least to have the certificate of a notary public or British consul to that effect. *Cole v. Sherrard*, 11 Ex. 482. *Ex-parte Worseley*, 2 H. Black. 275. *Re Barber*, 4 Dowl. 640; 2 Bing. N. S. 268. *Ex-parte Hutchinson*, 5 D. & L. 523.

[1] See 6 Geo. 4, c. 87, s. 20, authorising consuls and consuls-general to take affidavits in the Isle of Man. *See* 7 Ex. R. 43.

[2] An affidavit to show cause may be sworn after the rule is due, if no time be fixed by the rule for filing them. *Graham v. Beaumont*, 5 Dowl. 49; 3 Scott, 287. *Braine v. Hunt*, 2 Dowl. 391. But see *contra*, *Baynall v. Shepham*, 1 C. & J. 577. An affidavit sworn on Sunday is of no effect. *Doe d. Williamson v. Roe*, 3 D. & L. 328.

(*b*) *When Affidavit must be Re-sworn.*

QUELLY v. BOUCHER, 3 Dowl. 107; 1 Scott, 283.

Must be re-sworn, if used for other purpose.

On a rule coming on for argument the Court discharged it; another rule was afterwards obtained on a different ground. Counsel proposed to show cause against this rule upon the same affidavits that had been sworn but not used on the first rule.

But the Court refused to receive them, not having been sworn with reference to the purpose for which it was now attempted to use them, but on a former motion, upon which the facts sworn to might have been material, though perhaps not so now, and therefore could not be used, as great additional difficulty would inevitably be interposed in the way of a successful prosecution for perjury, which perhaps might be wholly prevented.[1]

V. WHEN AFFIDAVIT MUST BE FILED.

(*a*) *Affidavit used before Judge out of Court must be filed with the Masters.*

Affidavits used before a judge out of court must be filed with the masters.

By Reg. Gen. (Pr.) H. T. 1853, r. 147, "all affidavits used before a judge out of court shall be filed with the masters of the said courts, and be alphabetically indexed, and such affidavits shall be delivered to the masters of the respective courts, in order to be filed, ten days next after that on which the matter is disposed of."

(*b*) *And if used in Court, must be handed in.*

And affidavits used on motion must be handed in.

All affidavits used on a motion before the Court must be handed into the master, whether or not the rule be granted. *R. v. Peterhouse*, 1 Q. B. 314. *Ex-parte Dicas*, 2 Dowl. 92. *Ex-parte Elderton*, id. 568.

(*c*) *Cannot be filed after Time limited, unless with leave.*

No affidavits filed after time limited can be used, unless with leave.

By Reg. Gen. (Pr.) H. T. 1853, r. 145, "where a special time is limited for filing affidavits, no affidavits filed after that time shall be made use of in court, or before the master, unless by leave of the Court or a Judge."[2]

VI. DEFECTS IN AFFIDAVITS, AND WAIVER OF THEM.

(*a*) *Court will not reject Affidavit for mere Misspelling or Clerical Error.*

HOWARTH v. HUBBERSTY, 3 Dowl. 455.

The Court will not reject an affidavit for a mere misspelling or clerical error.

But where the word "said" was used instead of "saith," the affidavit was held to be insufficient.[3]

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[1] But it is no objection to affidavits that they have been used before a judge at chambers for the same purpose (*Pickford v. Ewington*, 4 Dowl. 453; 1 Tyr. & G. 29); or before the master on taxation, provided they be referred to in the rule and notice given of the intention to read them. *Cliffe v. Prosser*, 2 Dowl. 21. And after a matter has been disposed of at chambers, additional affidavits may be used on a similar motion to the Court. *Pike v. Davis*, 8 Dowl. 387.

[2] An attorney who is bound, and refuses on demand to file affidavits, may be compelled to do so by the Court. *Pilmore v. Hood*, 8 Dowl. 21. *Ex-parte Dicas*, 2 Dowl. 92. When the affidavits are filed, the opposite party may use them for his own purposes. *Price v. Hayman*, 7 Dowl. 47. If an *exhibit* is not filed, the opposite party is nevertheless entitled to a copy of it. *Tebbutt v. Ambler*, 7 Dowl. 674. *Davenport v. Jones*, 8 Dowl. 497; and see *Hawkyard v. Stocks*, 2 D. & L. 936. If filed, it cannot be taken off the file for other purposes. *Price v. Seeley*, 8 Dowl. 653.

[3] An affidavit cannot be altered after it is sworn. *Finnerty v. Smith*, 1 Bing. N. C. 649. *Wright v. Skinner*, 5 Dowl. 92. Where an alteration is made before swearing, it is usual for the commissioner or other person to put his initials opposite the alteration. *Re Worthington*, 5 C. B. 511. *Doe v.* ——, 5 Jur. 531. If a material formal defect is pointed out in the affidavit upon which a rule *nisi* has been obtained, the rule will in general be discharged. *Davies v. Skerlock*, 7 Dowl. 592. *Cooper v. Talbot*, 7 Scott, 345. *Ex-parte Evans*, 2 Dowl. N. S. 410. Some-

(b) By appearing to show Cause, a Party does not waive Defect.

CLOTHIER v. ESS, 2 Dowl. 731.

By appearing to show cause a party does not waive a defect in the title of the affidavit.

Counsel appeared to show cause against a rule on the merits, but took a preliminary objection that the Christian name of one of the parties was omitted in the title. The Court held that he was entitled to pursue that course, and did not waive the irregularity by appearing.[1]

VII. COMPULSORY EXAMINATION OF PERSON REFUSING TO MAKE AFFIDAVIT.

(a) May be compulsorily Examined before a Judge or Master.

In case of refusal of party to make affidavit, he may be compulsorily examined before a judge or master.

By the C. L. P. Act, 17 & 18 Vic. c. 125, s. 48, "any party to any civil action or other civil proceeding in any of the superior courts, requiring the affidavit of a person who refuses to make an affidavit, may apply by summons for an order for such person to appear and be examined upon oath, before a Judge or master to whom it may be most convenient to refer such examination as to the matters concerning which he has refused to make an affidavit; and a Judge may, if he think fit, make such order for the attendance of such person before the person therein appointed to take such examination, for the purpose of being examined as aforesaid, and for the production of any writings or documents to be mentioned in such order, and may thereon impose such terms as to such examination, and the costs of the application and proceedings therein, as he shall think just." And by sect. 49, "such order shall be proceeded upon, in like manner, as an order made under 1 Wm. 4, c. 22, and the examination thereon shall be conducted, and the depositions taken down and returned, as nearly as may be in the mode now used in *viva voce* examinations under the said act of parliament."

VIII. AFFIDAVITS IN ANSWER, WHEN ALLOWED.

(a) With leave of the Court or a Judge upon new matter.

With leave of the Court or a Judge, affidavits upon new matter may be used.

By the C. L. P. Act, 17 & 18 Vic. c. 125, s. 45, it is enacted, that "upon motions founded upon affidavits it shall be lawful for either party, with leave of the Court or a Judge, to make affidavits in answer to the affidavits of the opposite party, upon any new matter arising out of such affidavits, subject to all such rules as shall hereafter be made respecting such affidavits."[2]

AFFIDAVIT to hold to Bail, or of Debt.[3]

(A) *The Affidavit must state not only the Existence of a Debt, but that there is probable Cause for believing that the Defendant is about to quit England*, p. 251.

(B) *And must set forth the Grounds for such Belief*, p. 251.

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times a defect in an affidavit will be allowed to be corrected, or the mistake aided. *Davies v. Skerlock*, 7 Dowl. 592. *Cass v. Cass*, 1 D. & L. 698. It is in general no objection to an affidavit that it is of remote date, for the rule that an affidavit more than a year old is not to be used, applies only in the case of affidavits to hold to bail. *Doe d. Clarke v. Stillwell*, 8 Ad. & E. 645. *Wynne v. Wynne*, 2 Scott, N. R. 615.

[1] *See* to the same effect, *Levy v. Duncombe*, 3 Dowl. 447. *Barham v. Lee*, 2 id. 779; 4 M. & Scott, 327. A defect in the jurat of an affidavit has been held not waived by several months' delay. *R. v. Bloxham*, 2 D. & L. 168. It has, however, been held, that omission of the deponent's additions may be waived. *Seymour v. Maddox*, 1 L., M. & P. 542.

[2] The proper time for the Court to determine whether affidavits in reply should be allowed is when the matters are before the Court. *Maule, J.*, 24 L. J. C. P. 155; 15 C. B. 757. *See* 2 Jur. N. S. 475. But leave is often granted on representation of counsel.

[3] This is required when it is advisable to arrest the defendant (*see* Arrest); it was first made necessary by 12 Geo. 1, c. 29: it must accompany the one pointed out in the text, as essential to satisfy the Judge that an order for arrest ought to be granted. Prior to 1 & 2 Vic. c. 110, parties were liable to arrest without any such order.

(C) *And that he will be Absent such a length of time as to deprive the Plaintiff of the fruits of his Judgment*, p. 252.

(D) *It must be Entitled in the Cause if a Writ of Summons has issued, otherwise not*, p. 252.

(E) *The Christian and Surname of the Defendant must be inserted in full, unless it can be shown that due diligence has been used to obtain knowledge of the proper Name*, p. 253.

(F) *It should either state that the Action has been brought or that it is intended to sue out a Writ, according to the fact*, p. 253.

(G) *The Affidavit must state with precision the Cause of Action*, p. 253.

(H) *It may be made by One or more Persons*, p. 254.

(I) *Form of Affidavit to hold to Bail*, p. 256 n.

(A) *What the Affidavit must state.*

The affidavit to hold to bail must state not only the existence of a debt, but that there is probable cause for believing that the defendant is about to quit England.

1 & 2 Vic. c. 110, s. 3, provides, "that if a plaintiff in any action in any of her Majesty's superior Courts of law at Westminster, in which the defendant is now liable to arrest, whether upon the order of a Judge or without such order, shall, by the affidavit of himself or of some other person, show, to the satisfaction of a Judge of one of the said superior Courts, that such plaintiff has a cause of action against the defendant or defendants, to the amount of 20*l.* or upwards, or has sustained damage to that amount; and that there is probable cause for believing that the defendant, or any one or more of the defendants, is or are about to quit England unless he or they be forthwith apprehended, it shall be lawful for such Judge, by a special order, to direct that such defendant or defendants, so about to quit England, shall be held to bail for such sum as such Judge shall think fit, not exceeding the amount of the debt or damages; and thereupon it shall be lawful for such plaintiff, within the time which shall be expressed in such order, but not afterwards, to sue out one or more writ or writs of *capias* into one or more different counties, as the case may require, against any such defendant so directed to be held to bail, which writ of *capias* shall be in the form contained in the schedule to this act annexed, and shall bear date on the day on which the same shall be issued: Provided always, that the said writ of *capias*, and all writs of execution to be issued out of the superior Courts of law at Westminster into the counties palatine of Lancaster and Durham, shall be directed to the Chancellor of the county palatine of Lancaster, or his deputy there, or to the Chancellor of the county palatine of Durham, or his deputy there."

The authority with which the Courts and Judges at Westminster are invested by this section is expressly extended to the Courts of Lancaster and Durham by the 21st section; but it is therein provided, "that no order or other proceeding under this act, made by any justice or justices of the said Court of Common Pleas of the county palatine of Lancaster, or the Court of Pleas in the county palatine of Durham, shall be valid or effectual, except made in open Court, on one of the court or return days of the same Court, or except such justice or justices shall be also a Judge or Judges of one of the said Courts at Westminster: Provided also, that no order directing any person or persons to be held to bail under this act, nor any order for discharging out of custody any person or persons arrested under this act, shall be made by any justice or justices of the Court of Pleas in the county palatine of Durham, who shall not be a Judge or Judges of one of the said Courts of common law at Westminster."

(B) *And must set forth the Grounds for such Belief.*

And must set forth the

Bateman v. Dunn, 5 Bing. N. S. 49; 7 Dowl. P. C. 105; S. C. 6 Scott, 739. In an action against the acceptor of a bill of exchange, a Judge's order had

grounds for such belief.

been made to arrest the defendant, under 1 Vic. c. 110. On motion to discharge him out of custody, on the ground that the affidavit of debt was insufficient, the deponent only swearing he had been informed by the person who was the drawer of the bill, and he believed the defendant was a barrister practising in the Irish Courts, and that his usual place of abode was in Ireland, and also that the defendant had no permanent place of residence in England, and was about to return, or had actually returned, to his usual place of abode in Ireland,—

Per Cur. By 1 & 2 Vic. c. 110, it is directed, that the order must be granted on an affidavit made by the plaintiff himself, or by some person on his behalf, which must show, "to the satisfaction of the Judge of one of the superior Courts, that such plaintiff has a cause of action against the defendant or defendants, to the amount of 20*l.* or upwards, or has sustained damage to that amount; and that there is a probable cause for believing that the defendant, or any one or more of the defendants, is or are about to quit England, unless he be forthwith apprehended." Now the affidavit should show the belief of the party swearing it, that the defendant is about to quit England unless he be forthwith apprehended, and must also proceed further, and show the probable cause on which that belief is grounded, in order that it may be submitted to the consideration of the Judge. The affidavit is, therefore, insufficient.[1]

(C) *And that he will be Absent such a length of time as to deprive the Plaintiff of the fruits of his Judgment.*

LARCHIN v. WILLAN, 4 Mee. & W. 351; S. C. 7 Dowl. P. C. 11.

And that he will be absent such a length of time as to deprive the plaintiff of the fruits of his judgment.

On an application for an order to detain a defendant under 1 & 2 Vic. c. 110, on an affidavit that defendant was an officer in the army, that his regiment was in Ireland, and the deponent believed that he was about to quit this country, the defendant swore in answer that his regiment was abroad, that he was in England on official business, and had no intention of going abroad, but merely into Ireland, in obedience to orders of his superiors. *Coltman, J.*, and *Tindall, C. J.*, thereupon refused the order; but subsequently *Gurney, B.*, granted it.

On motion to rescind the order,—

Per Cur. We must refuse the rule; and the criterion is, that if the party is only going to leave England for a short time the case does not come within the statute: but if he be going for such purpose, or for such length of time, so that he is not likely to be forthcoming when the plaintiff, by the ordinary course of law proceedings, would be entitled to judgment, and to have his body in execution, he has a right to prevent his departure.[2]

(D) *It must be Entitled in the Cause if a Writ of Summons has issued, otherwise not.*

SCHELLETER v. COHEN, 7 Mee. & W. 389; 9 Dowl. 277.

It must be entitled in the

This was a motion to rescind an order for a *capias* under 1 & 2 Vic. c. 110,

[1] *See* also *Hargraves v. Hayes*, 5 E. & B. 272; 24 L. J. Q. B. 281. Where the deponent derives his information from another person he ought to state his own belief, and give the name and description of his informant. *Graham v. Sandrinelli*, 16 Mee. & W. 191. *Gibbons v. Spalding*, 11 Mee. & W. 174; 2 Dowl. N. S. 811.

[2] The kind of absence necessary to be shown is such as would prevent the plaintiff, if successful, suing out a *ca. sa.*; *e. g.* that the defendant, an officer, is about to join his regiment in India (*Arkenheim v. Colegrave*, 13 Mee. & W. 620); or that the residence of the defendant is in Ireland, and that he is about to go there. *Lamond v. Eiffe*, 3 Q. B. 910; 3 Gale & D. 256. But it will not be sufficient that the defendant, a sea captain, is going on one of his regular voyages to Hamburg (*Atkinson v. Blake*, 1 Dowl. N. S. 849); or where the defendant does not intend leaving England for two months (*Pegler v. Hislop*, 1 Ex. 436); nor where the defendant was going to Scotland, where he had been a few days before adjudicated a bankrupt. *Macgregor v. Fiskin*, 5 D. & L. 591. It need not, however, be stated expressly that the defendant is about to quit England "unless *forthwith* apprehended." *Hargraves v. Hayes, supra.*

on the ground that the affidavit upon which it was obtained, and which had been sworn before writ of summons, was not entitled in the cause. The Court refused a rule, *Parke, B.*, saying that he had constantly made orders of this description in cases where the affidavit was not entitled in the cause, upon this principle, that where no writ of summons has been sued out it is not necessary to entitle the affidavit. If, indeed, a writ of summons had issued before the affidavit was made, the case would be different, for then there would be a cause in Court.[1]

cause if a writ of summons has issued, otherwise it need not.

(E) *The Christian and Surname of the Defendant must be inserted in full, unless it can be shown that due diligence has been used to obtain knowledge of the proper Name.*

By Reg. Gen. (Pr.) H. T. 1853, r. 82, it is ordered, that "in any case where the defendant is described in the writ of *capias* or affidavit to hold to bail by initials or by a wrong name, or without a Christian name, the defendant shall not be discharged out of custody, or the bail-bond delivered up to be cancelled on motion for that purpose, if it shall appear to the Court that due diligence has been used to obtain knowledge of the proper name."[2]

The Christian and surname of the defendant must be inserted in full, unless it can be shown that due diligence has been used to obtain knowledge of the proper name.

(F) *It should either state that the Action has been brought or that it is intended to sue out a Writ, according to the fact.*

Bullock v. Jenkins, 1 L., M. & P. 645.

On an application to rescind an order for holding the defendant to bail, it was, amongst other objections, urged that the affidavit was insufficient, for not stating that the plaintiff had issued a writ of summons; but the Court held that it must be taken that the fact had been proved before the Judge, as, unless it had been proved to his satisfaction, he would not have made the order.[3]

It should either state that the action has been brought or that it is intended to sue out a writ, according to the fact.

(G) *The Affidavit must state with precision the Cause of Action.*[4]

Jones v. Collins, 6 Dowl. 526.

In an action on a bill of exchange by an indorsee against an indorser, the affidavit of debt must state the default of the acceptor; a statement that the amount is "now due and unpaid," will not supply the want of that allegation.

The affidavit must state with precision the cause of action.

[1] It ought also to be entitled in the Court. But it need not be so if sworn before a Judge of the Court in which it is used. *See* Reg. Gen. (Pr.) H. T. 1853, r. 144, *ante*, p. 242. It is mere surplusage, and not objection sufficient to set aside the order, that it is entitled of the cause, though made before the writ has issued. *Hargraves v. Hayes*, 24 L. J. Q. B. 281; 5 E. & B. 272.

[2] As to what is due diligence, see *Hicks v. Marreco*, 1 C. & M. 84; 3 Tyr. 216. *Ladbroke v. Philips*, 1 Har. & W. 109. *Rossett v. Hartley*, id. 581. The name of the defendant should be stated in full, both as to the Christian and surname. *Waters v. Joyce*, 1 D. & R. 150. *Reynolds v. Hankins*, 4 B. & A. 536. *Lake v. Silk*, 3 Bing. 296. His addition, however, is unnecessary. In actions on bills of exchange, promissory notes, and other written instruments, if the Christian names are designated in the instrument by initials, it is enough to insert those initials. 3 & 4 Wm. 4, c. 42, s. 12. *See* n.[3], p. 43.

[3] The affidavit may be sworn before the writ is issued, and in that event it should state that it is intended to issue a writ. *King v. Reginam*, 14 Q. B. 31.

[4] The affidavit must be positive and precise as to the existence of the cause of action, and must not state it inferentially, thus:—"As deponent believes;" or "as appears by the bond or bill;" or "as defendant has admitted," is bad. *Rios v. Belifante*, 2 Str. 1209. *Kelly v. Devereux*, 1 Wils. 339; Say. 59. *Champion v. Gilbert*, 4 Burr. 2126. *Mackenzie v. Mackenzie*, 1 T. R. 716. *Wheeler v. Copeland*, 5 T. R. 364. But less strictness is required when the plaintiff sues as assignee of a bankrupt (*Swayne v. Crammond*, 4 T. R. 176. *Rowney v. Deane*, 1 Price, 402. *Molling v. Buckholtz*, 2 M. & S. 563); or assignee of the obligee on a bond (*Cresswell v. Lovell*, 8 T. R. 418); or executor or administrator of the party to whom the debt was due (*Sheldon v. Baker*, 1 T. R. 87. *Coppice v. Potter*, 10 Bing. 443; 2 Dowl. 785; 4 M. & Scott, 272); in which case he may swear his "belief as appears by the

(H) *It may be made by One or more Persons.*

LANGSTON v. WETHERELL, 14 Mee. & W. 104.

It may be made by one or more per-

On an application made to a Judge at chambers for an order to hold the defendant to bail under 1 & 2 Vic. c. 110, the Judge thought the affidavit

books" of the bankrupt or the deceased. *Lowe v. Farley*, 1 Chit. R. 92. An affidavit of debt by a surviving partner must show that the other partner is dead. *Edgar v. Watt*, 1 Har. & W. 108. See *Morrell v. Parker*, 6 Dowl. 123. Where the plaintiff sues as assignee of a debt assigned according to a foreign law, he must state that by such law an assignee can sue, as the plaintiff is informed and believes. *Scuerhop v. Schammell*, 4 D. & R. 180. *Tenons v. Mars*, 8 B. & C. 638. *De la Vega v. Vianna*, 1 B. & Adol. 284. The affidavit must also, if the action is for interest, state there was a contract to pay such interest (*Neale v. Snoulten*, 3 D. & L. 422; 2 C. B. 320. *Cullum v. Leeson*, 2 Dowl. 381. *Drake v. Harding*, 4 Dowl. 34; 1 Har. & W. 364); but it need not state the amount of the principal debt, or when interest began to run. *White v. Sowerby*, 3 Dowl. 584; 1 Har. & W. 364. It is not enough to say the defendant is indebted in trover (*Hubbard v. Pachico*, 1 H. Black. 218); but it should state that plaintiff was possessed (*Woolley v. Thomas*, 7 T. R. 550) of the goods, their value, and a conversion, express or implied. *Molling v. Buckholtz*, 2 M. & S. 563. *Anon.* 1 Chit. R. 168. See *Charter v. Jaques*, Cowp. 529. *Emerson v. Hawkins*, 1 Wils. 335. *Imlay v. Ellessen*, 2 East, 453. Nor is it sufficient to say that defendant is indebted upon promises (*Cope v. Cooke*, 2 Dougl. 467); or in the amount "as a balance of accounts." *Polleri v. De Souga*, 4 Taunt. 154. *Jones v. Collins*, 6 Dowl. 526. If there were mutual accounts, the affidavit should be for the balance only. *Dronefield v. Archer*, 5 B. & A. 513; 1 D. & R. 67. *Austin v. Debnam*, 3 B. & C. 139; 4 D. & R. 653), unless the defendant has refused to furnish an account of his set-off. *Germain v. Burrows*, 5 Taunt. 259. *Sims v. Jaquet*, 10 Bing. 510. If the cause of action is on a guarantee, it should state the guarantee, and that the time for payment has elapsed. *Angus v. Robilliard*, 2 Dowl. 90. If there is a condition precedent to the money becoming due, it ought to be set forth. *Elworthy v. Maunder*, 5 Bing. 295. Where the damages are unliquidated, it is enough if the judge, from the nature of the case, can conclude that damage to the amount of 20*l.* has been sustained. *Bullock v. Jenkins*, 1 L., M. & P. 645. Where the damages are liquidated, it is not enough to state they are so (*Chambers v. Ward*, 1 Dowl. 139); but it must state the agreement and breach. *Wildey v. Thornton*, 2 East, 409. *Stinton v. Hughes*, 6 T. R. 13. In cases of action on bond for payment of money, or to perform a covenant, the amount stated should be the sum and interest actually due, or the real damages, and not the penalty. *Talbot v. Hodson*, 7 Taunt. 251. *Anderson v. Bell*, 2 C. & J. 630. *Edwards v. Williams*, 5 Taunt. 247; 1 Sid. 63. But where the bond is to secure a contract, and the penalty is in the nature of liquidated damages, the penalty may be sworn as the amount due. *Kirk v. Strickland*, Dougl. 449. *See* Causes of Action on Deed (*Barnard v. Neville*, 3 Bing. 126; 10 Moore, 475. *Masters v. Billing*, 3 Dowl. 751); on Bond (*Byland v. King*, 7 Taunt. 275; 1 Moore, 24. *Bosanquet v. Fillis*, 4 M. & S. 330. *Chambers v. Ward*, 1 Dowl. 139. *Smith v. Kendall*, 7 D. & R. 232); on an Award (*Anon.* 1 Dowl. 5. *Driver v. Hood*, 7 B. & C. 494. *Jenkins v. Lawe*, 1 B. & P. 365. *Masel v. Angell*, 6 D. & R. 15); on an Indenture (*Jones v. Collins*, 6 Dowl. 526).

Where the promise or contract was not under seal, the consideration must be stated. *Walker v. Gregory*, 1 Dowl. 24. *Macpherson v. Lovie*, 1 B. & C. 108; 2 D. & R. 69. So if a condition precedent to the right of action existed, the performance of it ought to be alleged. *Elworthy v. Maunder*, 5 Bing. 295. *Young v. Dowlman*, 2 Y. & J. 31. *Taylor v. Higgins*, 3 East, 169. Where the action is on a bill of exchange or promissory note, the affidavit should show expressly that the money is due and unpaid, or circumstance from which that fact may be directly presumed. *Kirk v. Almond*, 1 Dowl. 318; 2 C. & J. 354. *Halcomb v. Lambkins*, 2 M. & S. 475. *Jackson v. Yate*, id. 148. *Edwards v. Dick*, 3 B. & A. 495. *Walmsley v. Dibdin*, 4 M. & P. 10. If the bill is payable by instalments, it should show what instalments are unpaid. *Hart v. M'Genis*, 3 Tyr. 238. If not payable with interest, the affidavit should show that the arrest is made for the principal sum only. *Brook v. Colman*, 2 Dowl. 7; 1 Car. & M. 621. *Westmacott v. Cook*, 2 Dowl. 519. *Latreile v. Hoepner*, 10 Bing. 334; 2 Dowl. 758. The affidavit should also state the character in which the plaintiff sues, and how the defendant is indebted, as, if he sues as indorsee, he ought to say so, though, perhaps, it need not mention the name of the indorser. *Mammon v. Mathew*, 4 M. & Scott, 356; 1 Bing. 506. *Bradshaw v. Saddington*, 7 East, 94. But see *Lewis v. Gompertz*, 2 C. & J. 352; 1 Dowl. 319. The intermediate indorsements need not be stated. *Luce v. Irwin*, 6 Dowl. 92; Tidd, N. P. 122. Where the defendant is drawer or indorser, the presentment to and default of the acceptor, or something equivalent, must be stated; but it need not state the giving of notice of dishonour. *Simpson v. Dick*, 4 Dowl. 731. *Jones v. Collins*, 6 Dowl. 526. *Hopkins v. Salembier*, 5 Mee. & W. 426;

insufficient, and adjourned the hearing to a future day, when, upon production by the plaintiff of an additional affidavit, which had shortly before been used by a different plaintiff upon a similar application against the defendant, and which was entitled in a different court and in a different cause, the learned Judge made the order. The Court refused a rule to rescind the order, being of opinion that the affidavit was properly received.[1]

sons, and used, although entitled in another court and in a former suit.

7 Dowl. 493. It is not enough to say that several persons are jointly indebted on a bill accepted by them, or one of them. *Harmer v. Ashby*, 10 Moore, 323. Where the cause of action is on the common counts, particular attention should be given so as not to omit the words "by or from the plaintiff," "to or for the use of the defendant, at the request of the defendant," as the case may be; for many affidavits have been held insufficient for either omitting some of these words or stating loosely the privity of the parties. *See* where those material words, or some of them, were omitted: *Perks v. Severn*, 7 East, 194. *Taylor v. Forbes*, 11 East, 315. *Young v. Gatien*, 2 M. & S. 603. *Cathron v. Haggar*, 8 East, 106. *Fenton v. Ellis*, 6 Taunt. 192. *See* also *Bell v. Thrupp*, 2 B. & A. 596. *Fricke v. Poole*, 9 B. & C. 543; 4 M. & R. 448. *Visger v. Delegal*, 2 B. & Adol. 571. *Stratton v. Matthews*, 3 Ex. 480; 1 Dowl. 333. *Kelly v. Curzon*, 4 Ad. & E. 622. *Smith v. Heap*, 5 Dowl. 11. *Wade v. Wade*, 4 Bing. 50. *Morgan v. Baylis*, 3 Dowl. 117. Thus, an affidavit which states that a party is indebted for goods bargained and sold, without stating that they are delivered, is not sufficient. *Pontifex v. De Mattyoff*, 1 Ex. 436. The true rule on the subject, however, is, that if what is stated is enough to raise the presumption that a debt existed, and there is nothing to show any circumstances disentitling the plaintiff to the order for an arrest, that order will not be set aside. *Hargraves v. Hayes*, 24 L. J. Q. B. 281; 5 E. & B. 272. The affidavit has, accordingly, been held sufficient where it has stated the cause of action, thus: "For materials found, goods sold and delivered, and work done by the plaintiff to and for the use of the defendant;" the objection being that the latter words were applied only to work done, and not to the goods sold, &c. (*Lucas v. Godwin*, 4 Scott, 502; 3 Hodg. 32); "for money had and received on account of plaintiff," without the words "by the defendant" (*Coppinger v. Beaton*, 8 T. R. 338), "for 20*l.* lent on a bill of exchange for 37*l.* drawn by A. and accepted by defendant, and now overdue and unpaid," without stating to whom lent (*Bennet v. Dawson*, 1 Moo. & P. 594; 4 Bing. 609); "for use, &c. of a house, &c. of the plaintiff, held by the defendant as tenant thereof," without saying as tenant to the plaintiff, or held at his request (*Lee v. Selwood*, 9 Price, 332); "for hire of carriages of plaintiff, hired to and for the use of the defendant," without stating of or by whom hired (*Brown v. Garnier*, 6 Taunt. 389; 2 Marsh. 83); "for work done by plaintiff in and about the printing of a book of defendant's, and at his request" (*Gale v. Leekie*, 6 M. & S. 228); "for money expended and wages due to plaintiff for services on board defendant's ship," without stating "due from the defendant." *Symonds v. Andrews*, 1 Marsh. 317.

In an action on a penal statute, the affidavit should state concisely the offence, and that the forfeiture has been incurred, and describe the statute correctly. *Davies v. Mazzinghi*, 1 T. R. 705. *Watson v. Shaw*, 2 T. R. 654.

Where several causes of action are included in the action, and one entire sum is claimed, the affidavit is good, without distinguishing the several sums applicable to each cause. *Hague v. Levi*, 9 Bing. 595; 1 Dowl. 720. It is, however, desirable to state these separately, for if the affidavit be bad as to one, it may stand good as to other of the causes of action. *Jones v. Collins*, 6 Dowl. 526. *Cunliffe v. Maltass*, 7 C. B. 695; 6 D. & L. 723. *Bank of England v. Reid*, 7 Mee. & W. 159. If the declaration varies materially from the affidavit, the bail will be discharged; thus, as to the character in which the plaintiff sues or defendant is sued, *Marzetti v. Jouffroy*, 1 Dowl. 44. *Isley v. Isley*, id. 310; 2 C. & J. 330. See *Manesty v. Stevens*, 9 Bing. 100; or as to the number of plaintiffs or defendants, *Spalding v. Mare*, 6 T. R. 363; or as to the name of the plaintiff, *Grindall v. Smith*, 1 M. & P. 24. The affidavit must also agree as to the nature of the action with the *capias*. *Green v. Elgie*, 3 B. & Adol. 437; 1 Dowl. 344. *Richards v. Stuart*, 10 Bing. 319; 2 Dowl. 537. *Rogers v. Jones*, 9 D. & R. 878. If sworn abroad, it must have the same requisites as when sworn in this country. *Nesbitt v. Pym*, 7 T. R. 376 n. It may be sworn before the issuing of the writ of summons. *King v. Reginam*, 14 Q. B. 31. The affidavit is stale after it is a year old, and a judge will not act upon it, for the debt may have since been satisfied. *Ramsden v. Maugham*, 2 C., M. & R. 634; 4 Dowl. 403. *Collier v. Hague*, 2 Str. 1270. If the affidavit is informal, the party arrested under a *capias* thereupon may bring an action for false imprisonment. But the defendant in such action may justify under the writ, if not set aside. *Riddell v. Pakeman*, 2 C., M. & R. 30; 3 Dowl. 714.

[1] Any person cognizant of the facts may make the affidavit, and he need not state any connexion between the plaintiff and himself. *Holliday v. Lawes*, 3 Bing. N. C. 541. *Short v. Campbell*, 3 Dowl. 487; 1 Gale, 60. *King v. Turner*, 1 Chit. R. 58.

The affidavit may be sworn before any of the Judges, or before a Court duly appointed.

AFFIDAVITS sworn before Justices.

Justices are not to administer oaths, &c., touching matters whereof they have no jurisdiction by statute.

By 5 & 6 Wm. 4, c. 62, s. 13, after reciting that a practice had prevailed of administering and receiving oaths and affidavits voluntarily taken and made in matters not the subject of any judicial inquiry, nor in anywise pending or at issue before the justice of the peace, or other person by whom such oaths or affidavits have been administered or received: "And whereas doubts have arisen, whether or not such proceeding is illegal, for the more effectual suppression of such practice, and removing such doubts, be it enacted, that, from and after the commencement of this act, it shall not be lawful for any justice of the peace, or other person, to administer, or cause or allow to be administered, or to receive, or cause or allow to be received, any oath, affidavit, or solemn affirmation touching any matter or thing whereof such justice or other person hath not jurisdiction or cognizance by some statute in force at the time being: Provided always, that nothing herein contained shall be construed to extend to any oath, affidavit, or solemn affirmation before any justice in any matter or thing touching the preservation of the peace, or the prosecution, trial, or punishment of offences, or touching any proceedings before either of the Houses of Parliament, or any committee thereof, respectively, nor to any oath, affidavit, or affirmation which may be required by the laws of any foreign country to give validity to instruments in writing, designed to be used in such foreign countries respectively."

But the 18th section provides, "that it may be necessary and proper, in many cases not therein specified, to require confirmation of written instruments, or allegations or proof of debts, or of the execution of deeds or other matters," and enacts, "that it shall and may be lawful for any justice of the peace, notary public, or other officer now by law authorised to administer an oath, to take and receive the declarations of any person voluntarily making the same before him in the form in this act mentioned; and if any declaration so made be false in any material particular, the person wilfully making the same shall be deemed guilty of a misdemeanour."

AFFILIATION.[1]

I. Summons against Putative Father, p. 257.

(A) *May be obtained by the Mother of a Bastard Child*, p. 257.

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(*a*) *Form of Application*, p. 258 n.

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(1) *Form of Affidavit to hold to Bail.*

In the Q. B. [C. P., or Ex. of Pleas].
Between A. B. plaintiff,
and
C. D. defendant.

I, E. F., of clerk to A. B. of in the county of merchant, make oath and say:

That C. D., the above-named defendant, is justly and truly indebted unto A. B., the above-named plaintiff, in £ for [*here state the cause of action for which the arrest is to be made*].

(2.) [*Here state the facts which show that the defendant is about to quit England.*]

(3.) For the reasons aforesaid, I verily believe that the said C. D. is about to quit England, unless he be forthwith apprehended. And I further say, that the said A. B. hath caused a writ of summons to be sued out of this honourable Court at the suit of the said A. B. against the said C. D.

Sworn, &c. E. F.

[1] The adjudication of a child to a parent by legal authority—the adjudging the paternity of a bastard, and obligation to maintain him.

II. The Order, p. 259.

(A) *If Mother corroborated, Justices may make Order*, p. 259.

(*a*) *What Order is valid*, p. 260.

(*b*) *Form of Order*, p. 261 n.

(B) *Either Party may summon Witnesses*, p. 262.

III. Appeal, p. 262.

(A) *Lies against Order on the giving of Notice and Security for Costs*, p. 262.

(B) *Mother must be corroborated*, p. 263.

IV. Enforcing the Order, p. 263.

(A) *Not after Child attains age of Thirteen Years, or Mother is married, or Child dies, except for Arrears*, p. 263.

(B) *Arrears may be recovered by Distress, and in default Putative Father may be committed to Gaol*, p. 263.

(C) *May be enforced by Mother, unless Child placed in care of other Person under Order of Justices*, p. 264.

(D) *Or in case of Death or Incapacity of Mother, or where she becomes chargeable to Parish*, p. 264.

(E) *Arrears exceeding Thirteen Weeks cannot be recovered*, p. 265.

I. Summons against Putative Father.[1]

(A) *May be obtained by the Mother of a Bastard Child.*

The mother of a bastard child may obtain a summons against the putative father, provided, if the application is made after twelve months from the birth of the child, proof is given

By the 7 & 8 Vic. c. 101, s. 2, it is enacted, "that any single woman who may be with child, or who may be delivered of a bastard child, after the passing of this act, or who has been delivered of a bastard child within the period of six months before the passing of this act, may, either before the birth or at any time within twelve months after the birth of such child,[2] or at any time thereafter, upon proof[3] that the man alleged to be the father of such child has within the twelve months next after the birth of such child paid money for its maintenance, make application to any one justice of the peace acting for the petty sessional division[4] of the county, or for the city, borough, or place in which she may reside, for a summons to be served on the man alleged by her to be the father of such child;[5] and if such application be made before the birth of

[1] At common law there was no obligation on the father of a bastard child to pay for its support. See *Furillio v. Crowther*, 4 D. & R. M. C. 1; 7 D. & R. 612. The statutes do not apply to children born out of the country. *R. v. Blane*, 18 L. J. M. C. 216; 13 Jur. 254. Story's *Conflict of Law*, ss. 18, 19.

[2] The application must be made within the time limited; but it is not necessary that the summons should be issued immediately. If there is a difficulty in serving it, from the defendant's residence being unknown, it may not be issued until a subsequent time; and even although such time be after the expiration of the twelve months from the birth, an order founded upon it will be good. *Potts v. Cumbridge*, 27 L. J. M. C. 62.

[3] It is not necessary, upon the making of the *application*, that there should be any corroboration of the testimony of the mother. *Hodges v. Bennet*, 8 W. R. 463.

[4] The petty sessional division includes any division of a county, riding, or division, having a separate commission of the peace, in which petty sessions are usually held, or any division for the holding of special sessions. Where the justice acts for two divisions, he may summon the party to either. 8 & 9 Vic. c. 10, s. 10. See *Reg. v. Whittles*, 18 L. J. M. C. 96; 13 Jur. 403. Arch. J. P. 383.

[5] Where the magistrate granted a summons more than twelve months after the birth, without proof of any payment by the putative father within the twelve months,

of the alleged father having paid money for its maintenance within such twelve months.

the child, the woman shall make a deposition upon oath, stating who is the father of such child, and such justice of the peace shall thereupon issue his summons to the person alleged to be the father of such child, to appear at a petty session to be holden after the expiration of six days at least for the petty sessional division, city, borough, or other place in which such justice usually acts."

(B) *Notwithstanding she is a Married Woman.*

Reg. v. Collingwood, 12 Q. B. 681; 17 L. J. M. C. 168.

The order may be obtained by a married woman the mother of a bastard.

Per Cur. "The single question is, whether a married woman becoming the mother of an illegitimate child is within the act 7 & 8 Vic. c. 101, which authorises the justices to make an order of bastardy. The language of the statute applies in terms only to single women, so did the language of stat. 6 Geo. 2, c. 31; yet Lord Ellenborough and the whole Court, in *R. v. Luffe*, 8 East, 193, held that an order might be made on the putative father of the bastard child of a married woman, who was to be considered single under the existing circumstances, and for that purpose. The act last named is repealed indeed by that now in force; but the authority and reason of the decision remain unimpaired, and the law differently interpreted would fail to reach a very large proportion of illegitimate children."[1]

(*b*) *If Application before Birth, Putative Father must be summoned on a day after the expected time of Birth.*

Where the application is made before the birth of the child the

By the 8 & 9 Vic. c. 10, s. 4, after reciting that doubts were entertained as to the time for applying for an order in the case where the application is made before the birth of the child, it is enacted, that "the said justice to whom any application shall be made by any such woman being pregnant, shall summon

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the defendant was held to have waived the objection by appearing and making no objection on that ground before the magistrates, as proof of the fact, upon application for the summons, was material only as matter affecting the process. *R. v. Berry*, 28 L. J. M. C. 86. *R. v. Simmons*, id. 183.

[1] The Court held the order good, though it described the woman as "wife of G. R., single woman." It did not find the non-access of the husband, and it appointed the payments to be made till the child should attain the age of thirteen, or die, or the said G. R. should again live and cohabit with his said wife, the said M., or the said W. should marry again after the decease of her said husband.

(*a*) The following is the

Form of Application by a Woman with Child.

—— } Application and deposition of
to wit. } a single woman, residing at
in the county [*or city, borough, or other place*] of taken upon oath before me, the undersigned one of her Majesty's justices of the peace acting for the petty sessional division [*or city, borough, or other place*] of in the said county of in which she resides, this day of in the year of Our Lord one thousand eight hundred and sixty who upon her oath saith that she is now with child, and that of in the county of is the father of the child with which she is now pregnant, and maketh application for a summons to be served upon the said so alleged by her to be the father of the said child, to appear at a petty session to be holden after the birth of such child for the petty sessional division [*or, ut supra*] of in which I usually act, to answer such complaint as she shall then and there make touching the premises.

Exhibited and sworn before me }
the day and year first written. }

Where the application is made after birth, the form is the same as above, from the beginning down to the words, "who upon her oath," instead of which proceed thus:—

Who saith that she hath been delivered of a bastard child since the passing of the act of the eighth year of the reign of her present Majesty, intituled "An Act for the further Amendment of the Laws relating to the Poor in England," and within twelve calendar months before this day, to wit, on the day of in the year of Our Lord one thousand eight hundred and sixty and alleges that one of in the county of is the father of such child, and maketh application to me for a summons to be served upon the said to appear at a petty session to be holden for the petty sessional division [*or city, borough, or other place, as the case may be*] of in which I usually act, to answer such complaint as she shall then and there make touching the premises.

the man to appear at some petty session, at which he usually acts, to be held on a day after the time when the said mother shall expect the child to be born: Provided that if on such day the woman shall not have been delivered, or the justices shall be satisfied that she has been delivered at so short a period before such day that she cannot appear at the said session, it shall be lawful for the justices thereat to adjourn the hearing of the said case until some other day, and so from time to time, until the child shall have been born, and the woman shall be able to attend at the said session; and it shall be lawful for the justices at their petty session to make an order in respect of any such application so made by such woman so pregnant to a justice as aforesaid, if she apply at such petty session within the space of two calendar months from the birth of the child, although more than forty days shall have elapsed from the time when the summons was served upon the alleged father, or was left at his last place of abode." [1]

putative father shall be summoned on a day after the time the child is expected to be born; and the application at the petty sessions for the order may be made within two months after the birth.

(*c*) *After Birth, the Order must be applied for within Forty Days after Service of Summons.*

By 7 & 8 Vic. c. 101, s. 4, it is enacted, that "the justices in petty sessions as aforesaid may adjourn the hearing of the cause as often as to them may seem fit; but no such order shall be made unless applied for at such petty sessions within the space of forty days from the service of the summons after the birth of the bastard child."

The order must be applied for within forty days from service of the summons after the birth of the child.

(*d*) *If Summons refused, Mother may make Second Application within Time specified.*

Reg. v. Machen, 18 L. J. M. C. 213; 13 Jur. 765.[2]

On a rule for a *mandamus* to justices to hear an application for an affiliation, the justices justified their refusal by showing that a summons had previously issued, that the matter was heard, and an order refused, on the ground that the mother was not corroborated.

Per Cur. No appeal is given to the mother, though it is to the party charged; and, therefore, if we were to hold that no second application could be made, the parties would be placed on unequal terms. We cannot see that the justices should have any power to adjudicate finally against the mother. Their dismissal of the application is rather in the nature of a nonsuit in an action, in which case the plaintiff may come again better prepared. *See* Tapping, M. 47.

The mother may make a second application after refusal of the order by the petty sessions, provided such application be made within the time limited by the statute.

II. The Order.

(A) *If Mother corroborated, Justices may make Order.*

By 7 & 8 Vic. c. 101, s. 3, it is enacted, that "after the birth of such bastard

On the hearing of the

[1] By the 11th sect. of the 7 & 8 Vic. c. 101, clerks to justices are required, on the first of January in every year, to transmit to the clerk of the peace a list of summonses issued, applications heard, and orders made under the act since the 1st of January of the preceding year; and the clerk of the peace is required to transmit a copy of the same, together with a list of appeals, and the result of each, to the principal Secretary of State for the Home Department.

Parish officers are prohibited from interfering in any way with the obtaining of the order under a penalty of 40*s.* (7 & 8 Vic. c. 101, s. 7.) And if any parish officer endeavour to induce any person to contract a marriage by threat or promise concerning any application for an affiliation order, he is guilty of a misdemeanour. Sect. 8.

[2] *S. P. Reg. v. Brisby*, 18 L. J. M. C. 157; 2 C. & Kir. 962. The woman, if she remove into another division, may apply to the justices of that division. *Reg. v. Justices of Buckinghamshire*, 18 L. J. M. C. 113; 13 Jur. 1053. If an order be made, which is bad on the face of it, and therefore void, it may be treated as a nullity, and a second order applied for, without the necessity of having the first quashed or appealed against. *Reg. v. Brisby, supra.*

summons, if the justices are satisfied by the evidence of the mother, corroborated in some material particular, that the defendant is the putative father, they may adjudge him to be so; and make an order on him for the payment of a weekly sum for its maintenance, and the costs of obtaining the order.

child, on the appearance of the person so summoned,[1] or on proof that the summons was duly served on such person, or left at his last place of abode,[2] six days at least before the petty session, the justices [3] in such petty session shall hear the evidence of such woman, and such other evidence as she may produce, and shall also hear any evidence tendered by or on behalf of the person alleged to be the father, and if the evidence of the mother be corroborated in some material particular [4] by other testimony, to the satisfaction of the said justices, they may adjudge the man to be the putative father of such bastard child; and they may also, if they see fit, having regard to all the circumstances of the case, proceed to make an order on the putative father for the payment to the mother of the bastard child, or to any person who may be appointed to have the custody of such child, under the provisions of this act, of a sum of money weekly, and of such costs as may have been incurred in the obtaining such order, including, if they think proper, ten shillings for the midwife, and ten shillings towards the funeral expenses of the child, provided it have died before the making of such order; and if the application be made before the birth of the child, or within two calendar months after the birth of the child, such weekly sum may, if the justices think fit, be calculated from the birth of the child, at a rate not exceeding five shillings per week for the first six weeks after the birth of such child; and in other cases, such sum shall not exceed two shillings and sixpence per week from the time of the making of the application."

FOLLET v. ROETZOW, 29 L. J. M. C. 128; 24 Jur. 651.

The justices have jurisdiction to make an affiliation order, notwithstanding an agreement to make an allowance, or the mother may, in consideration of a sum paid down, have released the father.

The father of a bastard child entered into a contract with the mother to make her a certain allowance for its maintenance; afterwards the mother, in consideration of a payment of 10*l.*, released the father from all further payments. The release was set up in answer to an application for an affiliation order. The justice stated a case for the opinion of the Court, to obtain their opinion whether his jurisdiction was taken away by the release.

Per Cur. The object of the statute is to provide for the maintenance of the child, and that might be defeated if the mother were to be allowed to release the father. Although an agreement to make an allowance is binding on the father, it is not a bar to the application by the mother for the order, but the existence of such an agreement ought to be taken into consideration by the magistrates in entertaining the application.

(*a*) *What Order is valid.*[5]

[1] Either party may appear at the petty sessions by counsel or attorney. 8 & 9 Vic. c. 10, s. 7.

[2] The justices, upon evidence of the summons having been left at what was believed to be the residence, will have *primâ facie* jurisdiction to make the order; but the party against whom the order was made may show by affidavit that the summons never was duly served, and obtain a *certiorari* to quash it, as being made without jurisdiction. *R. v. Evans*, 19 L. J. M. C. 151.

[3] In the metropolitan police district, the police magistrates may do alone all that the justices in petty sessions are empowered to do with reference to affiliation orders. 8 & 9 Vic. c. 10, s. 9.

[4] It is necessary at the hearing, in case the summons was taken out twelve months after the birth of the child, to give evidence of payments within that period by the defendant in respect of the child: evidence of this by a person other than the mother is a corroboration of her testimony within the meaning of the act. *R. v. Berry*, 28 L. J. M. C. 86. The parties may appear by attorney or counsel. 7 & 8 Vic. c. 101, s. 17.

[5] Upon objection to the form of orders, the following points have been decided. It is not necessary that the order should state that the evidence was given on oath. *Reg. v. Shipperbottom*, 10 Q. B. 514; 16 L. J. M. C. 113; 11 Jur. 526. It ought, however, to state that the evidence was given in the presence and hearing of the defendant or his attorney, as the case may be, where the defendant appears, or it should show some special reason for omitting that statement. *Reg. v. Grafton*, 17 L. J. M. C. 126. But where the order stated that the putative father, having been served, &c. "and now appearing;" and, afterwards, that the justices having, "in the presence and hearing of the said attorney attending on behalf of the" putative father, heard the evidence, &c.; it was held sufficient, because it was con-

Reg. v. Milner, 13 L. J. M. C. 157.

An order reciting the application for the summons to have been made to a justice "usually acting *in* this division" is valid.

On application for a *certiorari* for the return of an affiliation order, in order to its being quashed, the objection was, that in the recital of the issue of the summons it stated the application to have been made to a justice "usually acting *in* this division."

Per Coleridge, J. "I think the spirit and object of the recent statute, 8 Vic. c. 10, was to cure such technical defects as the present. I do not intend to say that the words 'in' and 'for,' are generally synonymous; but, referring to the forms given in the schedule to that statute, it appears to me that these two words are, for the purposes of this act, used as synonymous, and therefore the objection fails."

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sistent with the statement that the defendant appeared at first in person, and afterwards went away, leaving his attorney to attend for him. *Reg. v. Shipperbottom, supra. See* also, as to sufficiency of order, *Ex-parte Boynton*, 1 L., M. & P. 12.

An order may be bad as to antecedent sums, and good as to subsequent payments. Thus, where it appeared on the face of the order that more than two months had elapsed between the birth of the child and the application for the order, it was bad so far as regarded payments prior to the date of the application, it was good as to payments accruing subsequently to that date. *Reg. v. Green*, 20 L. J. M. C. 168.

(*b*) *Form of Order when Application was made by a Woman after Birth.*

—— } At a petty session of her Majesty's
to wit. } justices of the peace for the county [*or city, borough, or other place, as the case may be*] of holden in and for the division [*or, ut supra*] of in the said county [*or, ut supra*] at on the day of in the year of Our Lord one thousand eight hundred and sixty before us her Majesty's justices of the peace for the said county [*or, ut supra*].

Whereas one single woman residing at within this division [*or city, &c.*] did on the day of in the year of Our Lord one thousand eight hundred and sixty having been delivered of a bastard child within twelve calendar months prior thereto, make application to one of her Majesty's Justices of the Peace, acting for this division [*or city, &c.*], for a summons to be served upon one of whom she alleged to be the father of the said child [*when the application is made after the expiration of twelve months from the birth, but the alleged father has paid money for the maintenance of the child, for the word* "within," *substitute the words* "more than," *and after the word* "child" *insert*, "and who was proved before the said justices to have paid money for the maintenance of the said child within twelve calendar months after its birth"]; and the said justice thereupon issued his summons to the said to appear at a petty session to be holden on this day for this division [*or city, &c.*], in which the said justice usually acts, to answer her complaint touching the premises.

And whereas the said having been duly served with the said summons within forty days from this day [*if the order be made at an adjourned sessions, insert the day of the commencement of the session, adding these words*, "from which day the hearing of this case hath been adjourned," *and erase the words*, "this day." *If the defendant do not appear, insert here*, "and six days at least before this day, as is now proved before us," *or*, "the same having been left at his last place of abode six days at least before this day, as is now proved before us," *and erase the words which follow in italics*], and now appearing in pursuance thereof, and the said having now applied to us, the justices in petty sessions assembled, for an order on the said according to the form of the statute in such case made and provided; and it being now proved to us *in the presence and hearing of the said* [*if the defendant should not appear, omit the words in italics*], that the said child was, since the passing of an act passed in the eighth year of the reign of her present Majesty, intituled, "An Act for the further Amendment of the Laws relating to the Poor in England," that is to say, on the day of in the year of Our Lord one thousand eight hundred and sixty born a bastard of the body of the said and we having, *in the presence and hearing of the said* [*if the defendant should not appear, omit the words in italics*], heard the evidence of such woman and such other evidence as she hath produced; *and having also heard all the evidence tendered by* [*should the defendant appear by attorney or counsel, it will be then only necessary to erase the word* "by," *and add* "on behalf of;" *but should he not appear himself, or by attorney or counsel, then erase the words in italics*], *the said* and the evidence of the said the mother of the said child, having been corroborated in some material particular by other testimony to our satisfaction, do hereby adjudge the said to be the putative father of the said bastard child; and, having regard to all the circumstances of this case, we do now hereby order that the said do pay unto the said the mother of the said bastard child, so long as she shall live and be of sound mind, and shall not be in any gaol or prison or under sentence of transportation,

(B) *Either Party may summon Witnesses.*

And either party may procure witnesses to be summoned.

It is enacted by the 7 & 8 Vic. c. 101, s. 8, "in any proceedings to be had before justices in petty or special sessions, or out of sessions, under the provisions of this act, or of any of the acts required to be construed as one act herewith, if any party to such proceedings request that any person be required to appear as a witness in such proceedings, it shall be lawful for any justice to summon such person to appear and give evidence upon the matter of such proceedings."[1]

III. Appeal.

(A) *Lies against Order on the giving of Notice and Security for Costs.*

An appeal lies to the quarter sessions against the order, upon

By the 7 & 8 Vic. c. 101, s. 4, it is enacted, that "if within twenty-four hours after the adjudication and making of any order on the putative father as aforesaid, such putative father give notice of appeal[2] to the mother of the bastard child, and also within seven days give sufficient security, by recognizance[3] or

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or to the person who may be appointed to have the custody of such bastard child under the provisions of the said statute, the sum of [*not to exceed five shillings. This larger amount for the six weeks cannot be allowed unless the application has been made within two calendar months after the birth. If the application has not been made within this time, or the justices do not think it right to allow that or any less sum from the birth, erase the words in italics, and proceed thus :* " per week from the said day of last, being the day upon which such application was made to the said justices as aforesaid"] *per week for the first six weeks from the birth of the said child, and from the expiration of such six weeks the sum of* per week, until the said child shall attain the age of thirteen years, or shall die, or the said shall marry. And we do hereby further order the said to pay to the said the sum of being the costs incurred in obtaining this order. [*If the justices should decide upon allowing such expenses, insert here* " and the sum of ten shillings for the midwife."]

Given under our hands and seals at the session aforesaid.

For Forms of Summonses, Recognizances, Informations, Warrants, &c., under the Statutes, *see* the Schedule to 8 & 9 Vic. c. 10.

In case of neglect of a person summoned to appear, the justice may issue a warrant requiring him to be brought before him, upon being satisfied of personal service of the summons and tender of expenses. The justices have also power to commit witnesses refusing to give evidence. 7 & 8 Vic. c. 101, s. 70.

[2] Notice of appeal is good if given within twenty-four hours after a verbal adjudication of the justices, although at the time it was given the written formal order was not signed. *Reg. v. Justices of Huntingdonshire*, 19 L. J. M. C. 127. It has also been decided that, if given within twenty-four hours of the actual signature of the order, it will be in time. *Reg. v. Justices of Flintshire*, 15 L. J. M. C. 50. In calculating the twenty-four hours, Sunday ought to be excluded if it intervene. *Reg. v. Justices of Middlesex*, 17 L. J. M. C. 111. The notice may be verbal. *Reg. v. Justices of Huntingdonshire, supra.* If in writing, personal service is not imperative; it may be left at her usual place of residence. *Reg. v. Justices of Cheshire*, 15 L. J. M. C. 114. By the 5th section of the 8 & 9 Vic. c. 10, the father is empowered to abandon the appeal without the recognizances being estreated upon giving notice of his intention, and paying all sums due under the order, and the costs of the mother in consequence of the appeal.

If, however, the appellant, after having unsuccessfully urged objections in point of law, retire from the case, the Court may, without having any corroborative evidence, confirm the order. *Reg. v. Justices of Bucks*, 18 L. J. M. C. 113; 13 Jur. 1053.

After notice of appeal and recognizance have been entered into, an order cannot be abandoned without payment of all the costs incurred by the opposite party. *Reg. v. Hinchliffe*, 10 Q. B. 356; 16 L. J. M. C. 78; 11 Jur. 514.

[3] The condition of the recognizance is for the appearance of the putative father at such general quarter session of the peace as is required by the said act, and his trial of the appeal thereat, and the payment of such costs as he shall be then and there ordered to pay (8 & 9 Vic. c. 10, s. 3). By the same section, the party entering into the recognizance is required forthwith to give or send a notice in writing of his having so entered into such recognizance to the woman in whose favour the order has been made; the appeal will not be allowed unless such notice has been given: the sending the notice by post is sufficient. This word "forthwith" means within a reasonable time. Where a recognizance was entered into on the 14th, and a notice was sent by a messenger on Saturday the 19th, who endeavoured to effect service personally for several days without success, and the service was not effected until the

otherwise, for the payment of costs, to the satisfaction of some one justice of the peace, it shall be lawful for such putative father to appeal to the general quarter sessions[1] of the peace, to be holden after the period of fourteen days next after the making of the said order, for the county, city, borough, or place, for which such petty session may have been held; and the justices in such quarter sessions assembled, or the recorder,[2] as the case may be, shall thereupon hear and determine such appeal, and shall order such costs to be paid by either party as to them or him may seem fit."

the putative father giving notice to the mother within twenty-four hours after it has been made, and giving security for costs within fourteen days.

(B) *Mother must be corroborated.*

By the 8 & 9 Vic. c. 10, s. 6, it is enacted, that "on the trial of any such appeal before any court of quarter sessions, the justices therein assembled, or the recorder (as the case may be), shall hear the evidence of the said mother, and such other evidence as she may produce, and any evidence tendered on behalf of the appellant, and proceed to hear and determine the said appeal in other respects according to law; but shall not confirm the order so appealed against, unless the evidence of the said mother shall have been corroborated in some material particular by other testimony, to the satisfaction of the said justices in quarter sessions assembled, or the said recorder."

Upon the hearing of the appeal the mother must be corroborated.

IV. Enforcing the Order.[3]

(A) *Not after Child attains age of Thirteen Years, or Mother is married, or Child dies, except for Arrears.*

The 5th sect. of 7 & 8 Vic. c. 101, contains the following proviso:—"Provided always, that no order for the maintenance or support of any such bastard child, made in pursuance of this act, shall, except for the purpose of recovering money previously due under such order, be of any force or validity after the child in respect of whom it was made has attained the age of thirteen years, or after the marriage of the mother of such child, or after the death of such child."

The order ceases to be of force, except for the recovering of arrears, upon the child attaining thirteen years, upon the marriage of the mother, or the death of the child.

(B) *Arrears may be recovered by Distress, and in default, Putative Father may be committed to Gaol.*

By the 3d sect. of the same act it is enacted, that "if at any time after the expiration of one calendar month from the making of such order as aforesaid it be made to appear to any one justice, upon oath or affirmation, that any sum to be paid in pursuance of such order has not been paid, such justice may, by warrant under his hand and seal, cause such putative father to be brought before any two justices, and in case such putative father neglect or refuse to make payment of the sums due from him under such order, or since any commitment for disobedience to such order as hereinafter provided, together with the costs attending such warrant, apprehending, and bringing up of such putative father,

In case of default of the putative father in payment of money under the order, he may be summoned before justices, who

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31st, it was held to be too late. *Ex-parte Lowe*, 15 L. J. M. C. 99; 10 Jur. 595. It need not state the condition of the recognizance. *R. v. Holborrow*, 3 New Sess. Cas. 723. If there be evidence before the justices to establish due notice, as where the attorney has admitted the due services of the notices of bail and appeal, the Court of Queen's Bench will not interfere by *certiorari*. *Reg. v. Justices of Gloucestershire*, 16 L. J. M. C. 57.

[1] Under the Middlesex Act, 7 & 8 Vic. c. 71, s. 2, the putative father may appeal either to the adjourned sessions or to the general quarter sessions. See *Reg. v. Justices of Middlesex*, 17 L. J. M. C. 111.

[2] The word "recorder" applies to any person presiding as judge at any court of general or quarter sessions held for any city, borough, liberty, or other place of limited jurisdiction. 8 & 9 Vic. c. 10, s. 11.

[3] Disobedience to the affiliation, by default in paying the money, is a criminal matter, for which the defendant may be indicted. Soldiers are expressly exempt from this consequence by a provision in the Mutiny Act, introduced in consequence of the case of *Reg. v. Ferral* (20 L. J. M. C. 39; 2 Den. C. C. 51; 15 Jur. 128), in which it was held they were indictable.

may grant a warrant for the recovery of arrears by distress, and in default of distress he may be committed to gaol.

such two justices may, by warrant under their hands and seals, direct the sum so appearing to be due, together with such costs, to be recovered by distress and sale of the goods and chattels of such putative father, and may order such putative father to be detained and kept in safe custody until return can be conveniently made to such warrant of distress, unless he give sufficient security, by way of recognizance or otherwise, to the satisfaction of such justices, for his appearance before two justices on the day which may be appointed for the return of such warrant of distress, such day not being more than seven days from the time of taking any such security; but if upon the return of such warrant, or if by the admission of such putative father, it appear that no sufficient distress can be had,[1] then any such two justices may, if they see fit, by warrant under their hands and seals, cause such putative father to be committed to the common gaol or house of correction of the county, city, borough, or place where they have jurisdiction, there to remain without bail or mainprise for any term not exceeding three calendar months, unless such sum and costs, and all reasonable charges attending the said distress, together with the costs and charges attending the commitment and conveying to gaol, or to the house of correction, or of the persons employed to convey him thither, be sooner paid and satisfied.

(C) *May be enforced by Mother, unless Child placed in care of other Person under Order of Justices.*

Order may be enforced by the mother, unless the child has been placed, under the order of two justices, in the care of another person, and then it may be enforced by such person.

By the 7 & 8 Vic. c. 101, s. 5, it is enacted, that "all money payable under any order as aforesaid shall be due and payable to the mother of the bastard child, in respect of such time, and so long as she lives and is of sound mind, and is not in any gaol or prison, or under sentence of transportation; and after the death of the mother of such bastard child, or while such mother is of unsound mind, or confined in any gaol or prison, or under sentence of transportation, any two justices may, if they see fit, by order under their hands and seals, from time to time appoint some person,[2] who, with his own consent, shall have the custody of such bastard child,[3] so long as such bastard child is not chargeable to any parish or union; and any two such justices may revoke the appointment of such person, and may appoint another person in his stead; and every person so appointed to have the custody of a bastard child shall, so long as such child is not chargeable to any parish or union, be empowered to make application for the recovering of all payments becoming due under the order of the court of petty session as aforesaid, in the same manner as the mother of such bastard child might have done; and the clerk to the justices making any order on the putative father of a bastard child, or appointing any person to have the custody of such child as hereinbefore provided, shall, as soon as may be, send by post or otherwise a duplicate of such order or appointment, signed by such clerk, to the clerk of the guardians of the union or parish in which the mother of such bastard child resided at the time of making such order or appointment."

(D) *Or in case of Death or Incapacity of Mother, or where she becomes chargeable to Parish.*

Or in case of the death or incapacity of the mother,

By the 7th sect. it is provided, that "after the death of such mother, or if such mother be incapacitated as aforesaid, so often as any bastard child, for whose maintenance such order of petty sessions has been made, becomes charge-

[1] It is sufficient to authorise the committal if it appear, "on the return of the distress warrant, or on the admission of the putative father, that no sufficient distress can be had on any goods and chattels within the jurisdiction of the justices before whom he shall have been brought on such warrant of apprehension." 8 & 9 Vic. c. 10, s. 8.

[2] This must not be a parish officer. 7 & 8 Vic. c. 101, s. 7.

[3] In case of misapplication of the money payable under the order, or of withholding proper nourishment from the child, or otherwise maltreating the child, a penalty not exceeding 10*l.* is imposed by the 8th sect.

able to any parish or union by the neglect of the putative father to make the payments due under the order of justices, then, and in such case, it shall be lawful for any board of guardians of a union or parish, or if there be no such board of guardians, for the overseers of any parish or place, to make such application for the enforcement of the order as might have been made by the mother of such bastard child if alive; but all payments for the maintenance of such child made in pursuance of such application shall be made to some person, to be from time to time appointed by the justices as hereinbefore provided, and on condition that such bastard child shall cease to be chargeable to such parish or union."

and if the child becomes chargeable to the parish, the order may be enforced by the guardians or overseers.

(E) *Arrears exceeding Thirteen Weeks cannot be recovered.*

The 3d sect. contains the following proviso: "Provided always, that if the woman have allowed the weekly payment to be in arrear for more than thirteen successive weeks without application to a justice, the man shall not be called upon to pay more than the amount due for thirteen weeks in discharge of the whole debt, and no warrant of distress shall be issued for more than the amount of arrears for thirteen weeks' payment in discharge of the whole arrears or debt."

But arrears exceeding thirteen weeks cannot be recovered.

AFFINIS mei affinis non est mihi affinis. *One who is related by marriage to a person related to me by marriage has no affinity to me.* Shelford, M. & D. 174.

AFFINITY. Relation by marriage between the husband and the blood relations of the wife, and between the wife and the blood relations of the husband. Co. Lit. 157 a; 1 Bl. Com. 434; Gib. *Codex*, 412. In a larger sense, consanguinity or kindred. Co. Lit. 157 a.

AFFIRMANTI non neganti incumbit probatio. *The burden of proof lies on him who affirms, not on him who denies.* See *infra*, Affirmative.

AFFIRMATION. *See* Oath. 17 & 18 Vic. c. 125, s. 20: "If any person called as a witness, or required or desiring to make an affidavit or deposition, shall refuse or be unwilling from alleged conscientious motives to be sworn, it shall be lawful for the Court or Judge, or other presiding officer, or person qualified to take affidavits or depositions, upon being satisfied on the sincerity of such objection, to permit such person, instead of being sworn, to make his or her solemn affirmation or declaration in the words following; *videlicet:* 'I, A. B., do solemnly, sincerely, and truly affirm and declare, that the taking of any oath is, according to my religious belief, unlawful; and I do also solemnly, sincerely, and truly affirm, and declare,' &c. Which solemn affirmation and declaration shall be of the same force and effect as if such person had taken an oath in the usual form."[1]

Persons refusing to be sworn from conscientious motives may make affirmation.

AFFIRMATIVE. *See* Power; Right to begin.[2]

(A) *The burden of Proof lies on the Party who substantially asserts the Affirmative*, p. 266.

[1] Previous to the above enactment the legislature had, by the 3 & 4 Wm. 4, c. 49, allowed Quakers and Moravians to affirm in all cases where an oath is required. The act of 3 & 4 Wm. 4, c. 82, contains a similar provision in favour of the sect of Separatists. And the act of 1 & 2 Vic. c. 77, which was passed in consequence of the decision in *Doran's case* (2 Moo. C. C. 37), extends the privilege to all persons who have been Quakers or Moravians, but have ceased to belong to either of those sects. *See* the 12 & 13 Vic. c. 106, s. 246, permitting bankrupts and their wives to be examined in the Court of Bankruptcy, after signing a declaration to speak the truth without being sworn. These affirmations have the same effect as an oath, and persons who knowingly affirm what is false are equally guilty of perjury with those who falsely swear.

[2] See Best on Right to begin.

(B) *Unless there be a disputable Presumption of Law*, p. 266.

(C) *Or the Fact be one which lies peculiarly within the Knowledge of the Party*, p. 267.

(A) *The burden of Proof lies on the Party who substantially asserts the Affirmative.*

SOWARD v. LEGGATT, 7 Car. & P. 613.

The burden of proof lies on the party who substantially asserts the affirmative.

In an action for breach of covenant in not repairing a dwelling-house, the defendant pleaded that he did repair; a question was raised as to whether the *onus probandi* were on the plaintiff or the defendant.

Per Lord Abinger, C. B. "Looking at these things according to common sense, we should consider what is the substantive fact to be made out. It is not so much the form of the issue as the substance and effect of it. In many cases a party, by a little difference in the drawing of his pleadings, might make it either affirmative or negative, as he pleased. The plaintiff here says, 'You did not repair;' he might have said, 'You let the house become dilapidated.' I shall endeavour by my own view to arrive at the substance of the issue, and I think in the present case that the plaintiff's counsel should begin."[1]

(B) *Unless there be a disputable Presumption of Law.*

DOE D. BRIDGER v. WHITEHEAD, 8 Ad. & E. 571.

Unless there be a disputable presumption of law.

Ejectment by a landlord against his tenant, on an alleged forfeiture by

[1] The above rule of convenience, which in the Roman law is thus expressed, *Ei incumbit probatio, qui dicit, non qui negat* (Dig. lib. 22, tit. 3, l. 2; Masc. de Prob. Concl. 70, tot.; concl. 1128, n. 10; *see* Tait, Ev. 1), has been adopted in practice, not because it is impossible to prove a negative, but because the negative does not admit of the direct and simple proof of which the affirmative is capable (*Dranquet v. Prudhomme*, 3 Louis, R. 83, 86); and, moreover, it is but reasonable and just that the party who relies upon the existence of a fact should be called upon to prove his own case. In the application of this rule, regard must be had to the substance and effect of the issue, and not to its grammatical form; for in many cases the party, by making a slight alteration in the drawing of his pleadings, may give the issue a negative or affirmative form at his pleasure. *Soward v. Leggatt*, 7 Car. & P. 615, *per Lord Abinger, supra.* Greene, Ev. 85.

The best tests that can be devised for ascertaining on whom the burthen of proof lies are, first, to consider which party would succeed if no evidence were given on either side (*Amos v. Hughes*, 1 M. & Rob. 464: *per Alderson, B. Belcher v. M'Intosh*, 8 Car. & P. 721: *per id. Doe v. Rowlands*, 9 Car. & P. 735: *per Coleridge, J. Osborn v. Thompson*, 2 M. & Rob. 256: *per Erskine, J. Ridgway v. Ewbank*, 2 id. 218: *per Alderson, B. Geach v. Ingall*, 14 Mee. & W. 97: *per id.*); and, secondly, to examine what would be the effect of striking out of the record the allegation to be proved, bearing in mind that the *onus* must lie on whichever party would fail, if either of these steps were pursued. *Mills v. Barber*, 1 Mee. & W. 427: *per Alderson, B.* For instance, if in an action of covenant or *assumpsit* brought against a tenant the breach assigned be that the premises were not kept in repair, and this allegation be traversed by the plea, the plaintiff must prove his negative averment. *Soward v. Leggatt*, 7 Car. & P. 613. *Doe v. Rowlands*, 9 Car. & P. 734: *per Coleridge, J. Belcher v. M'Intosh*, 8 Car. & P. 720. *See* also *Huckman v. Firnie*, 3 Mee. & W. 505, 510. *Ashby v. Bates*, 15 Mee. & W. 589; 4 Dowl. & L. 33, S. C. *Geach v. Ingall*, 14 Mee. & W. 95. *Rawlins v. Deborough*, 2 M. & Rob. 70, *per Lord Denman;* 8 Car. & P. 321, S. C. *Contra, Pole v. Rogers*, 2 M. & Rob. 287. Again, if to an action of *assumpsit* for not executing a contract in a workmanlike manner the defendant plead that the work was properly done (*Amos v. Hughes*, 1 M. & Rob. 464); or if a declaration allege that a horse sold under a warranty was unsound, and this fact be traversed by the plea (*Osborn v. Thompson*, 9 Car. & P. 337, *per Erskine, J.*; 2 M. & Rob. 254, S. C. *Cox v. Walker*, cited 9 Car. & P. 339. *Doe v. Rowlands*, id. 735), the *onus* in either case will lie on the plaintiff. The same rule will prevail in an action brought against an attorney for not using due diligence (*Shilcock v. Passman*, 7 Car. & P. 291: *per Alderson, B.*), or against a merchant for not loading a sufficient cargo on board a ship pursuant to a charter-party (*Ridgway v. Ewbank*, 2 M. & Rob. 217: *per Alderson, B.*); or against an architect for not building houses according to specification. *Smith v. Davies*, 7 Car. & P. 307: *per Alderson, B.*

breach of a covenant to insure in some office in or near London. The Court held that the omission to insure must be proved by the plaintiff, because the law in favour of the party in possession will presume that he has satisfied the terms of the covenant.[1]

(C) *Or the Fact be one which lies peculiarly within the Knowledge of the Party.*

Apothecaries' Company v. Bentley, R. & M. 159.

Or the fact be one which lies peculiarly within the knowledge of the party.

In an action for a penalty for practising as an apothecary without having obtained the certificate required by the act, *Abbott, L. C. J.*, ruled, that the burden of proof lay upon the defendant to establish that he had a certificate; for it was a negative, and the plaintiffs were not bound to prove it.[2]

AFFIRMATIVE and Negative Statutes. *See* Statutes.

AFFRAY. *See* Assault and Battery; Assembly, Unlawful; Riot. An affray is a public offence to the terror of the Queen's subjects; so called because it affrighteth and maketh men afraid. 3 Inst. 158.[3]

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[1] So where a shipper was charged in an action on the case with having shipped goods dangerously combustible on board the plaintiff's ship, without giving notice of their nature to any officer on board, whereby the ship was burned and lost, it was held that, inasmuch as the omission to give notice would have been a criminal neglect of duty on the part of the defendants, the law presumed that notice had been given, and threw upon the plaintiff the burthen of proving the negative. *Williams v. East India Co.* 3 East, 192. *See* also *Elkin v. Janson*, 13 Mee. & W. 655. So the burden of proving that a bill of exchange was given without value lies on the acceptor, the possession of the bill raising a presumption of due consideration having been given for it. *Mills v. Barber*, 1 Mee. & W. 425; Tyr. & Gr. 835; 5 Dowl. 77. So will a plea that the defendant accepted the bill for his own accommodation, and that the drawer, instead of getting it discounted, indorsed it without consideration, or after it became due. *Lewis v. Parker*, 4 Ad. & E. 838. *Jacob v. Hungate*, 1 M. & Rob. 445. But if it be proved that the person who indorsed the bill to the plaintiff got possession of it fraudulently, the *onus* of proving consideration is thrown on the plaintiff. *Smith v. Braine*, 16 Q. B. 244. *Harvey v. Towers*, 6 Ex. 656. *Berry v. Alderman*, 14 C. B. 95. *Fitch v. Jones*, 5 E. & B. 238; 24 L. J. Q. B. 293. *Mather v. Lord Maidstone*, 26 L. J. C. P. 58; 1 C. B. (N. S.) 273. See *Lewis v. Parker*, *supra*. *Jacob v. Hungate*, *supra*. *See* also *Bailey v. Bidwell*, 13 Mee. & W. 73, overruling *Paterson v. Hardacre*, 4 Taunt. 114. So if the plaintiff were to aver that a certain party was at a specified time of sound mind, and this were traversed, the burden of proof would devolve on the defendant, the presumption being that every man is sane. *Sutton v. Sadler*, 26 L. J. C. P. 284. *Dyce Sombre v. Troup*, 1 Dean, *Ecc. R.* 38. But where a similar issue is directed from the Court of Chancery, the presumption is shifted, since the Judge would not have directed the issue unless he had considered a *primâ facie* case of insanity was established, and by ordering the party alleging sanity to be plaintiff in the issue indicated an intention that the burden of proof should be upon him. *Frank v. Frank*, 2 M. & Rob. 314. *See Turberville v. Patrick*, 4 Car. & P. 557.

On the twofold ground that a prosecutor must prove every fact necessary to substantiate his charge against a prisoner, and that the law will presume innocence in the absence of convincing evidence to the contrary, the burden of proof, unless shifted by legislative interference, falls in criminal proceedings on the prosecuting party, though, in order to convict, he must necessarily have recourse to negative evidence. *R. v. Jarvis*, 1 East, 644 n. *R. v. Allen*, 1 Moo. C. C. 154.

This rule is in practice attended with so much inconvenience that the legislature has in a vast number of instances interfered, by expressly enacting that the burden of proving authority, consent, lawful excuse, and the like, should lie on the defendant. *See* these statutes collected, Tayl. on Evidence ss. 274, 275.

[2] This exception applies to proceedings, whether criminal or civil, instituted against persons for doing that which they are not permitted to do, unless duly qualified; as for selling liquors, sporting (1 & 2 Wm. 4, c. 32), exercising a trade or profession, and the like. *R. v. Turner*, 5 M. & S. 206. *Smith v. Jeffries*, 9 Price, 257. *Harrison's case*, Paley, Conv. 45 n. *Sheldon v. Clark*, 1 Johns. 513. *U. S. v. Hayward*, 2 Gale, 485. *Gening v. The State*, 1 M'Can. 573. *See Doe v. Whitehead*, 8 Ad. & E. 571. So in misprision of treason, if the treason be proved, and the knowledge of it be traced to the prisoner, he is in strictness bound to negative the averment of concealment by offering proof of a discovery on his part. *R. v. Thistlewood*, 33 How. *St. T.* 691.

[3] There may be an assault which does not amount to an affray; as where it hap-

AFFREIGHTMENT. *See* Charter-party; Freight; Ship and Shipping.

AFORESAID (*Prædictus*).[1]

AFORETHOUGHT (*Præcogitatu*).[2]

AFTER.[3]

AFTER-MATH.[4]

AFTER the Fact committed.[5]

AGAINST the Form of the Statute.

I. As to Civil Proceedings.[6]

II. As to Criminal Proceedings.[7]

AGE. *See* Infants. A person becomes of age on the first instant of the last day of the twenty-first year next before the anniversary of his birth: thus, if

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pens in a private place, out of the seeing or hearing of any except the parties concerned, in which case it cannot be said to be to the terror of the people. 1 Hawk. c. 63, s. 1. And it is said that no quarrelsome or threatening words whatsoever will amount to an affray. Id. s. 2. But there may be an affray without actual violence, as where a man arms himself with dangerous and unusual weapons, in such a manner as naturally to cause terror to the people. Id. s. 4; and *see* ss. 9 & 10. 4 Steph. *Com.* 276.

Without a warrant, a constable has no right to apprehend a party who has been engaged in an affray when the affray is over. *Cook v. Nethercote*, 6 Car. & P. 741; S. P. 1 Hawk. c. 63, s. 17. But, it appears, he may take those who have been engaged in the affray before a justice, when they may have been arrested by other persons present, and who are delivered over by such persons into his custody. See *Reg. v. Tooley*, 2 Ld. Raym. 1296. *Clifford v. Brandon*, 2 Camp. 367. See *Williams v. Glennister*, 2 B. & C. 699; S. C. 4 D. & R. 217; 1 Hawk. c. 63. *See* Police.

[1] Before, or already said, or mentioned (Plowd. 67), refers to the last antecedent (1 Chit. *Crim. Law*, 173); but not so invariably; or the word *same*, which is more explicit (*Woodford v. Asley*, 11 East, 513; 1 Ld. Raym. 407; 2 id. 888–1094; 3 Wils. 339), and matter stated in a parenthesis, saves the rule of grammar, that the words "said" and "aforesaid" refer to the last antecedent. 4 Harg. *St. T.* 747.

[2] In criminal law, premeditated. *See* Malice aforethought.

[3] In a will or devise does not always or necessarily refer to time, but to order in point of right and enjoyment. *A. R. Reports*, cited 1 Burr. 71.

[4] The grass which grows after the hay has been made—the second mowing or crop of hay. 2 Wooddes, s. 41. "Tithes of after-math shall be paid, but not tithes of after-pasture." Bunb. 10, case 12. "The after or latter math" of a meadow. 13 East, 155. The right to the last crop of pasturage. 1 Chit. *Gen. Prac.* 181. *See* Tithes.

[5] Under the 53 Geo. 3, c. 127, s. 12, which requires that an action for anything done in pursuance of the act shall be commenced within three calendar months *after the fact committed*, an action of trespass for seizing, taking, and carrying away, and distraining, and selling the plaintiff's goods under a warrant of distress for arrears of rates, may be brought within three calendar months *after the sale*. The seizure of the goods is made not absolutely, but with a view to their detention only until the amount should be paid, and their subsequent sale if it should not; and the seizure, when a sale has taken place, is but part of the *entire act* complained of, and which forms the real grievance to the plaintiff. And the Court said this distinguishes the case from those of *Godin v. Ferris*, 2 H. Black, 18; *Saunders v. Saunders*, 2 East, 254; and *Cook v. M'Tavish*, 1 Bing. 167; in all which the seizure was for a forfeiture, and was in its nature absolute and indivisible, and must be considered as intended to deprive the plaintiff of his property immediately. *Collins v. Rose*, 5 Mee. & W. 202.

[6] A declaration upon a penal statute must state that the act was done against the form of the statute, otherwise it will be bad in arrest of judgment. *Fife v. Bousfield*, 6 Q. B. 100; and *see* New R. 174, and forms referred to in 7 Wentw. *Index*, 464–5, not concluding *contra formam*. Com. Dig. Action on Statute; Lutw. 1548; 1 Saund. 135, n. 3. The meaning of the allegation is, that the illegality relied upon is against the form of some statute then in force. *Turquand v. Mosedon*, 7 Mee. & W. 510. Informations and convictions founded upon statute should contain a similar allegation.

[7] The conclusion of indictments against statutes is, against the form of the statute (or statutes) "in such case made and provided." See *R. v. Williams*, 14 L. J. M. C. 164. *R. v. Adams*, Car. & M. 299. No indictment, however, shall be deemed insufficient for want of proper or formal conclusion. 14 & 15 Vic. c. 100, s. 124.

a person were born at any hour of the 1st of January, 1801 (even a few minutes before twelve o'clock of the night of that day), he would be of full age at the first instant of the 31st of December, 1821, although forty-eight hours before he had actually attained the full age of twenty-one, according to years, days, hours, and minutes. 1 Chit. *Gen. Pr.* 766; 1 Bl. Com. 463; 2 Kent, Com. 233.

AGGRAVATED Assault.

See Assault.

AGGRAVATION.

See also Assault and Battery; Damages; Libel; Malicious Prosecution; New Assignment; Slander; Trespass.

I. Pleading Matters of.[1]

II. Of giving Matters of in Evidence.[2]

[1] As the rules of pleading prohibit the taking of a traverse on matter of aggravation, that is matter which only tends to increase the amount of damages, and does not concern the right of action itself; as in trespass for chasing sheep, *per quod* the sheep died, the dying of the sheep being aggravation only, is not traversable. 1 Vent. 54; S. C. 1 Lev. 283. Steph. on Pl. 207. Hence, to declarations alleging various acts in the same count, some substantive causes of action, others only inserted in aggravation, it requires much care and discrimination to distinguish between the real legal grievance and the alleged injurious effect. In a count charging a trespass by entering a house and taking goods, the taking is a substantive trespass, and not mere matter of aggravation. *Pritchard v. Long*, 9 Mee. & W. 666. So in trespass for entering a house and taking and converting goods, the conversion is mere matter of aggravation; and a plea to the whole count, which justifies only the entering and taking of the goods, is a good plea. *Pratt v. Pratt*, 2 Ex. 413. In a count for a trespass by entering the plaintiff's house and expelling him therefrom, a plea justifying the entry is sufficient, and the expulsion is mere matter of aggravation. *Taylor v. Cole*, 3 T. R. 292; 1 Smith's L. C. 4th ed. 95; and see *Kavanagh v. Gudge*, 7 Man. & G. 316. In a count charging a trespass in pulling down a house, it is mere matter of aggravation to state that the plaintiff was in it at the time. *Perry v. Fitzhowe*, 8 Q. B. 757. *Burling v. Read*, 11 Q. B. 904. So also the statement that an entry was forcible is mere matter of aggravation. *Davidson v. Wilson*, 11 Q. B. 890; and see *Newton v. Harland*, 1 Man. & G. 644; *Harvey v. Brydges*, 14 Mee. & W. 437. When a defendant omits to plead to particular acts charged in the declaration, the plaintiff may, by demurring to the plea, raise the question, whether on the construction of the declaration those acts are substantive causes of action or matter of aggravation only, or where the act in question is sufficiently charged as a substantive cause of action, but its import is mistaken or restricted by the defendant, the plaintiff may new-assign the true cause of action, or the excess for which he sues. See *Taylor v. Cole*, 1 Smith's L. C. 4th ed. 95, notes.

[2] This is never essential to the maintenance of the action. Matters specially in aggravation are immaterial, provided sufficient be proved to establish some right, offence, or justification included in the claim, charge, or defence specified on the record; therefore, where defendant was charged on an information with *composing*, printing, and publishing a libel, but no evidence was given to show that he was the *author*, *Lord Ellenborough* held it was enough to prove *publication*. *R. v. Hunt*, 2 Camp. 583. And in an indictment for murder, the prisoner may be convicted of manslaughter, for the averment of malice aforethought is merely matter of aggravation. Co. Lit. 282*a*.

In actions for defamation, it is stated to be the prevailing doctrine that evidence of the defendant subsequently repeating the slander or libel is inadmissible for the plaintiff in *aggravation* of damages. 1 Hill on *Torts*, 336. But words spoken at different times may be given in evidence for the purpose of making out the charge laid in the declaration, or to prove the *animus* of the defendant; but if they in themselves constitute so many different libels, giving rise to separate and distinct causes of action, the jury must be cautioned not to give damages in respect of them. Add. on *Torts*, 622.

"The distinction," observes *Lord Abinger*, "is, you may give evidence of subsequent words to explain the words in the declaration; but when there is nothing equivocal in the words charged you cannot give evidence of subsequent words of the same import, for which subsequent words another action may be brought and damages recovered; inasmuch as the record in this action would be no bar to a subsequent action for the same words, though the evidence now offered would tend to aggravate the damages in this." *Pearce v Ormsby*, 1 Mo. & R. 456. *Symmons v. Blake*, id. 477. *Stuart v. Lovell*, 2 Stark. 93.

Such evidence, where the defendant's intention is at all equivocal, is clearly admissible to show malice. *Charlter v. Barrett*, Peake, R. 22. *Caufield v. Bird*, 3 C. & Kir. 56. *Rustell v. Macquister*, 1 Camp. 49 n. *Chubb v. Westley*, 6 Car. & P. 436. Thus it is said, "proof of a long practice of libelling the plaintiff would be evidence to show that the defen-

AGISTMENT. The feeding of cattle on the land of another; also the hire paid for the same: so called because the cattle are suffered *agiser; i. e.* to be *levant et couchant* on the land. *See* Bailment; Lien.

AGNATES or Agnati. Relations by the father's side.

AGRICULTURAL Produce. Farming stock, live or dead, and implements of husbandry, as well in Great Britain as Ireland, are so far privileged that when upon any farm they are exempted from stamp duties on insurances by 3 & 4 Wm. 4, c. 23, s. 5; and when the land on which crops have been grown are held under an express covenant or agreement, prescribing that they shall be consumed upon the premises, the same cannot be sold or carried off the farm under an execution against the tenant in prejudice of the covenant and deterioration of the land (35 Geo. 3, c. 50). Neither, under such circumstances, can they be taken as a distress for tithes, taxes, or rates (7 & 8 Geo. 4, c. 17). But the act does not exempt them from seizure at the suit of the king (6 Price, R. 94). *See* also, as to construction of statute, *Peacock v. Jarvis*, 5 Moore, 79; 2 B. & B. 362; and *Eaton v. Southby*, Willes, 131; 1 Chit. *Gen. Pr.* 93.

AID-Prayer. A plea in suspension of the action to the abolished writ of right, pleadable when the title to the inheritance was in question.

AIDER by Verdict. Where a matter is so essentially necessary to be

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dant was actuated by malice in the particular publication complained of, and that it did not take place through carelessness or inadvertence; and the more nearly the evidence approaches the proof of a systematic practice of libelling, the more convincing will it be. The circumstance that the other libels are more or less frequent, more or less remote from the date of the publication of that in question, will affect merely the weight, not the admissibility of the evidence." *Per Parke, B.* (*Barrett v. Long*, 3 H. L. C. 414.) Hence, on the trial of an action for a libel published in a newspaper, the plaintiff was allowed to give in evidence a paragraph published subsequently, in which the charge was re-asserted, for the purpose of showing the defendant's intention; and the Judge having instructed the jury to take the two paragraphs with them, and to give the plaintiff such damages as they considered him entitled to under the circumstances, an application for a new trial was refused. *Barwell v. Adkins*, 1 Man. & G. 807; S. C. 2 Scott, N. R. 11. And it has been held, that even words barred by the Statute of Limitations may be considered to determine the malice of others not barred. *Barrett v. Long*, *supra*, and A. R. cited 1 Hill, 337. So evidence of words of a similar import to those charged in the declaration spoken by the defendant afterwards, both before and after the commencement of the action, is admissible, for the purpose of establishing malice. More especially actionable words having reference to the slanders complained of may, though spoken after commencement of suit, be proved for that purpose. So evidence of other words of like import, or imputing the same crime, is admissible, not as showing separate grounds of action, but to prove malice; and other words besides those charged may be proved as evidence of malice, whether actionable or not. So, in an action for a libel, the plaintiff, in order to show the *quo animo*, may give in evidence subsequent letters addressed by the defendant to third parties, containing substantially a repetition of the slanderous matter, though the libel declared on is free from ambiguity, and the letters offered were written after the commencement of the action, and without reference to the time intervening between the writing of the respective letters. *Pearson v. Le Maitre*, 6 Scott, N. R. 607. Where other words than those laid in the declaration are given in evidence, the defendant may prove such words to be true, because he has had no opportunity of justifying them. *Warne v. Chadwell*, 2 Stark. 457. But not where the words amount to a mere repetition of the slander in the declaration. *Higgs v. Snell*, cited Roscoe, Ev. 537.

A party by pleading a justification may materially enhance the original wrong, and augment the damages; and although the plea be abandoned, it has been held (*see ante*, p. 3) that reference may be properly made to it, and it may be taken into consideration by the jury in estimating the compensation to be recovered. 1 Hill, *Torts*, 425. It has, however, been suggested in an American court, where pleas of justification are withdrawn, they are no longer part of the proceedings, and therefore not legal evidence to the jury. Id.

proved, that had it not been in evidence the jury could not have given such a verdict as that recorded, then the want of stating that matter in express terms in a declaration, provided it contain terms sufficiently general to comprehend it in fair and reasonable intendments, will be cured by the verdict; and where a general allegation must, in fair construction, so far require to be restricted that no judge and no jury could have properly treated it in an unreasonable sense, it may reasonably be presumed, after verdict, that it was so restrained at the trial. *Jackson v. Pesked*, 1 M. & S. 234; 1 Wms.; Saund. 228.

AIDERS and Abettors.[1] *See* also Principal and Accessory.

Denton and Chapple, Fost. 353.

If an act amounting to murder be committed *in prosecution of some unlawful purpose*, all persons accompanying the

Three soldiers went together to rob an orchard; two got upon a pear-tree, and the third stood at the gate with a drawn sword in his hand; and the owner's son coming by, collared the man at the gate, and asked him what business he had there; whereupon the soldier stabbed him. It was ruled to be murder in the man who stabbed, but that those on the tree were innocent. It was considered that they came to commit a small inconsiderable trespass, and that the man was killed upon a sudden affray without their knowledge. But that the

[1] The cases in the text illustrate the kind of participation necessary to render the person so participating liable as a principal in the second degree by being present, aiding, and abetting at the commission of an illegal act. A person is present aiding and abetting if, with the intention of giving assistance, he be near enough to afford it, should the occasion arise. Thus, if he be outside the house watching to prevent surprise, or the like, whilst his companions are in the house committing a felony, such constructive presence is sufficient to make him a principal in the second degree. See *R. v. Borthwick*, 1 Dougl. 207; 1 Leach, 66; 2 Hawk. c. 29, ss. 7, 8; 1 Russ. 31; 1 Hale, 555. *R. v. Gogerly*, R. & R. 343. *R. v. Owen*, 1 Mood. C. C. 296. But he must be sufficiently near to give assistance. *R. v. Stewart*, R. & R. 363. *R. v. Kelly*, id. 421; 1 Russ. 27. *R. v. King*, R. & R. 332. See *R. v. M'Makin*, id. *R. v. Dyer*, 2 East, P. C. 767. If not present, or so near as to be able to afford aid and assistance at the time, he will not be a principal, although the act was done in pursuance of a previously concerted plan, but an accessory before the fact. *R. v. Soares*, R. & R. 25. *R. v. Davis*, id. 113. *R. v. Else*, id. 142. *R. v. Badcock*. id. 249. *R. v. Manners*, 7 Car. & P. 801. *Reg. v. Howell*, 9 id. 437. *Reg. v. Tuckwell*, Car. & M. 215. *Reg. v. Johnson*, 1 id. 218. But presence during the whole of the transaction is not necessary; for instance, if several combine to forge an instrument, and each executes by himself a distinct part of the forgery, and they are not together when the instrument is completed, they are, nevertheless, all guilty as principals. *R. v. Bingley*, R. & R. 446. *See* 2 East, P. C. 768. *R. v. Dale*, 1 Mood. C. C. 307. *R. v. Kirkwood*, 1 id. 304. See *Reg. v. Kelly*, 2 Car. & K. 379. There must also be a participation in the act; for, although a man be present whilst a felony is committed, if he take no part in it, he will not be a principal in the second degree merely because he did not endeavour to prevent the felony, or apprehend the felon (1 Hale, 439; Fost. 350). It is not necessary, however, to prove that the party actually aided in the commission of the offence; if he watched for his companions, in order to prevent surprise, or remained at a convenient distance in order to favour their escape, if necessary, or was in such a situation as to be able readily to come to their assistance, the knowledge of which was calculated to give additional confidence to his companions; in contemplation of law he was present, aiding and abetting. So a participation, the result of a concerted design, to commit a specific offence, is sufficient to constitute a principal in the second degree. *R. v. Stanley*, R. & R. 305; 1 Russ. 24. *R. v. Passey*, 7 Car. & P. 282. *R. v. Lockett*, id. 300. So, if two persons driving carriages incite each other to drive furiously, and one of them run over and kill a man, it is manslaughter in both. *Reg. v. Swindall*, 2 C. & Kir. 230. *See* also *R. v. Dyson*, R. & R. 523. *R. v. Russell*, 1 Mood. C. C. 356. *Reg. v. Alison*, 8 Car. & P. 418. The act must be the result of the confederacy; for if several are out for the purpose of committing a felony, and upon alarm and pursuit run different ways, and one of them kill a pursuer to avoid being taken, the others are not to be considered as principals in that offence. *R. v. White*, R. & R. 99. See *R. v. Hawkins*, 3 Car. & P. 392. The purpose must also be unlawful, or be prosecuted by unlawful means. Fost. 354, 355; 2 Hawk. c. 29, s. 9. But a mere participation in the act without a felonious participation in the design, will not be sufficient. 1 East, P. C. 258. *R. v. Plummer*, Kel. 109. *Reg. v. Cruse*, 8 Car. & P. 541. All persons present at a prize-fight, having gone thither with the purpose of seeing the prize-fighters strike each other, are principals in the breach of

perpetrator of it to aid and assist him are guilty of murder.

decision would have been otherwise if they had all gone there with a general resolution against all opposers, for then the murder would have been committed in prosecution of their original purpose. *See* 1 Hawk. P. C. c. 29, s. 7. *R. v. Hodgson*, 1 Leach, 6. *R. v. Plummer*, Kel. 109.

Anonymous. Cited by Lord Holt in *The King v. Plummer*, 12 Mod. 627; S. C. cited 1 Leach, 7, n. a.

But if several persons confederate to break open a door without a warrant, and some of them commit a robbery, it is not a robbery in all; as they were ignorant of the original design.

The Secretary of State made his warrant to apprehend divers suspected persons, directed to the messengers; the messengers having notice of their being in a particular house, took several soldiers with them to assist them to apprehend the accused, but took no civil officer with them; neither did they make any demand to have the door opened, as they ought by law to do, but broke open the door; and as soon as they had done this some of the soldiers commenced plundering, and stole away some goods; and the question was, whether this was felony in them all. "That they were all," observed *Holt, C. J.*, "engaged in an unlawful act, is plain, for they could not justify breaking a man's house without making a demand first; yet in that case all those who were not guilty of the stealing were acquitted, notwithstanding their being engaged in one unlawful act of breaking the door; and the reason was because they knew not of any such intent, but it was a chance opportunity of stealing, whereupon some of them did lay hands." *See* 1 Leach, 6; Fost. 353. *Rex v. Thompson*, Keb. 66. *Anon.* 8 Mod. 165.

Aiders and abettors of offences punishable on summary conviction are liable to the same punishment as principals.[1]

11 & 12 Vict. c. 43, s. 5. "Every person who shall aid, abet, counsel, or procure the commission of any offence which is, or hereafter shall be punishable on summary conviction, shall be liable to be proceeded against and convicted for the same, either together with the principal offender or before or after his conviction, and shall be liable, on conviction, to the same forfeiture and punishment as such principal offender is or shall be by law liable, and may be proceeded against and convicted, either in the county, riding, division, liberty, city, borough, or place where such principal offender may be convicted, or in that in which such offence of aiding, abetting, counselling, or procuring, may have been committed."

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the peace. *R. v. Perkins*, 4 Car. & P. 537. See *R. v. Murphy*, 6 id. 103; and upon the same principle, the seconds in a duel being participators in an unlawful act, would both be guilty of murder if death were to ensue. *Reg. v. Young*, 8 Car. & P. 645. *Reg. v. Cuddy*, 1 C. & Kir. 210. But *see* 1 Hale, 422.

Upon an indictment for forcible entry, if the party entering had, in fact, no right of entry, all persons in his company, as well those who did not use violence as those who did, are equally guilty; but if he had a right of entry, then those only who used or threatened violence, or actually abetted those who did, are guilty. 3 Bac. Abr. Forc. Ent. *R. v. Smyth*, 1 M. & Rob. 155; 5 Car. & P. 201.

[1] Principals in the second degree may be tried before the principal in the first degree has been found guilty (2 Hale, 223), and may be convicted, though the party charged as principal in the first degree is acquitted. *R. v. Taylor*, 1 Leach, 360. *Benson v. Offley*, 2 Show. 510; 3 Mod. 121. *R. v. Wallis*, Salk. 334. *R. v. Towle*, R. & R. 314; 3 Price, 145; 2 Marsh. 465.

In treason and offences below felony, and in all felonies in which the punishment of principals in the first degree and of principals in the second degree is the same, the indictment may charge all who are present and abet the fact as principals in the first degree (2 Hawk. c. 25, s. 64; see *Mackally's case*, 9 Co. 67 b), provided the offence permit of a participation (Fost. 345); or specially as aiders and abettors. *Reg. v. Cusham*, Car. & M. 187. But where by particular statutes the punishment is different, then principals in the second degree must be indicted specially as aiders and abettors. 1 East, P. C. 348, 350. *R. v. Sterne*, 1 Leach, 473. See *R. v. Borthwick*, Dougl. 207; 1 East, P. C. 350. *Reg. v. Swindall*, 2 C. & Kir. 230. *Reg. v. Downing*, 1 Den. C. C. 52; 2 C. & Kir. 382.

Where a prisoner was convicted upon an indictment which charged him with a rape as a principal in the first count, and as an aider and abettor in the second, it was holden that the conviction upon the first count was good. *R. v. Folkes*, 1 Mood. C. C. 354. *R. v. Gray*, 7 Car. & P. 164.

Indictment. — After stating the offence of the principal in the first degree, and immediately before the conclusion of the indictment, charge the principal in the second degree thus:—"And the jurors aforesaid, upon their oath aforesaid, do further pre-

AIDS. Abolished by 12 Car. 2, c. 24. Originally mere benevolences granted in times of distress by a tenant to his lord, they became in time claimable as of right. They were payable to ransom the lord if taken prisoner; to make his eldest son a knight; and to portion his eldest daughter. 2 Bl. Com. 63, 64.

ALARMING the Queen. 5 & 6 Vic. c. 51, s. 2. " From and after the passing of this act, if any person shall wilfully discharge or attempt to discharge, or point, aim, or present at or near to the person of the Queen, any gun, pistol, or any other description of fire-arms, or of other arms whatsoever, whether the same shall or shall not contain any explosive or destructive material, or shall discharge or cause to be discharged, or attempt to discharge or cause to be discharged, any explosive substance or material near to the person of the Queen; or if any person shall wilfully strike or strike at or attempt to strike or strike at the person of the Queen with any offensive weapon, or in any other manner whatsoever, or if any person shall wilfully throw or attempt to throw any substance, matter, or thing whatsoever, at or upon the person of the Queen, or with intent in any of the cases aforesaid to injure the person of the Queen, or with intent in any of the cases aforesaid to break the public peace, or whereby the public peace may be endangered, or with intent in any of the cases aforesaid to alarm her Majesty; or if any person shall, near to the person of the Queen, wilfully produce or have any gun, pistol, or any other description of fire-arms, or other arms whatsoever, with intent to use the same to injure the person of the Queen, or to alarm her Majesty; every such person so offending shall be guilty of a high misdemeanour, and being convicted thereof in due course of law, shall be liable, at the discretion of the Court before which the said person shall be so convicted, to be transported beyond the seas for the term of seven years, or to be imprisoned, with or without hard labour, for any period not exceeding three years; and during the period of such imprisonment to be publicly or privately whipped, as often and in such manner and form as the said Court shall order and direct, not exceeding thrice."

Persons discharging or pointing fire-arms, &c. at the Queen, with intent to alarm her Majesty, are guilty of a high misdemeanour, and liable to be transported.

Sec. 3. " Provided that nothing herein contained shall be deemed to alter in any respect the punishment which by law may now be inflicted upon persons guilty of high treason or misprision of treason."

ALDERMAN.[1] *See* Corporations, Municipal. 5 & 6 Wm. 4, c. 76, s. 25. The Municipal Corporation Act, after providing that a mayor, aldermen, and councillors, shall be elected in every borough, who shall be called " the council of such borough," enacts that " the number of persons so to be elected aldermen shall be one-third of the number of persons so to be elected councillors, and on the 9th day of November, in this present year, the councillors first to be elected under the provisions of the act, and on the 9th

Under the Municipal Corporation Act, aldermen hold their office for three years, and may be re-elected.

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sent that J. W., late of the parish aforesaid, in the county aforesaid, labourer, on the day and year aforesaid, with force and arms, at the parish aforesaid, in the county aforesaid, feloniously was present, aiding, abetting, and assisting the said J. S. the [*felony and larceny*] aforesaid, to do and commit against the peace," &c.

[1] The word " alderman," in a literal sense, imports no more than elder; but in its ordinary and legal acceptation it means one of the chief governors of the corporation, or one of the assistants of the mayor or other head of corporate associations. Spelm. *Gloss.* 25; Madox. *Firma Burgi*, 14. In the city of London, and some other chartered places, the alderman is a local magisterial officer, and he was formerly annually chosen, till by charter 28 Edw. 3 it was granted that they should not be removed without cause. By the stat. 17 R. 2, c. 11, it was enacted that they should not be (*vide* stat. 11 Geo. 2, c. 8, as to their election) chosen annually, but remain till removed for cause. 4 Inst. 253; Kyd. 323; Latch. 231; Palm. 454. They are exempted from serving inferior offices, nor are they liable to be summoned as jurors. Cro. Eliz. 585; Latch. 231. The term imports both a citizen and an inhabitant, 4 Mod. 33.

day of November in the year 1838, and in every third succeeding year, the council for the time being of every borough shall elect from the councillors, or from the persons qualified to be councillors, the aldermen of such borough, or so many as shall be needed to supply the place of those who shall then go out of office, according to the provisions hereinafter contained; and that upon the 9th day of November in the year 1838, and in every third succeeding year, one-half of the number appointed as aforesaid to be the whole number of the aldermen of every borough shall go out of office; and the councillors, immediately after the first election of aldermen, shall appoint who shall be the aldermen who shall go out of office in the year 1838, and thereafter those who go out of office shall always be those who have been aldermen for the longest time without re-election: Provided always, that any alderman so going out of office may be forthwith re-elected, if then qualified as herein provided: Provided also, that the aldermen so going out of office shall not be entitled to vote in the election of a new alderman."[1] *See* Grant on Corporations, 415.

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[1] Each member of the council entitled to vote, may vote for any number of persons not exceeding the number of aldermen then to be chosen, by personally delivering at the meeting, to the mayor or chairman, a signed voting-paper, containing the names, places of abode, and descriptions of the persons for whom he votes. 7 Wm. 4, & 1 Vic. c. 78, s. 14. *Reg. v. Deighton*, 5 Q. B. 896. *Reg. v. Stanley*, 11 Ad. & E. 882. *Reg. v. McGowan*, 11 Ad. & E. 869. In cases of extraordinary vacancy, the council are required to elect a new alderman within ten days thereafter, who goes out at the same time as the person in whose room he was chosen. 7 Wm. 4, & 1 Vic. c. 78, ss. 26, 27. A *mandamus* lies to compel such election, if the vacancy be not filled up within the prescribed time. *Reg. v Harvey*, 3 Q. B. 475. *See* 27 L. J. Q. B. 434, and 4 Burr. 2011. The alderman, upon election, must make a declaration before two or more aldermen or councillors that he accepts the office, and is possessed of the requisite amount of property, if his qualification be an estate qualification. 7 Wm. 4, & 1 Vic. c. 78, ss. 50, 51, 52. It is a good return to a *mandamus* to administer the declaration that the party is disqualified. *Reg. v. Greene*, 2 Q. B. 464. Refusal to accept the office renders the party (being eligible and not exempt) liable to such penalty, not exceeding 50*l.*, as the council shall declare by bye-law. 7 Wm. 4, & 1 Vic. c. 78, s. 51. And a penalty of 50*l.* is imposed upon any person acting as alderman without being qualified, or after he has become disqualified, or without having made the requisite declaration. 7 Wm. 4, & 1 Vic. c. 78, s. 53. If, after taking office, he neglect or refuse to perform the duties imposed by the Municipal Corporation Act, he is subject to a fine of 100*l.* for every offence (7 Wm. 4, & 1 Vic. c. 78, s. 48), whether the omission be wilful or not. *Rex v. Burrell*, 12 Ad. & E. 460.

A custom of London, that when the inhabitants of any ward shall three times elect and return to the court of mayor and aldermen the same person to be alderman who shall be by the said court, according to another custom of the said city, adjudged on such three returns not to be a fit person to support the dignity and discharge the duties of the said office, the mayor and aldermen may elect or admit a fit person, being a freeman, out of the whole body of citizens to be alderman of such ward, is a valid custom in law. *Rex v. Johnson*, 6 Clark & Fin. 41. *See* 11 Geo. 1, c. 18, regulating elections of aldermen in the city of London; and *Hutchins v. Player*, Bridg. R. 272.

It has been held, that it is no ground of amotion of an alderman from office that he was above seventy years of age (Com. Dig. Franchise, F. 31), or that he resided three miles from the borough (*R. v. Mayor of Doncaster*, Sayer, 37. See *R. v. Mayor of Portsmouth*, 3 B. & C. 152); that he refused to pay a tax imposed by law on the inhabitants of the borough (*R. v. Rippon*, 2 Keb. 15); or that he sent a letter to the Secretary of State charging the mayor with subornation of perjury (Carth. 174). But it has been held a sufficient ground that he was convicted as a common drunkard. Com. Dig. Franchise, F. 31.

In an information *quo warranto* against an alderman, the array may be challenged if returned by an alderman or a freeman. *Reg. v. Delme*, 10 Mod. 199.

A *mandamus* lies to elect or restore an alderman. *Kynaston v. Mayor of Shrewsbury*, 2 Str. 1051; 7 Mod. 201. But a *mandamus* will not lie to compel the returning officer to return the alderman alleged to have been duly elected. The injured parties will be left to their remedy by action. *Reg. v. Lord Mayor of London*, 10 Mod. 49; Fost. 283.

A writ of *mandamus* to receive his vote and allow him to act as alderman seems to be the proper mode of raising the question whether an alderman has been properly elected; a *mandamus* to restore would fitly raise the question whether the office had been duly declared void by the council. Grant, *Corp.* 419. *R. v. Mayor of Canterbury*, 1 Lev. 119. See *Shuttleworth v. City of Lincoln*, 2 Bulst. 132. Tapping, 37.

THE QUEEN v. ROGERS, 7 Mod. 28; S. C. 2 Ld. Raym. 777; S. C. 2 Salt. 426; S. C. Holt. 351.

It is not an indictable offence to speak contemptuously to an alderman of London while holding a wardmote, but the common serjeant may file an information against the offender in the aldermen's court.

A return was made to a *certiorari*, "that if any citizen speaks contemptuous words of an alderman, or assaults him in the execution of his office, an information shall be exhibited against him in the name of the common serjeant in the Court of Aldermen," and that they should proceed against him to fine him; and that at a wardmote held by Sir R. J. the defendant assaulted him, and said, "I have as much to do here as you; you think sure you are among your Bridewell birds, but you are mistaken." For this conduct an information has been exhibited against him by the common serjeant.

Per Cur. "It would have been doubtful if the offence had been by words only, because no indictment lies at common law, but he is to be bound to good behaviour; yet for the assault he is punishable, and that may be by information there by custom, as well as in this court, though the regular course at common law is by indictment. And we are of opinion that the information lay in the Court of Aldermen, though an alderman was aggrieved; otherwise of the mayor, for he is an integral part, without which the court cannot be held: but the other may be severed, and he must not sit; and the mayor and aldermen may grant to an alderman, but the aldermen and city cannot grant to a mayor. A custom to disfranchise for contemptuous words spoken of an alderman is void according to 2 Lev. 200. A *procedendo* was granted. *See* 1 Sid. 65; Hob. 62; 1 Mod. 35; 6 Mod. 124; 2 Lev. 200; 2 Jones, 229; 8 Co. 116; 4 Mod. 341; 3 Mod. 139; 1 Vent. 16; Cro. Jac. 58.

ALE.[1] *See* Excise; Weights and Measures.

ALEHOUSE and Beershops. *See* Bailment; Inn.

[1] By various statutes, the use of certain ingredients in the brewing of ale is prohibited. Thus, by 9 Anne, c. 12, ss. 24, 26, no common brewer, innkeeper or victualler, shall use any broom, wormwood, or any bitter ingredient (to serve instead of hops), in brewing or making any beer or ale for sale (except infusing broom or wormwood after it is brewed and turned, to make broom or wormwood ale or beer), on pain of 20*l.*, half to the king and half to the prosecutor, to be levied as by the laws of excise; and by 12 Anne, stat. 1, c. 2, s. 32, no common brewer or retailer of beer or ale shall use any [sugar, honey, see *infra*] foreign grains, guinea pepper, essentia bina, cocculus Indiæ, or any unwholesome ingredients in the brewing of beer or ale, or mix any of them therewith, on pain of 20*l.*, to be recovered and mitigated as by the laws of excise, half to the king and half to him that shall sue.

By the 56 Geo. 3, c. 58, s. 2, any dealer in, or brewer, or retailer of beer, receiving or having in his custody or possession, or making, using, or mixing with or putting into any worts or beer, any liquor, extract, calx, or other material or preparation, to darken the colour, or which has been or shall be used for that purpose, other than brown malt, ground or unground, as commonly used in brewing, or having in his custody or possession, or using or mixing with or putting into any worts or beer, any [*molasses*, *honey*, liquorice, see *infra*], vitriol, quassia, cocculus Indiæ, grains of paradise, guinea pepper, or opium, or extract or preparation thereof, or any article or preparation whatever for or as a substitute for malt or hops, shall forfeit all such liquors, extract, calx [molasses, honey], vitriol, quassia, cocculus Indiæ, grains of paradise, guinea pepper, opium, extract, article, and preparation, and also the worts and beer, together with the casks and other packages containing the same (which shall be seized by the officer of excise,) and also for each and every such offence 250*l.* See *Attorney-General v. Lockwood*, 9 Mee. & W. 378.

By the 10 & 11 Vic. c. 5, the use of sugar, subject to certain conditions and restrictions, is allowed in the brewing of ale and beer. The brewer is liable, however, to a penalty of 200*l.*, if he use sugar on which the duty of customs has not been paid. *See* sect. 3. He may also use sugar for the purpose of darkening ale or beer, but not any of the other ingredients mentioned in the 56 Geo. 3, c. 58. *See* 7 & 8 Geo. 4, c. 52, and 10 & 11 Vic. c. 5, s. 4.

Any common or other brewer, innkeeper, victualler, or retailer of beer or ale, mixing, or causing or suffering to be mixed in any vessel, tub, measure, or otherwise, any strong beer, ale, or strong worts, with any small beer or small worts, or with water, after the gauge of such strong beer, ale, or strong worts, by the officer of excise, shall for every offence forfeit 50*l.* 2 Geo. 3, c. 14, s. 2; and *see* 42 Geo. 3, c. 38, s. 12.

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IV. Obligation to receive Guests, and Duty as to care of Goods of Guest. See *post*, Inn.

I. What is an Alehouse.

Parkhouse v. Foster, 5 Mod. 427; S. C. 12 Mod. 254; 1 Raym. 479; S. C. Carth. 417; 1 Salk. 388; S. C. Holt, 366.

Letting lodgings and providing the lodgers with ale, &c., stable room, and horses' meat at a certain price per day, is not an alehouse within the meaning of the statutes.

By stat. 4 & 5 W. & M. entitled, "An Act for carrying on a War with France," it was enacted, that constables should quarter soldiers on innkeepers, and such as kept alehouses and victualling-houses, livery-stables, or sold brandy, metheglin, or cider by retail; and in an action brought by the plaintiff against a constable for quartering a horse and dragoon on him, he pleaded not guilty, and gave the statute in evidence, and the jury found that there were medicinal wells at Epsom, and that the plaintiff, during the season for drinking the waters, indefinitely let lodgings to such as went thither to drink the waters, for the air, or for their pleasure, and dressed victuals for them, and sold them ale and beer, and entertained their horses at 8*d.* per diem, but sold no victuals, drink, &c. to any but his lodgers; and that the plaintiff had no license from any justices of peace to sell ale; and that the defendant billeted a soldier and a horse on the plaintiff, who compelled him to find victuals for himself and provisions for his horse for the space of two months.

Per Cur. The plaintiff's house is not within the statute. 1st. It is no inn, for the verdict finds he lets lodgings only, which shows him not compellable to entertain any individual, and none could come there without a previous contract. 2ndly. It is not an alehouse or a victualling-house, for those extend only to such alehouses or victualling-houses as are known and described by several acts of parliament, which it is an offence to keep without a license; and it must be a common tavern, wherein drink, &c. is commonly sold to all the king's subjects. 3dly. It was resolved to be a statute against the liberty of the subject, for before it was passed no man was obliged to entertain soldiers against

his will, which appears by the petition of right (2 Car. 2, and by stat. 21 Car. 2), and therefore not to be construed favourably without great necessity. 4thly. That in this case the constable, having wrongfully quartered the dragoon on him, was answerable for all the loss the plaintiff had sustained. Judgment for the plaintiff. *See* 8 Mod. 877; Hutton, 200; Latch. 88; Dyer, 266; Moore, 877; Ra. Ent. 405; Cro. Eliz. 622, 398; Cro. Jac. 224; 3 Bac. Ab. 180; 2 Roll. Ab. 84; 1 Show. 268; Palm. 367; 8 Co. 32, 290; 4 Co. 123; Kel. 50; Godb. 345; 3 Wils. 409; 4 Burr. 2165; Dalton, J. 32; 1 T. R. 572; 1 Salk. 110; 3 B. & A. 283; 2 Chit. Rep. 484.

II. Of the License.

(A) *To whom it may be Granted.*

MAYOR OF LEICESTER v. BURGESS, 2 Nev. & M. 131; S. C. 5 B. & Adol. 246.

The particular custom of a borough, that no alehouse-keeper shall carry on that business, is not affected by stat. 11 Geo. 4, and 1 Wm. 4, c. 64.

Declaration stated that there had been, from time whereof, &c. an ancient custom in the borough, that no person not being a burgess, or the widow of a burgess, of the borough aforesaid, shall carry on the trade of an alehouse-keeper within the limits of the borough. *Breach.* That the defendant was not a burgess of the borough, and did carry on the trade of an alehouse-keeper within the borough. On demurrer the question raised was, whether the act of 1 Wm. 4, c. 64, which authorises the general sale of beer by retail, supersedes the local customs of particular places.

Per Cur. The object of the act was to give the public at large a power of selling beer. Under the former acts, no power was given to the magistrates to grant licenses to sell beer in places where a local custom as to the granting of licenses existed; therefore we think that this act, which merely extends the class of persons qualified to demand a license, does not empower the granting of licenses to sell within a borough where a local custom as to the retailing of beer exists.

(B) *By whom Granted.*[1]

BROOKER v. WOOD, 3 Nev. & M. 96, overruling *Meux v. Humphries*, 3 Car. & P. 79; M. & M. 132.

The price of beer sold to a party who carries on the business of an alehouse keeper through the agency and in the name of another, and in whose name the house is licensed, may be recovered against the former.

Action for price of beer supplied to defendant. It appeared that the business was conducted by his daughter, who alone resided at the house, and the license from the magistrates to sell beer was in her name. The defence was, that the daughter was liable, and that credit was not given to the defendant; and it was objected on defendant's part, that, assuming the credit was given to him, the plaintiff could not recover, as the contract would be a fraud on the revenue law.

Per Cur. In *Meux v. Humphries*, *Lord Tenterden* thought that the brewers could not charge any one as their debtor in the first instance, except the person who was licensed to keep the public-house; but, upon considering this question very fully, we are of opinion that this is not so. We think this cannot be considered a fraud on the licensing system, because the liability must depend on the fact to whom credit was given.[2]

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[1] The act 6 & 7 Wm. 4, c. 38, s. 3, extends to prevent a person who is already a publican from obtaining a license to carry on the business of a grocer on the same premises, as absolutely as it does to prevent a person licensed as a grocer from carrying on in the same premises the business of a publican. *McKenna*, App., *Pape*, Resp., 1 H. of L. C. 6.

[2] At common law, a license was unnecessary. *Rex v. Ivyes*, 2 Show. 468; S. C. Trem. 135; S. P. *Faulkner's case*, 1 Saund. 249. But it seems that keeping an alehouse without a license is an indictable offence, notwithstanding a particular punishment is given by statute. *Rex v. Marriott*, Carth. 263; but see *Stephen Watson's case*, 3 Salk. 26; S. C. 1 Salk. 46; S. P. *Rex v. Edwards*, 3 Salk. 28. To authorise the sale of ale and spirituous liquors two licenses are

(a) No Action lies against Justices for refusing to grant a License.

BASSETT v. GODSCHALL AND OTHERS, 3 Wils. 121.

No action lies against justices for refusing to grant a license.

General demurrer to an action of trespass on the case, brought against the justices for refusing a license to an alehouse-keeper.

Per Cur. The legislature has entrusted the justices of the peace with a discretionary power to grant or refuse licenses for keeping inns and alehouses; if they abuse that power, or misbehave themselves in the execution of their office or authority, they are answerable criminally, by way of information in B. R. We do not think that a justice of peace is answerable in an action to every individual who asks him for a license to keep an inn or alehouse, and he refuses to grant one; if he were so, there would be an end to the commission of the peace, for no man would act therein. Indeed he is answerable to the public if he misbehaves himself, and wilfully, knowingly, and maliciously injures or oppresses the king's subjects, under colour of his office, and contrary to law; but he cannot be answerable to every individual touching the matter in question in an action. Every plaintiff in an action must have an antecedent right to bring it; the plaintiff here has no right to have a license, unless the justices think proper to grant it: therefore he can have no right of action against the justices for refusing it.

(b) Nor Mandamus to compel them to grant.

A *mandamus* to compel justices to grant a license cannot be obtained.

JOHN GILES's CASE, 2 Str. 181; S. P. REX v. NOTTINGHAM, Say. Rep. 217.

A motion was made for a *mandamus* to the justices of the city of Worcester to grant a license to Giles to keep an alehouse, insisting that, it being within a city, the 2 Geo. 2, c. 28, did not extend to it. On the other side it was argued that it was discretionary in the justices, and cited Salk. 45, that no appeal lies for the denial of a license; and if the owner be committed, the want of a license can only come in question, and not the reason why it was denied.

Per Cur. There never was an instance of such a *mandamus*, and therefore we will not grant it.[1]

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necessary—a magistrate's license, and an excise license. *Rex v. Drake and another*, cited 1 Burn's *Just.* 41.

The justices at an annual licensing meeting are bound to hear the parties applying for licenses if they desire it. They cannot properly decide the applications by a general resolution to grant no new licenses in a particular locality. *Reg. v. Walsall*, 3 C. L. R. 100. It is not necessary that a borough should have a separate quarter sessions to be "a town corporate within the Alehouse Licensing Act, 9 Geo. 4, c. 61, s. 1. *Brown v. Nicholson*, 28 L. J. M. C. 49.

The 11 Geo. 4, & 1 Wm. 4, c. 64, an act to permit the general sale of beer and cider by retail in England, and the 3 & 4 Vic. c. 61, enables persons to sell these liquors upon obtaining a license for that purpose from the excise authorities, without the necessity of any magistrate's license. This license is necessary, although the beer is sold at a price not exceeding 1½ per quart. *Read v. Storey*, 3 L. T. (N. S.) 674. As to excise licenses for the sale of fermented liquors under the 3 & 4 Vic. c. 61, an overseer cannot be compelled by *mandamus* or otherwise to grant a certificate under the statute, that an applicant for a retail beer or cider license is the real resident holder and occupier of the house sought to be licensed. *R. v. Kensington*, 12 Q. B. 654; 17 L. J. Q. B. 332; 12 Jur. 747. He has not an arbitrary discretion to grant or refuse the certificate; but ought *bonâ fide* to inquire into the facts of holding and occupancy. *Reg. v. Overseers of Withyham*, 2 C. L. R. 167. Although the fact that the applicant is the real resident holder and occupier is essential to give validity to the license, the certificate of the overseer of the fact is not a condition precedent to the obtaining of the license. Where the overseer declined to certify, but the supervisor of excise obtained information which satisfied him that the applicant was the resident holder and occupier, and thereupon the license was granted, the license was held to be valid. *Thompson v. Harvey*, 28 L. J. M. C. 163. The granting of an excise license by the Solicitor of Excise under 3 & 4 Vic. c. 61, s. 2, is not a judicial act; it cannot, therefore, be removed into the Court of Queen's Bench by *certiorari*. *Reg. v. Overseers of Salford*, 21 L. J. M. C. 223.

[1] *See* 1 Barnard, 402; 4 B. & A. 298; 1 Chit. Rep. 34; 2 Selw. N. P. 1047. The justices have no authority to annex conditions to the grant of licenses not prescribed by

(c) *But Information for corrupt Refusal will lie.*

REX v. WILLIAMS AND DAVIS, 3 Burr. 1317. S. P. REX v. HANN AND PRICE, 3 Burr. 1716.

But an information will lie against justices for gross corruption in refusing a license.

An information was granted against the defendants, justices of the peace for the borough of Penryn, for refusing to grant licenses to those alehouse-keepers who voted against their recommendation of candidates for members of parliament for that borough. It appeared that they had acted very grossly, having previously threatened to ruin the applicants by not granting them licenses, in case they should vote against those candidates whose interests the justices themselves espoused, and having afterwards actually refused them licenses on that account only, and *Lord Mansfield* declared that the Court granted this information against the justices, not for the mere refusal to grant the licenses (which they had a discretion to grant or refuse, as they should deem to be right and proper), but for the corrupt motive of such refusal, for their oppressive and unjust conduct in refusing to grant them, because the persons applying for them would not give their votes for members of parliament as the justices had dictated.

THE KING v. HARRIES AND ANOTHER, 13 East, 270. S. P. REX v. ST. AUBYN AND ANOTHER, cited 13 East, 270 n.

And such information may be moved for in the second term after the offence, there being no intervening assizes.

A motion was made for leave to file an information against two justices of the peace for the county of Salop, upon a charge of having improperly refused an ale license; but after stating that the refusal was in September last, the counsel doubted whether this application was made in time, this being the second term after the fact complained of, and subsequently *Lord Ellenborough, C. J.*, stated that, upon an accurate review and consideration of the precedents and practice, the counsel was now in time to move for the information within the second term, no assizes having intervened.[1]

(C) *Appeal from Refusal of Justices.*[2]

(a) *Who may Appeal.*

REX v. JUSTICES OF MIDDLESEX, 3 B. & Adol. 938.

The parties aggrieved within the meaning of the appeal clause in 9 Geo. 4, c. 51, s. 27, are those only who are immediately aggrieved by the act done, and not merely consequentially injured.

The 9 Geo. 4, c. 61, s. 27, for regulating the granting of licenses to innkeepers, &c., enacts, that "any person who shall think himself aggrieved by any act of any justices in execution of that act, may appeal against such act to the quarter sessions." The justices having granted a license to A. B. to open a public-house not before licensed, within a short distance of C. D.'s, a licensed public-house, C. D. appealed against such grant of the license to A. B.

But the Court held that the words, "person who shall think himself aggrieved," means a person immediately aggrieved, as by a refusal of a license to himself, and not a person like the present appellant, who is merely consequentially injured.

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statute. *Rex v. Athay*, 2 Burr. 653. An information will not lie for a mere error in judgment. *Rex v. Young and Pitts*, 1 Burr. 557. But if gross corruption can be shown, an information will be granted for refusing (*Rex v. Williams, supra*); or for improperly granting an ale license. *Rex v. Holland*, 1 T. R. 692; S. P. *Rex v. Sainsbury*, 4 T. R. 457.

[1] The information cannot be obtained so late in the second term after the grievance as to prevent the magistrate from showing cause against the rule in the same term. *The King v. Marshall*, 13 East, 322. The defendants, upon such an information, must appear personally to receive judgment. *Rex v Hann*, 3 Burr. 1786.

[2] Under the 9 Geo. 4, c. 61, s. 27, an appeal lies to the coming quarter sessions against the refusal of justices in special sessions to grant an alehouse license. *Reg. v. Deane*, 2 Q. B. 96.

The sessions hearing an appeal under the Victualling Licensing Act (9 Geo. 4, c. 61), against the refusal of justices to grant a license, cannot adjourn such appeal to a subsequent session for the purpose of awarding costs there after a taxation in the interval. *Reg. v. Belton*, 11 Q. B. 397; 17 L. J. M. C. 70.

(*b*) *Notice of Appeal.*

Reg. v. Justices of Cheshire, 3 Per. & D. 23 n.

All the justices who have convicted under the 9 Geo. 4, c. 61, must have notice of the appeal against their conviction.

A. B. had been convicted under the 9 Geo. 4, c. 61 (the Alehouse Act) in a penalty of 40*s.*, at a petty sessions, by C. and D., justices. A. B. appealed against the conviction, and gave notice of appeal to the chairman only, C. At the trial at the quarter sessions it was objected, that notice of appeal should have been given to the other convicting justice; and the sessions dismissed the appeal.

On motion for a *mandamus* to compel them to hear the appeal, the Court decided, upon the authority of the case of *The Queen v. Justices of Bedfordshire* (3 Per. & D. 21), that the notice of appeal must be given to all the convicting justices.

(*c*) *Does not lie to Recorder of Borough.*

Reg. v. The Recorder of Bristol, 24 L. J. M. C. 43.

The recorder of a borough has no jurisdiction to hear an appeal from the refusal of a license by the borough justices.

This was an application for a *mandamus* requiring the recorder of Bristol to hear an appeal against the refusal of the justices to grant a license for the sale of exciseable liquors.

Per Cur. The rule must be discharged. The recorder has no power to grant a license. The Municipal Corporation Act (sec. 105) expressly prohibits the recorder from granting a license of this kind. That being so, it is impossible he should exercise the functions of a court of appeal, since he could not give the judgment which the Court below ought to have given. *See* also *R. v. Deane*, 2 Q. B. 96.

III. Offences against Tenor of License, &c.

(A) *Signing or using false Certificate to obtain License.*

Reg. v. Waghorn, 22 L. J. M. C. 61.

The jurisdiction to convict is in justices acting for the place where the offence is committed.

The jurisdiction to convict of the offence under the 3 & 4 Vic. c. 61, of using a false certificate for the purpose of obtaining a license to retail beer, is in the justices acting in and for the place where the offence is committed.[1]

(B) *Keeping House open at Prohibited Hours.*

(*a*) *On Week-days.*

A beershop-keeper is subject to a penalty if he keep open his house or sell beer after prohibited hour.

By 3 & 4 Vic. c. 61, s. 15, "no person licensed to sell beer or cider by retail under the said recited acts, or this act, shall have or keep his house open for the sale of beer or cider, nor shall sell or retail beer or cider, nor shall suffer any beer or cider to be drank or consumed in or at such house, at any time before the hour of five of the clock in the morning, nor after twelve of the clock at night, of any day in the week, in the cities of London or Westminster, or within the boundaries of any of the boroughs of Marylebone, Finsbury, the Tower Hamlets, Lambeth, or Southwark, as defined by the 2 & 3 Wm. 4, c. 64, nor after eleven of the clock within any parish or place within the bills of mortality, or within any city, cinque port, town corporate, parish or place, the population

[1] A conviction for signing a false certificate, contrary to sect. 8 of 4 & 5 Wm. 4, c. 85, to enable a person to obtain a license for the sale of beer to be consumed on the premises, may be drawn up according to the form provided in the schedule (I. 1) of 11 & 12 Vic. c. 43. *Reg. v. Bakewell*, 26 L. J. M. C. 150.

A license, though obtained by fraud, is valid, unless the fraud be practised by the party to whom it is granted. *R. v. Marshall*, 1 Nev. & M. 277. The carrying on by A. of the business of retailing beer in a public-house in the name and by the agency of B., the person licensed, is not a fraud. *Brooker v. Wood*, 5 B. & Adol. 1052. See *Meux v. Humphries*, M. & M. 132.

of which, according to the last parliamentary census, shall exceed 2500, or within one mile, to be measured as aforesaid, from any polling-place used at the last election for any town having the like population, and returning a member or members to parliament, nor after ten o'clock of the evening elsewhere. And if any such person shall keep his house open for selling beer or cider, or shall sell or retail beer or cider at any time other than as hereinbefore prescribed and directed, such person shall forfeit the sum of forty shillings for every offence, and every separate sale shall be deemed a separate offence."[1]

(b) On Sundays.

Alehouses must be closed between three and five, and after eleven o'clock in the afternoon of Sundays, and certain other days.

By 18 & 19 Vic. c. 118, s. 2, "it shall not be lawful for any licensed victualler, or person licensed to sell beer by retail to be drunk on the premises, or not to be drunk on the premises, or any person licensed or authorised to sell any fermented or distilled liquors, or any person who, by reason of the freedom of the mystery or craft of Vintners of the City of London, or of any right or privilege, shall claim to be entitled to sell wine by retail, to be drunk or consumed on the premises, in any part of England or Wales, to open or keep open his house for the sale of, or to sell beer, wine, spirits, or any other fermented or distilled liquor, between the hours of three and five o'clock in the afternoon nor after eleven o'clock in the afternoon on Sunday, or on Christmas-day, or Good Friday, or any day appointed for a public fast or thanksgiving, or before four o'clock in the morning of the day following such Sunday, Christmas-day, Good Friday, or such days of public fast or thanksgiving, except to a traveller,[2] or to a lodger therein."

By the 3d sect. it is enacted, that "no person shall open any house or place of public resort for the sale of fermented and distilled liquors, or sell therein such liquors, in any part of England or Wales, between three and five o'clock in the afternoon, or after eleven o'clock in the forenoon, on Sunday, or on Christmas-day, or Good Friday, or any day appointed for a public fast or thanksgiving, or before four o'clock in the morning of the day following such Sunday, Christmas-day, or Good Friday, or such other days appointed as aforesaid, except to travellers."

But constables may enter such houses at any time.

The 4th sect. enacts, that "it shall be lawful for any constable at any time to enter into any house or place of public resort in England or Wales for the sale of beer, wine, spirits, or other fermented or distilled liquor or liquors; and every person who shall refuse to admit, or shall not admit such constable into such house or place, shall be deemed guilty of an offence against this act."

Persons offending are subject to a penalty.

By sect. 5, "every person who shall offend against this act shall be liable, upon a summary conviction for the same before any justice of the peace for the county, riding, division, liberty, city, borough, or place where the offence shall be

[1] A conviction for keeping a house open for the sale of beer, and suffering it to be drunk on the premises at a time prohibited, and fining the party in a single penalty, is bad, as charging three distinct offences. *Newman v. Bendyshe*, 2 Per. & D. 340. The conviction must state the time fixed by the justices at which houses may be kept open, and the time at which the beer was consumed; it is not enough to state it to be at a time declared to be unlawful by an order of justices. *Newman v. Earl of Hardwicke*, 8 Ad. & E. 124. If the license require the house to be shut nightly at ten, and the house is situate in a place of that description that, according to the 3 & 4 Vic. c. 61, s. 15, it may be kept open until eleven, an information for keeping open his house beyond ten o'clock, contrary to the statute, is not maintainable. *Reg. v. Charlesworth*, 20 L. J. M. C. 181. As to the sufficiency of an indictment for perjury committed on the hearing, see *R. v. Rawlins*, 8 Car. & P. 439. A licensed victualler entertaining his friends in his house is not liable to the penalty because he has given them refreshment during the prohibited hours. *Oberton v. Hunter*, 35 L. T. 366.

[2] A man is not less a traveller within the meaning of the act because he travels for pleasure. As to what constitutes "travelling," each case must stand upon its own merits; but where a party had for their pleasure driven a round of eight miles, and were five miles from their home when they drew up and had refreshment at an alehouse during prohibited hours, the Court held that the case was within the exception, and that the licensed victualler ought not to be convicted. *Atkinson v. Sellers*, 27 L. J. M. C. 12.

committed, to a penalty not exceeding 5*l.* for every such offence, and every separate sale shall be deemed a separate offence."

The effect of the above statute is to substitute fixed hours for "the usual hours of divine service," during which, by the statute of 9 Geo. 4, c. 61, s. 21, licensed victuallers were required to keep their houses closed. The selling therefore of exciseable liquor during the usual hours of afternoon service in the place, is not an offence if it be not between three and five o'clock. *Whiteley v. Heaton*, 3 H. & N. 143; 27 L. J. M. C. 217; 22 Jur. 120.

(C) *Permitting Disorderly Conduct or Gaming.*

Beerhouse-keepers permitting disorderly conduct, or transgressing the conditions specified in their license, are subject to a penalty.

By 11 Geo. 4, and 1 Wm. 4, c. 64, s. 13, "every seller of beer, ale, and porter by retail, having a license under the provisions of this act, who shall permit any person or persons to be guilty of drunkenness or disorderly conduct in the house or premises mentioned in such license, shall for every such offence forfeit the respective sums following; and any person who shall in any way transgress or neglect, or shall be a party in transgressing or neglecting the conditions and provisions specified in such license, or shall allow such conditions or provisions to be in any way transgressed or neglected in the house or premises so licensed, shall be deemed guilty of disorderly conduct; and every person so licensed, who shall permit any such disorderly conduct, shall for the first offence forfeit any such sum not less than 40*s.*, nor more than 5*l.*, as the justices before whom such retailer shall be convicted of such offence shall adjudge; and for the second such offence, any sum not less than 5*l.* nor more than 10*l.*; and for the third such offence, any sum not less than 20*l.* nor more than 50*l.*; and it shall be lawful for the justices before whom any such conviction for such third offence shall take place to adjudge, if they shall so think fit, that such offender shall be disqualified from selling beer by retail for the space of three years next ensuing such conviction, and also, if they shall so think fit, to adjudge that no beer shall be sold by retail by any person in the house or premises mentioned in the license of such offender."[1]

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[1] The 3 & 4 Vic. c. 61, s. 16, authorises a mitigation of the penalty. A conviction under the above section need not state the names of the persons permitted to be drunk, or allege that they are unknown. *Wray v. Toke*, 17 L. J. M. C. 183. The 15th sect. of the 11 Geo. 4, and 1 Wm. 4, c. 64, limits the time for prosecuting to three calendar months after the offence. The information may be before two justices acting in petty sessions: it is not necessary, however, that it should be before two justices of the division within which the licensed house is situated. Neither need the conviction allege that the prosecution took place within three calendar months. *Wray v. Toke*, *supra*. But in an indictment for perjury committed on the hearing of an information under this section, it is necessary to aver that the justices were acting in and for the division or place in which the house is situate; but it is not necessary to aver that they were acting in petty session; nor is it necessary that the information should have been written. *R. v. Rawlins*, 8 Car. & P. 439. A party convicted of a third offence may appeal to the quarter sessions. *See* 11 Geo. 4, & 1 Wm. 4, c. 64, s. 16. As to the form of conviction for permitting disorderly conduct, see *Wray v. Toke*, 12 Q. B. 492; 17 L. J. M. C. 183.

The portion of the penalty which, by sect. 126 of the 9 Geo. 4, c. 61, is to be paid to the treasurer of the county or place for which the justices are acting, must, on a conviction by justices of a borough which has a separate commission of the peace, but no court of quarter sessions, be paid to the treasurer of the county in which the town is situated, and not to the treasurer of the borough. *Reg. v. Dale*, 22 L. J. M. C. 44.

(*a*) *Form of Conviction for an Offence under* 11 *Geo.* 4, *and* 1 *Wm.* 4, *c.* 64.

Sect. 25 of the statute enacts, "in order to prevent frivolous and vexatious appeals," that a conviction in the form or to the effect following, *mutatis mutandis*, as the case may be, shall be good and effectual to all intents and purposes whatsoever, without stating the case, or the facts or evidence, in any more particular manner.

—— } Be it remembered, that on the
to wit. } day of in the year
A. B. of was duly convicted before us, C. D. and E. F., two of her Majesty's justices of the peace in petty sessions for the of for that [*here state the offence, and the time and place when and where committed*] whereby the said A. B. has forfeited the sum of this being adjudged to be the first [*or* second *or* third] offence [*as the case shall happen to be*] against the

REG. v. ASHTON, 1 E. & B. 286; 22 L. J. M. C. 1.

A conviction stated that the defendant being the keeper of an alehouse and victualling-house, and having a license under the provisions of stat. 9 Geo. 4, c. 61, was "guilty of an offence against the tenor of such license; that is to say, that he, the said R. A., did then and there knowingly suffer a certain unlawful game, to wit, the game of dominoes, to be played in his said house and premises, contrary to the said statute and against the tenor of his said license."

It is not an offence against the tenor of the license to allow a game, such as dominoes, to be played, unless it be for money.

On motion to quash the indictment, the Court held that it was bad, since it did not show that dominoes was itself an unlawful game, nor that it was gaming by reason of being played for money; and the conviction was quashed accordingly.

PATTEN v. RHYMER, 29 L. J. M. C. 189.

Upon a case stated on appeal from the conviction of justices of an innkeeper for an offence against the tenor of his license in suffering gaming in his house, the facts were, that the defendant had invited some private friends to his house, and entertained them in the bar-parlour, where they played at cards for money at a low stake. It did not appear what the game was. The Court held the conviction was proper; the facts bringing the case within the terms of the statute 9 Geo. 4, c. 61, playing at cards for money being gaming.

But if play for money be permitted to take place in the house, it is an offence against the tenor of the license, however small the stake and however innocent the game.

(D) *Suppression of Alehouse.*

THE KING v. VENABLES, 8 Mod. 377; S. C. Forts, 325; 2 Lord Raym. 1405; S. C. 1 Str. 630.

An objection was made in this case to an order for suppressing an alehouse, on the ground that there ought to be a summons. But the Court, after argument, held that it was unnecessary to set out the summons in the order, though it might be proper that such a preliminary notice should be given.

An order of sessions for suppressing an alehouse need not set out the summons.[1]

ALE-TASTER, or Ale-Conner. An officer appointed at every leet-court, who is sworn to look to the assize of ale and beer within the precincts of the lordship. Kitch. 46. There are also four ale-conners chosen by the liverymen of the city of London, in common hall, on Midsummer's-day, whose office it is to inspect the measures used in public-houses. *See* 1 Wils. 248.

ALIA Enormia. *Other Wrongs.* Under the usual concluding allegation in actions of trespass, that the defendant other wrongs there did, nothing can be given in evidence except matters that could not with decency be put on the record. *Lowden v. Goodrick*, 1 Peake's N. P. C. 65. *Sippora v. Basset*, Sid. 225; Comb. 357; 1 Chit. Pl. 412; Roscoe, Ev. 564.

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provisions of an act to permit the general sale of beer and cider by retail in England, besides the costs of this conviction, which we, the said justices, do hereby assess at the sum of pursuant to the statute in such case made and provided.

Given under our hands and seals } the day and year above written. }

The 21 Jac. 1, c. 7, allows an alehouse-keeper, suffering inhabitants of the parish to tipple, to be convicted on the oath of one witness; and the 1 Car. c. 4, extends the same penalty to the case of strangers, but requires proof by two witnesses. A conviction against an alehouse-keeper, stated to be on the oath of one witness, for allowing persons to tipple in his alehouse, was therefore holden to be insufficient, for not showing whether those persons were inhabitants or strangers. *Rex v. Dove*, 3 B. & A. 596.

[1] An alehouse licensed by the justices cannot be suppressed by the session, unless it be a disorderly house. *Rex v. Randall*, 2 Salk. 470; S. C. Holt, 405; S. C. 2 Salk. 27. If an order of session for suppressing an alehouse have only the county in the margin, it will be quashed. *The King v. Austin*, 8 Mod. 309; S. C. Forts, 325.

ALIAS dictus. *Otherwise called.* In indictments, if there be a doubt which one of two names is the defendant's real surname, the second may be added in the indictment after an *alias dictus* (Bro. *Misnom.* 47): thus, "Richard Wilson, otherwise called Richard Layer." The *alias dictus* should be placed after the addition of the defendant. 2 Inst. 699. *Anon.* 3 Salk. 20. *R. v. Semple*, 1 Leach, 420; Arch. *Crim. Pl.* 28.

ALIAS Writ. Alias writs of summons were abolished by the 15 & 16 Vic. c. 76, s. 10, and the present practice of renewing writs by means of resealing introduced. As to alias writs of execution, *see* Execution.

ALIBI. *Elsewhere.* A defence by which it is sought to establish the innocence of a person accused of an offence, by showing that at the time the fact is supposed to have been committed he was at a different place.[1]

ALIENATIO Rei præfertur Juri accrescendo. *Alienation is favoured by the Law rather than accumulation.* Co. Litt. 185.

ALIENATION. A transferring the property of a thing to another. In Co. Litt. 118, it is thus defined: *Alienatio*, i. e. *alienum facere; vel ex nostro dominio in alienum transferre; sive rem aliquam in dominium alterius transferre.* Alienation, *i. e.* to make alien; or to transfer from our ownership to that of one foreign to us, or to transfer anything to the dominion of another.[2] 2 Bl. Com. 287; 1 Steph. Com. 433.

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[1] On a charge of highway robbery the prosecutor was allowed to rebut an *alibi*, by proving that shortly before the attack made upon him, and near the same spot, the prisoner had robbed another person. *R. v. Briggs*, 2 M. & Rob. 199. And even had no such defence been set up, similar evidence would, it seems, be admissible, as showing at least that the prisoner was in the neighbourhood at the time when the crime was committed. *R. v. Rooney*, 7 Car. & P. 517.

"Fabricated alibis," says Mr. Best, "seldom succeed, if the witnesses are skilfully cross-examined *out of the hearing of each other*, especially as courts and juries are aware that a false *alibi* is a favourite defence with guilty persons, and, consequently, listen with suspicion even to a true one."—*Principles of Ev.*

[2] The owner of every description of tenure and estate (except leases by copyholders), has, unless the power has been expressly taken away by the terms of the conveyance, a right to alienate either the whole or a part of his estate, whether he is entitled to an estate of inheritance in fee simple, or for a year, or a time certain even less than a year, in lands of freehold tenure. 1 Co. Litt. 636, n. k; *Doct. & Stu.* 27; 15 Ves. 264. He may either convey or assign his entire interest, or may carve out less interests therein, unless such power be expressly prohibited, as it may be, and as occurs in estates upon condition, and more frequently in leases for years, where a landlord having the *jus disponendi* may annex any lawful terms to his grant or demise. 2 T. R. 133.

Further, the right of alienation being an incident of property, the law will not allow the owner of property to bestow it on another deprived of this incident. It is an established doctrine, that where real or personal estate is given to a man during his life, or for any definite estate or interest of greater or less extent, accompanied with the strongest injunction against his alienating it, the prohibition is nugatory, and the devisee or legatee enjoys unfettered his disposing power. See *Brandon v. Robinson*, 18 Ves. 429. *Graves v. Dolphin*, 1 Sim. 66. The mere ownership of income, however, though it cannot (except in favour of married women) be the subject of an inalienable trust, may be made to cease on alienation, bankruptcy, or other such event. See *Martin v. Marsham*, 14 Sim. 230. *Rochford v. Hackman*, 9 Hare, 475. *Re Dickson's Trust*, 1 Sim. N. S. 37. But an estate of inheritance in lands, or the entire interest in personalty, cannot be made liable to divestment, even on alienation or bankruptcy (*Ware v. Cann*, 10 B. & C. 433. *Bradley v. Pexote*, 3 Ves. 324. *Whitfield v. Prichett*, 2 Keen, 608), for the power of alienation is incidental to an estate in fee, or a complete ownership of personalty, and any attempted general restraint on the exercise of this incident to ownership is repugnant to the estate, and therefore void. *See* Hayes & Jar. on Wills, 5th ed. 178; Smith, R. & P. P. 533.

ALIENS. *See* Naturalisation.

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(B) *And may take a Lease, not exceeding Twenty-one Years, of Premises for Occupation or Business*, p. 288.

(C) *But Persons born out of the United Kingdom of a Mother being a Natural-born Subject, are capable of inheriting or taking Lands*, p. 288.

(D) *An Alien may acquire a Settlement under* 13 *&* 14 *Car.* 2, *c.* 12, p. 289.

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(F) *And the Statute of Limitations does not commence against Plaintiff, who is a Foreigner, until he comes into this Realm*, p. 289.

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III. The Alien Act, p. 290.

(A) *Masters of Vessels are required by* 6 *Wm.* 4, *c.* 11, *to certify the Names, &c. of Aliens who land here*, p. 290.

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IV. Of Alien-Enemies, p. 291.

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(*c*) *But mere Residence in their Country does not necessarily constitute an adhering to the Enemy*, p. 292.

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(*a*) *An Action does not lie at the Suit of an Alien-Enemy*, p. 292.

(*b*) *And a Demand due to two, one of whom is an Alien-Enemy, cannot be enforced by the other*, p. 293.

(*c*) *A British-born Subject resident in a Hostile Country cannot, upon the return of Peace, recover in a British Court upon Contracts entered into by him in that Country in time of War*, p. 293.

(*d*) *An Alien-Enemy Executor may maintain an Action*, p. 293.

(*e*) *And an Alien-Enemy commorant here by the King's License may Sue, though he came in the time of War*, p. 294.

(*f*) *Choses in Action belonging to an Alien-Enemy are forfeited to the Crown*, p. 294.

(*g*) *The Queen may License a Trading with the Enemy, or may License it with certain Qualifications, in which latter case the Plaintiff must show a due Conformity with the Conditions imposed*, p. 294.

(*h*) *And where a Description of Trading with an Enemy's Country is licensed, which would otherwise be illegal, such Commerce must be regarded as legal, with all the consequences of its being legal*, p. 295.

(*i*) *A License to an Alien-Enemy to go to an Enemy's Country and return here does not authorise him to reside here*, p. 295.

(C) *Of the Plea of Alien-Enemy*, p. 295.

(*a*) *To an Action brought by an Agent on behalf of an Alien Enemy it cannot be replied that the Object of the Suit was that the Agent might with the Proceeds pay himself a Debt due to him from the Alien*, p. 296.

(*b*) *If a Plaintiff becomes an Alien-Enemy after Action brought, his Disability ought to be pleaded in bar of the further maintenance of the Suit, and not of the Action generally. But although the latter form is inaccurate, the Court are bound* ex officio *to give Judgment against the Plaintiff, if it appears upon the whole Record that the Plaintiff has no right to sue*, p. 296.

(*c*) *Judgment and Execution were refused to be stayed on a summary Application, because the Plaintiffs, after verdict, became Alien-Enemies*, p. 296.

(*d*) *The Plea of Alien-Enemy cannot be pleaded with a plea that admits the Plaintiff's right to sue in a British Court, as the General Issue and Alien-Enemy*, p. 297.

(*e*) *Alien-Enemy cannot be given in evidence under the General Issue*, p. 297.

(*f*) *Neither can the fact of an Alien, on whose behalf a British Agent is suing, having become an Enemy since the completion of the Contract, be taken advantage of under the General Issue*, p. 297.

I. Who are Aliens.[1]

[1] The term "alien" signifies a person born out of the allegiance of the sovereign. If, therefore, a foreign enemy be resident in this country, and have issue born within the realm, his offspring would be alien, because not born under her Majesty's protection, or under an acknowledgment of her supremacy. A person born in a district not actually possessed by the king at the period of his birth, but which is obtained by treaty or conquest subsequent to his nativity, continues an alien, notwithstanding the political change or substitution of one dynasty for another. But the children of a subject who has not disclaimed allegiance, though resident in a colony which has declared itself independent of the parent state, are not aliens. *Auchmuty v. Mulcaster*, 5 B. & C. 771; 8 D. & R. 593. *See* also *Sutton v. Sutton*, 1 Russ. & Mylne, 663; Smith's R. & P. P. 1030.

(A) *An Alien becoming the Wife of a British Subject is thereby Naturalised.*

By the 7 & 8 Vic. c. 66, s. 16, it is enacted, that "any woman married, or who shall be married to a natural-born subject, or person naturalised, shall be deemed and taken to be herself naturalised, and have all the rights and privileges of a natural-born subject." [1]

An alien becoming the wife of a British subject is thereby naturalised.

II. Rights and Disabilities of Aliens.[2]

(A) *Aliens, the Subjects of a friendly Power, may take and hold every kind of Personal Property except Chattels Real.*

By the 7 & 8 Vic. c. 66, s. 4, it is enacted, that "every alien, being the

Aliens, the subjects of a friendly power,

[1] In general an alien was not dowable. *Count de Watt's case*, 6 Moore, P. C. C. 216. Where, however, an alien woman was created a denizen, she became entitled to dower out of all the lands whereof her husband was seised at and after the time when she was created a denizen, but not out of any lands whereof he was seised before, and which he had aliened. 1 Cruise, T. 6, c. 1, s. 31.

[2] With respect to the rights and incapacities of aliens, some discrimination between citizens and foreigners, as to their rights and obligations, has prevailed in the laws of most civilised states. In England, it has been thought inconsistent with the safety and interests of the country that aliens should, with the exception mentioned in the text, hold real property—a phrase used to denote things permanent, fixed, and immovable, as houses and lands. This apparently harsh exclusion from enjoying the profits of the soil is founded upon solid reasoning and political experience. If an alien could acquire a permanent property in lands, he must acknowledge an allegiance, equally permanent with that property, to the King of England—a permanent allegiance which would be inconsistent with that which he owes to his own natural sovereign. "If," says Lord Coke (Co. Litt. 206), "an alien purchase lands to him and his heirs, he is of capacity to take a fee simple, that is, to become a purchaser, but not to retain; for after the holding of a proper inquisition, the king shall have the estate by his prerogative, by whomsoever the land may be possessed." So, if an alien purchase land and die, the law casts the freehold and inheritance upon his majesty. So it is the rule, if land be devised to an alien; but the estate purchased by, or demised to an alien, does not vest in the Crown immediately. An inquest of office must be holden, and a jury must find him an alien. Until such judicial inquiry has been instituted, and the result recorded, the alien continues legal proprietor, and he may maintain an action for injuries committed to the property by a wrongdoer. The exercise of the prerogative of the Crown, to the prejudice of the alien's relatives, is of rare occurrence. The practice is, for her Majesty, on a petition being presented to the Commissioners of the Treasury, disclosing the facts, to grant the lands to the parties, who might otherwise be deprived of them, and to direct the execution of the necessary trusts to which the property is to be liable. The adoption of this course of proceeding is sanctioned and confirmed by an express declaration in the 47 Geo. 3, c. 24. Although an alien may take real property by purchase, that is, by an act of his own, yet he cannot derive title to it by descent, by dower, or by the courtesy of England; such interests are transmitted by acts of law. "The act of law," observes the learned commentator upon Littleton, "giveth the alien nothing." Hence, even at the present day, an alien is excluded, not only from strictly holding what real estate he has acquired by purchase, but from even taking by descent, or acquiring a title to dower, or as tenant by the courtesy. The reason of this distinction between the acts of the alien himself, by which he may take but cannot hold, and the act of law, by which he cannot even take, is, that the law will not confer a mere nominal right, the possession of which cannot be permanently secured.

Alien-friends may lawfully come into the country without any license or protection from the Crown; though it seems that the Crown, even at common law and by the law of nations, and independently of the powers vested in it by the Alien Act, 55 Geo. 3, c. 54, which extends even to foreign merchants, possesses a right to order them out of the country, or prevent them from coming into it, whenever her Majesty thinks proper. Chit. *Prer. of Crown*, 49. The enactment in Magna Charta, c, 30, relates only to foreign *merchants*.

Aliens have always been eligible to hold any superior ecclesiastical appointment; but an alien cannot be appointed to, or entrusted with, any office connected with the administration of justice—not even the office of constable; much less is he qualified to vote at parliamentary elections, or to be chosen a member of the legislature. See *Rex v. De Mierre*, 5 Burr. 2785.

As an alien while he resides here is generally subject to our laws, and owes a local and temporary allegiance to our sovereign, he may be guilty of high treason. When tried for this offence, he cannot demand the privilege of having a jury consisting of an equal number of foreigners and natural-born subjects, to which he is entitled on other criminal charges.

may take and hold every kind of personal property except chattels real.

subject of a friendly state, shall and may take and hold, by purchase, gift, bequest, representation, or otherwise, every species of personal property, except chattels real, as fully and effectually, to all intents and purposes, and with the same rights, remedies, exemptions, privileges and capacities, as if he were a natural-born subject of the kingdom."

(B) *And may take a Lease, not exceeding Twenty-one Years, of Premises for Occupation or Business.*

And may take a lease, not exceeding twenty-one years, of premises for occupation or business.[1]

By the 7 & 8 Vic. c. 66, s. 5, it is enacted, that " every alien now residing in, or who shall hereafter come to reside in any part of the United Kingdom, and being the subject of a friendly state, may by grant, lease, demise, assignment, bequest, representation, or otherwise, take and hold any lands, houses, or other tenements, for the purpose of residence or of occupation by him or her, or his or her servants, or for the purpose of any business, trade, or manufacture, for any term of years not exceeding twenty-one years, as fully and effectually, to all intents and purposes, and with the same rights, remedies, exemptions, and privileges, except the right to vote at elections for members of parliament, as if he were a natural-born subject of the United Kingdom."

(C) *Of Persons born out of the United Kingdom, &c.*

But persons born out of the United King-

By the 7 & 8 Vic. c. 66, s. 3, it is enacted, " that every person now born, or hereafter to be born out of her Majesty's dominions, of a mother being a natural

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[1] If an alien purchase a larger estate in lands than that permitted by the statute, the Crown might at any time assert a right to such estate. For the conveyance to an alien of any greater estate in lands in this country is a cause of forfeiture to the Queen, who, after an inquest of office has been held, for the purpose of finding the truth of the facts, may seize the lands accordingly. Wms. *Real Property*, 61. Before office found, that is, before the verdict of any such inquest of office has been given, an alien may make a conveyance to a natural-born subject; and such conveyance will be valid for all purposes except to defeat the prior right of the Crown, which will still continue. Shep. *Touch.* 232; 4 Lev. 48. When the conveyance or lease would be void, an agreement for it will be equally void as an actual demise. *Lapierre v. M'Intosh*, 9 Ad. & E. 857; 1 Per. & D. 629.

Aliens may take under a will the produce of real estate thereby devised to trustees to be sold. *Du Hourmelin v. Sheldon*, 4 Mylne & C. 525. They cannot, however, be seised to a use, and therefore if a conveyance is made to an alien and a natural-born subject to uses, the moiety of the alien upon office found becomes vested in the Crown. 1 Cruise, T. 11, c. 3, s. 10. There is a difference of opinion as to whether, in the case of a trust to convey to an alien, the beneficial interest results to the heir of the testator or goes to the Crown. The former opinion is held by Sir J. Stuart, V. C. (*Rittson v. Stordy*, 3 Sim. & Gr. 230); the latter by the Master of the Rolls. *Barrow v. Wadkin*, 24 Beav. 1. *See* 4 Mylne & C. 524.

If an alien purchase lands, and before office found the sovereign make him a denizen by letters patent, and confirm his estate, the confirmation will be good. Sug. *Concise View*, 540.

An alien cannot protect himself by taking the conveyance in the name of a trustee. An alien cannot take by act of law, as by descent, courtesy, dower, or guardianship, because he cannot hold. 2 Pres. Shep. T. 232, n. 12. If, therefore, the husband is an alien, he will not acquire any right to a term of years belonging to his wife (1 Cruise, T. 8, c. 1, s. 33); but if an alien is made a denizen, he may be tenant by the courtesy in respect of issue born after his naturalisation, but not on account of issue born before. 1 Cruise, T. 5, c. 1, s. 26.

Aliens generally purchase in the names of their wives or children, by way of advancement to them. By the old law, an alien's sons born here might inherit to each other, because the descent was immediate. By the 11 & 12 Wm. 3. c. 5, it was enacted, that all persons, being natural-born subjects of the king, might inherit and make them titles by descent from any of their ancestors, lineal or collateral. And by the statute 25 Geo. 2, c. 89, to remedy apprehended inconveniencies from the former statute, it is provided that no right of inheritance shall accrue by virtue of the former statute to any persons whatsoever, unless they are in being and capable to take as heirs at the death of the persons last seised, with an exception, however, in the case where lands shall descend to the daughter of an alien, which descent shall be divested in favour of an after-born brother, or the inheritance shall be divided with an after-born sister, or sisters, according to the usual rule of the common law. 2 Bl. Com. 251; Co. Litt. 8 a (2).

born subject of the United Kingdom, shall be capable of taking to him, his heirs, executors or administrators, any estate, real or personal, by devise, or purchase, or inheritance of succession." *See* 6 Hare, 51; 17 L. J. Ch. 73.

dom of a mother being a natural-born subject, are capable of inheriting or taking lands.[1]

(D) *An Alien may acquire a Settlement under* 13 *&* 14 *Car.* 2, *c.* 12.

The King v. the Inhabitants of Eastbourne, 4 East, 103.

A question arose in this case, whether a foreigner could gain a settlement in this country. It appeared that Anne Borchert had been removed from the parish of Seaford to the parish of Eastbourne; that her maiden settlement was in Eastbourne; that about seven years ago she married one John Borchert, a German, at the time an alien-enemy; that the said John Borchert was at the time of the removal resident in a house in Seaford, of above the value of 10*l.*, which he had rented for two years, carrying on the trade of a baker; and that the sessions, on appeal, had confirmed the order, subject to the opinion of the Court upon the above facts.

An alien may acquire a settlement under 13 & 14 Car. 2, c. 12, by renting a tenement.[2]

Per Cur. The stat. 32 Hen. 8, c. 16, makes leases of dwelling-houses or shops granted to any stranger artificer void; but if an alien not an enemy occupies a dwelling-house under an agreement, not amounting to a lease, of the yearly value of 10*l.*, for forty days, he gains a settlement under the stat. 13 & 14 Car. 2, c. 12. It has been urged, that as no obligation to maintain poor foreigners existed anterior to the passing of the statutes pointing out the different methods of acquiring settlements, they are not included in the statutory regulations which were thereby introduced; but the law of humanity is anterior to all positive laws, and obliges us to afford relief. Besides, the objects of these acts was only to specify how and in what manner the burden of supporting the poor should be borne. Orders quashed. *See* 1 Sessions Cases, 97; Burn's *Justice*, Poor (Overseers), s. 1; 1 Saund. 8; 2 Show. 235; 3 Wm. 3, c. 11; 2 & 3 Anne, c. 6; and *Reg. v. Preston*, 12 Ad. & E. 822.

(E) *An Alien may Sue here.*

Michelotte v. Dillon, 2 Esp. 621.

An alien may sue in our courts. *See* Broom's *Parties to Actions*, 85; 9 Ad. & E. 857; 12 Mee. & W. 129; 1 C. & Kir. 390. And when indicted, is entitled to a mixed jury, of one half aliens. *See* 2 C. & Kir. 887.

An alien may sue here.[3]

(F) *The Statute of Limitations.*

Strithorst v. Graeme, 3 Wils. 145; S. C. 2 Black. 723.

To an action of *assumpsit*. Plea, *non assumpsit infra sex annos;* replication, that he, the plaintiff, was abroad at the time of making of the promises, and that he hath ever since been and still is abroad. Demurrer and joinder therein.

And the statute of limitations does not commence against a plaintiff who is a foreigner until he comes into this realm.

Per Cur. If the plaintiff is a foreigner, and doth not come to England in fifty years, he still hath six years after his coming to England to bring his action, and if he never comes to England himself, he has always a right of action while he lives abroad, and so have his executors or administrators after his death. *Vide post*, Limitations, Statute of.

(G) *The Wife of an Alien.*

[1] It was otherwise before the statute. He could not even inherit to his mother. *Dupoure v. Jones*, 4 T. R. 300. All children born out of the Queen's ligeance, whose father or grandfather by the father's side were natural-born subjects, are now to be deemed such to all intents and purposes. 13 Geo. 3, c. 21.

[2] But not an alien-enemy. It is questionable whether an alien, during the time he is in possession of an estate, has not such an interest as will entitle him to a settlement (Com. Dig. Alien, c. 2); and as executor or administrator, he has such an interest in a term of years as renders him irremovable. A bastardy order cannot be made on the putative father, under stat. 7 & 8 Vic. c. 101, s. 2, in respect of a child born abroad. 13 Q. B. 769; 18 L. J. M. C. 216. An alien cannot present to a church. Wats. 106. His right vests in the Crown.

[3] Though resident abroad, 6 Bing. N.C. 90.

DERRY v. THE DUCHESS OF MAZARINE, 1 Ld. Raym. 147; S. C. Comb. 402; S. C. 1 Salk. 116.

The wife of an alien residing here, unless he be an alien-enemy, is not chargeable as a *feme sole*.[1]

To an action of *assumpsit* for wages and money lent, the defendant pleaded coverture and issue thereon. Cogent evidence was produced at the trial that the defendant's husband was alive in France. The jury found a verdict for the plaintiff, because the duchess had lived in this country for twenty years as a *feme sole*, and had contracted continually as such, and her husband was an alien-enemy. On a motion to set aside the verdict, on the supposition that it was against evidence and contrary to law, as a *feme covert* could not be sued as *sole* for debts and contracts without a divorce and alimony, though the husband might be a foreigner,—

Sed per Holt, C. J. "When the husband is an alien, and under an absolute disability to come and live here, the law perhaps will make the wife of such husband chargeable as a *feme sole* for her debts and contracts, for this case does not differ from the cases of *Lady Belknap* and *Lady Weyland*, cited Co. Litt. 112, b. 132; 1 Roll. Rep. 400; who were allowed to be able to sue and be sued on the abjuration or banishment of their husbands, as if they had been *sole*." Judgment for the plaintiff. See *ante*, p. 53, n.[3]; and 2 Mee. & W. 61–5; 1 Bing. N. C. 139; 6 Moo. P. C. C. 216; 2 C. & Kir. 887.

III. THE ALIEN ACT.[2]

(A) *Masters of Vessels are required by 6 Wm. 4, c. 11, to certify the Names, &c. of Aliens who land here.*

Masters of vessels are required by 6 Wm. 4, c. 11, to certify the names, &c. of aliens who land here.

The stat. 6 Wm. 4, c. 11 (which repeals the 7 Geo. 4, c. 54), s. 2, provides "that the master of every vessel which shall arrive in this realm from foreign parts shall, immediately upon his arrival, declare in writing to the chief officer of the customs at the port of arrival whether there is, to the best of his knowledge, any alien on board his vessel, and whether any alien hath to his knowledge landed therefrom at any place within this realm, and shall in his said declaration specify the number of aliens (if any) on board his vessel, or who have to his knowledge landed therefrom, and their names, rank, occupation, and description, as far as he shall be informed thereof; and if such master shall refuse or neglect to make such a declaration, or make a false one, he shall forfeit 20*l.*, and also 10*l.* for each alien on board at the time of such vessel's arrival, or who to his knowledge landed therefrom within this realm, whom such master shall have wilfully refused or neglected to declare."[3]

(B) *Alien must produce his Passport.*

And the alien is required to

By the 6 Wm. 4, c. 11, s. 3, it is enacted, that "every alien who shall

[1] *Vide post*, Husband and Wife; and see *Walford v. Duchesse de Pienne*, 2 Esp. 554. *Franks v. same*, id. 587. *Kay v. same*, 3 Camp. 123. *De Gillon v. Victoire Hurrell L'Aigle*, 1 B. & P. 357. *Marsh v. Hutchinson*, 2 B. & P. 226. Nor can the wife of an alien sue as *sole*. 2 Mee. & W. 65.

[2] By 7 & 8 Vic. c. 66, ss. 6–8, an alien coming to *settle* in any part of the United Kingdom may memorialise the Secretary of State, for the purpose of obtaining a certificate of naturalisation; which, on proving the truth of his memorial, will be granted to him. By means of this certificate, on taking the oath specified in the act, he will be invested with all the rights of a natural-born British subject, except that of becoming a privy councillor or member of parliament, and also with such other exceptions as may be specified in the certificate. Any foreign woman, moreover, married to a natural-born or naturalised subject, shall be taken to be herself naturalised, and have all the rights and privileges of a natural-born subject. Aliens may also be naturalised in any of the British colonies or possessions (10 & 11 Vic. c. 83), subject to confirmation or disallowance by the Queen.

[3] If such master neglect or refuse forthwith to pay the penalty, any officer of the customs may detain the vessel until the same be paid. 6 Wm. 4, c. 11, s. 2. The section, however, does not extend to mariners actually employed in the navigation of such vessel during the time they are so employed. (Id.) If such declaration be made, the chief officer of the customs at the port shall, within two days, transmit a copy of it to one of the Secretaries of State. (Id. s. 6.) These provisions are rarely observed.

arrive in any part of the United Kingdom from foreign parts shall immediately after such arrival present and show to the chief officer of the customs at the port of debarkation, for his inspection, any passport which may be in his possession, and declare in writing to such chief officer, or verbally make to him a declaration, to be by him reduced into writing, of the day and place of his landing, and of his name, and shall also declare to what country he belongs and is subject, and the country and place from whence he shall then have come. And if any such alien shall neglect or refuse to present and show any passport which may be in his possession, or to make such declaration, he shall forfeit the sum of 2*l*."[1]

produce any passport he may have, and declare to the chief officer of customs at the place of debarkation his name and country, &c.

IV. Of Alien-Enemies.

(A) *Who are.*[2]

(*a*) *Occupation of a Country by Belligerents.*

Hagedorn v. Bell, 1 M. & S. 450.

Per Cur. Although a state may be in the hostile possession of one of two belligerents, that will not necessarily constitute her subjects enemies to

The occupation of a country by one of two belligerents does not

[1] Upon the passport being produced, and the declaration made, the officer of the customs shall register the declaration, and grant the alien a certificate (6 Wm. 4, c. 11, s. 4) without fee, under a penalty of 20*l*. (id. s. 8), a copy of which certificate he shall transmit to one of the Secretaries of State. (Id. s. 5.) On quitting the realm the alien shall deliver the certificate to the officer of the customs, who shall insert therein that the alien has departed the realm, and shall transmit the same to the Secretary of State. (Id. s. 6.) All offences against this act shall be prosecuted within six calendar months after the offence committed; and all such offences shall be prosecuted before two or more justices of the peace of the place where the offence shall be committed, who are required, in default of payment of any pecuniary penalty, to commit the offender to the common gaol for any time not exceeding one calendar month, unless the penalty shall be sooner paid, and forthwith to report to one of his Majesty's principal Secretaries of State the conviction of every offender under this act, and the punishment to which he is adjudged: no writ of *certiorari* shall be allowed to remove the proceedings. (Id. s. 15.)

By sec. 11 it is provided, that nothing in it contained "shall affect any foreign ambassador or other public minister duly authorised, nor the domestic servant of any such ambassador or minister registered as such according to law, or being actually attendant upon such ambassador or minister, nor any alien who shall have been residing here three years, and shall have obtained a certificate thereof from one of the Secretaries of State; nor any alien under fourteen years of age in respect of any act done or omitted by him. And it is also provided that if any question shall arise, whether any person alleged to be an alien, and to be subject to the provisions of this act, be an alien or not, or is or is not subject to the said provisions, or any of them, the proof that such person is a natural-born subject, or a denizen, or naturalised, or that such person (if an alien) is not subject to the provisions of this act, by reason of any exception in the act or otherwise, shall lie upon the person so alleged to be an alien, and subject to the provisions of this act."

[2] An alien-enemy is a person acknowledging an allegiance to a state engaged in actual hostilities with this country. The war which converts an alien-friend into a foreign enemy is that species of conflict between nations which is undertaken and prosecuted by the constituted authorities. To legalise hostilities, they must not only be commenced or declared by one of the belligerent states, but such commencement or declaration must be made by that particular branch of the government which is invested by the constitution with this important prerogative. In England, the right of declaring war or making peace is vested exclusively in the sovereign. To ascertain whether or not a state of war or a state of amity or neutrality prevails, it was observed by Sir William Grant that it always belongs to the government of the country to determine in what relation any other nation or state stands towards it. It is a point upon which courts of justice cannot decide. A proclamation in the *Gazette* for reprisals is evidence of hostilities. 4 M. & S. 532. So a recital of the existence of warfare in an act of parliament is evidence of the fact. 2 Camp. 44. So an order in council declaring certain ports not hostile, which had formerly been so, is conclusive evidence that hostilities no longer prevail (3 Camp. 61); but with respect to a war between this country and another power, it has been decided that public notoriety is sufficient proof of the existence of such hostilities, and that special evidence of the fact need not be adduced. 11 Ves. 292.

necessarily make the inhabitants enemies to the other belligerent,

the other belligerent, if the sovereign power of the latter choose to permit a continuance of commerce with them.

(*b*) *A British Subject in a Foreign Country.*

O'Mealey v. Wilson and another, 1 Camp. 482.

A British subject will be deemed an alien-enemy if he reside and carry on trade in a foreign country at war with Great Britain.

The defendants to a *scire facias* against them as the bail of N., pleaded, 1st, That plaintiff, before and at the time of exhibiting his bill against N., was and is an alien-enemy under the government of France, and, further, that a war had been and is carried on by the government of France against this realm; 2d, That the plaintiff is a subject of France, residing and carrying on trade as a subject there; 3d, The same as the last, except adding that the plaintiff adheres to the government in that country.

The evidence disclosed that the plaintiff lived in France for many years, and still resided at Paris; but that he represented Ireland to be his native country. This conduct, it was contended, clearly made him an alien-enemy.

Per Lord Ellenborough, C. J. If the plaintiff is an Irishman by birth, and voluntarily resides and carries on trade in France, the defendants are clearly entitled to a verdict; since it is a general rule, that if a British subject resides in an enemy's country, without being detained as a prisoner of war, he is incapacitated from suing here.[1]

(*c*) *Residence in a Foreign Country.*

Roberts v. Hardy, 3 M. & S. 533.

But mere residence there does not necessarily constitute an adhering to the enemy.

Per Cur. Where a person sets out for a foreign country, then in amity with this, and it does not appear at what time he arrives there, or what time was afforded him after his arrival, and after the country became hostile, to take measures for quitting it during the period legally allowed, those disabilities which belong to a person who adheres to the king's enemies do not necessarily attach. *See* 3 B. & P. 113; 1 Camp. 482; 2 N. R. 97; 3 Rob. *Adm. R.* 17, &c.; 5 id. 91.

(B) *Rights and Disabilities of.*

(*a*) *An Action does not lie at the Suit of an Alien-Enemy.*

Brandon v. Nesbitt, 6 T. R. 23; S. P. Bristow v. Towers, 6 T. R. 35. Potts v. Bell, 8 T. R. 548. Casseres v. Bell, id. 166.

An action does not lie at the suit of an alien enemy.[2]

The declaration in an action on a policy of insurance on goods on board an American ship from L. to B. averred, that the policy was effected for the benefit of certain persons (naming them) who were interested in the goods; and that the ship was captured as prize.

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[1] A British-born subject domiciled in a neutral country is not prevented from trading with a country inimical to this. *Bell v. Reid*, 1 M. & S. 726. *Marryat v. Wilson*, 1 B. & P. 430. The disabilities of an alien-enemy rest on a neutral only so long as he adheres to a state at war with this country; not, therefore, from the time of being a prisoner of war; consequently, such a subject taken on board an enemy's fleet may, whilst in confinement, sue upon a contract entered into by him as a prisoner of war. *Sparenbergh v. Bannatyne*, 2 Esp. N. P. C. 581; S. C. 1 B. & P. 163; S. P. *Rex v. Despardo*, 1 Taunt. 29. And it seems that the king, in such an instance, may enforce the contract for the benefit of the crown. *Rex v. Despardo*, 1 Taunt. 29.

A father, though an alien-enemy, is entitled to the custody of his child, unless it appear that he intends to remove it abroad, or that he will abuse his right in any way detrimental to the child, *The King v. De Manneville*, 5 East, 221.

[2] Nor can the wife of an alien-enemy maintain an action in her own name on a contract made either before or during coverture. *De Wahl v. Braune*, 25 L. J. Ex. 343. An alien-enemy may be sued here, but it seems a foreigner cannot be compelled to come in under the Interpleader Act. 12 Mee. & W. 277.

Pleas, 1st, That the persons interested were aliens born in foreign parts, to wit, at B. in France; and that before the ship sailed a public and open war commenced, and was carried on. 2d, The plaintiff alleging that the persons were living in France, and enemies (without saying they were enemies born), and that the goods were sent from L. after the commencement of the war, for the purpose of being sold in France; the king's, &c. *Replication* to the first plea stated, that the persons interested in the insurance were, before the commencement of the suit, indebted to the plaintiff in sums of money exceeding the respective interests of those persons in goods insured; replication to the second plea stated, that the goods insured were not prohibited by any law at the time of the policy, and that they were put on board the ship before the commencement of the war. On demurrer, and joinder in demurrer,—

Per Cur. We are of opinion that judgment must be given for the defendant, on the ground that an action will not lie, either by or in favour of an alien-enemy. Indeed, we have not been able to find a single case in which an action has been supported by an alien-enemy. For, though it was held in *Ricord v. Bettingham*, 3 Burr. 1734,[1] that an action by an enemy on a ransom bill might be maintained, the action was not brought until peace was restored, which got rid of the objection.

Judgment for defendant. See *Alcenius v. Nygren*, 4 E. & B. 217; *ante*, 16.

(*b*) *And a Demand due to two, one of whom is an Alien-Enemy, cannot be enforced by the other.*

ROBERTS v. HARDY, 3 M. & S. 533.

Per Cur. If a debt is due to two persons, and one of them is an alien-enemy, the other cannot enforce its payment.[2] *See* 6 T. R. 413.

And a demand due to two, one of whom is an alien-enemy, cannot be enforced by the other.

(*c*) *A British-born Subject resident in a Hostile Country.*

WILLISON v. PATTISON, 7 Taunt. 439; S. C. 1 Moore, 133.

Per Cur. A contract with an alien-enemy in time of war cannot be enforced upon the return of peace in a British court of judicature, although the plaintiff be an English-born subject resident in the hostile country.[3] *See* 12 East, 225; 15 id. 260.

A British-born subject resident in a hostile country cannot, upon the return of peace, recover in a British Court upon contracts entered into by him in that country in time of war.

(*d*) *An Alien-Enemy Executor may maintain an Action.*

VILLA v. DIMOCK, Skinner, 370.

In an action by an executor for work and materials found for the defendant by the testator, the defendant pleaded that the father of the plaintiff, who was the testator, and the plaintiff, were alien-enemies, born in France; to which the plaintiff demurred.

Per Cur. The plea is bad; for it is not shown that the testator did not die before the war, so that the plaintiff might be executor and the action attach in him before hostilities commenced; and then being dead before he could become an alien-enemy, he might have an executor; and the action being *en autre droit*,

An alien enemy executor may maintain an action.

[1] In the subsequent case of *Authon v. Fisher*, 2 Dougl. 650, n., this doctrine was overruled, and the Court held that an alien-enemy cannot sue for the recovery of a right claimed to be acquired by him in actual war.

[2] A *habeas corpus* does not lie for an alien-enemy who is a prisoner of war, however ill-used or deceived. *The case of Three Spanish Sailors*, 2 Black. 1324.

[3] *See* Vattel, b. 3, c. 5, s. 70. An action will not lie in favour of a merchant residing in and carrying on trade in an enemy's country (*Albretcht v. Sussman*, 2 Ves. & B. 323); nor of a British subject living in and carrying on trade under the protection and for the benefit of an hostile state (*M'Connell v. Hector*, 3 B. & P. 113); *secus*, if his residence in an enemy's country was for the purpose of a trade licensed by the government of this country. *Ex parte Baylehole*, 18 Ves. 525.

it shall be maintained. Judgment for plaintiff. *See* 1 Bac. Ab. 5, 137; Co. Litt. 1296; 1 Salk. 46; 1 Ld. Raym. 202; 1 Lutw. 34; Com. Dig. Administrators, B. 6; Cro. Car. 9; Brownl. 31; 11 Vin. Abr. 94; 2 Vern. 126, Toll Executors, 34, 94; 1 Wms. *Exors.* 126, 127.

(*e*) *And an Alien-Enemy commorant here by the King's license*[1] *may Sue, though he came in the time of War.*

Wells v. Williams, 1 Lutw. 15; S. C. 1 Salk. 46; S. C. 1 Ld. Raym. 282.

And an alien-enemy commorant here by the king's license may sue, though he came in the time of war.

Debt upon bond. The defendant pleaded that the plaintiff was an alien-enemy, born in France of French parents, who were alien-enemies, and that he came to England *sine salvo conductu*, and concluded in bar. The plaintiff replied, that at the time of making the bond he was, and yet is, here *per licentiam et sub protectione domini regis*. The defendant demurred.

Per Cur. If an alien-enemy comes here *sub salvo conductu*, he may maintain an action; so if an alien-enemy comes here in time of peace, *per licentiam domini regis*, as the French Protestants did, and lives here *sub protectione*, and a war afterwards happens between the two nations, he may maintain an action: for suing is but a consequential right of protection, and, therefore, an alien-enemy who is here in peace under protection may sue on a bond, *aliter* of one commorant in his own country. *See* Fost. *Crim. Law*, 186.

(*f*) *Choses in Action belonging to an Alien-Enemy are forfeited to the Crown.*

Attorney-General v. Weedon and another, Parker, 267.

Choses in action belonging to an alien-enemy are forfeited to the Crown, after inquisition found

A Frenchman naturalised made his will during the war, and gave several legacies to Frenchmen living at Bourdeaux, and died; some of the legacies were payable immediately, and others when the legatees became of age: a commission issued to find this matter; in the meantime peace was established, and subsequently an inquisition was found and returned after debate.

Per Cur. We are of opinion, 1st, That choses in action vested in an alien-enemy are forfeited to the Crown; 2d, That this ought to be found by inquisition to make a title to the king, and that this is an inquisition of entitling and not of instruction; 3d, That the peace being concluded before the inquisition was taken, discharges the forfeiture; 4th, That the inquisition taken afterwards does not relate to set up the forfeiture, for the cause is but temporary, and that cause being removed before the king's title was found, the finding after should not relate back. See *Page's case*, 5 Co. 52; 19 Edw. 4, c. 1; 1 Saund. 361; Ra. Ent. 605; 2 Roll. Abr. 399; 8 Rep. 170; 1 Inst. 118; 3 Bulst. 27; Freem. Rep. 39.

(*g*) *The Queen may License, &c.*

Vandyck and others v. Whitmore, 1 East, 475; S. P. Vanharthals v. Halked, ib. 487, n.

The Queen may license a trading with the enemy, or may license it with certain qualifications, in which latter case the plaintiff must show a due conformity with the conditions imposed.

Per Cur. The King may, at common law, license a trading with an enemy's country. He may also qualify his license; in which case the party seeking to protect himself under such license must conform to the requisitions in it. *See* Abbott on Shipping, 170, 178. Marsh on Ins., by Shee, 45.

[1] The king may permit an enemy to come into the country without molestation, by granting him letters of safe-conduct. These letters ought to be under the Great Seal, and enrolled in Chancery. But passports under the king's sign manual, or licenses from his ambassadors abroad, are now more usually obtained, and are allowed to be of equal validity. Chit. *Prer. of Cr.* 48; 1 Bl. Com. 260.

(*h*) *Where the Trading is Licensed, &c.*

USPARICHI v. NOBLE, 13 East, 332.

And where a description of trading with an enemy's country is licensed, which would otherwise be illegal, such commerce must be regarded as legal, with all the consequences of its being legal.

The plaintiff, a Spaniard by birth, who had been domiciled as a merchant in England for several years, having purchased and shipped goods in a neutral vessel, on account of a correspondent, a native of and resident in Spain, obtained a license from the British Government for the vessel to proceed with her cargo on a voyage from an English port to a port in Spain. A policy was effected on the goods in the usual form, and stated to be made by the plaintiff, as well in his own name as in the name of any person to whom the same might appertain. The vessel, in the prosecution of the voyage, was captured by a French privateer, and carried into a port in Spain, where the vessel and cargo were condemned. At the time of the capture and condemnation, France and Spain were co-belligerent allies, at war with England. A verdict had been found for the plaintiff, subject to the opinion of the Court upon the preceding facts.

Per Cur. The plaintiff is entitled to recover, and the action is well brought in his name, there being an averment of interest in the purchase. The legal result of the license is, not only that the plaintiff, the person licensed, may sue in respect of such licensed commerce in an English court of law, but that the commerce itself is to be regarded as legalised for all purposes of its due and effectual prosecution. For the purpose of the licensed act of trading (but to that extent only) the person licensed is to be considered as virtually an adopted subject of this country; and his trading, as far as the disabilities arising out of a state of war are concerned, is British trading. The plaintiff and the Spanish purchaser of the cargo are actually privy to the objects of the British Government, and acting in furtherance of them, and in direct opposition to the laws and policy of their own country; and it cannot be contended to be illegal, to ensure a trade carried on in contravention of the laws of a state at war with us, and in furtherance of the policy of our country in its trade, and which this trade in question, sanctioned as it is by his Majesty's license, must be deemed to be. Judgment for the plaintiff.[1]

(*i*) *A License to an Alien-Enemy to go to an Enemy's Country.*

BOULTON AND ANOTHER v. DOBREE, 2 Camp. 163.

A license to an alien-enemy to go to an enemy's country and return here, does not authorise him to reside here.

To an action on a policy of insurance the defendants pleaded, that the action was brought on behalf of H. E., a Dane, an alien-enemy, not resident within the king's dominions under letters of safe-conduct, license, or protection. Issue was taken on the license, and *per Lord Ellenborough, C. J.*, "I am of opinion that a license from the king to H. E., then an alien-friend, authorising him to undertake a voyage to an enemy's country and to return to England, does not operate a license to reside, though the voyage did not terminate till after the commencement of hostilities with Denmark, and though he remain here unmolested." Plaintiff nonsuited.

(C) *Of the Plea of Alien-Enemy.*[2]

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[1] *See* 2 East, 473; 3 id. 193; 8 id. 1273; 9 id. 284; 10 id. 536; 1 Rob. *Adm. Rep.* 201–2; 1 Ld. Raym. 282; Dougl. 467. Where a trading with an alien-enemy's country is licensed by the king's authority, an insurance effected on the enemy's ship, as well as on the goods and specie put on board, for the benefit of the British subjects, by the British agent of both parties in whose name it was made, is valid, and an action may be supported by the agent against the underwriters. *Kensington v. Inglis & another*, 8 East, 273.

[2] The plea of alien-enemy must be certain in every particular. The defendant must state not only that the plaintiff was born in a foreign country now at enmity with the Crown, but that he came here without safe letters from the Crown (*Casseres v. Bell*, 8 T. R. 166. *Le Bret v. Papillon*, 4 East, 502. *Allen v. Hopkins*, 13 Mee. & W. 101); whereas, according to the general rule, such safe-con-

(*a*) *To an Action brought by an Agent on behalf, &c.*

BRANDON v. NESBITT, 6 T. R. 23.

To an action brought by an agent on behalf of an alien-enemy it cannot be be replied that the object of the suit was that the agent might with the proceeds pay himself a debt due to him from the alien.

The replication to a plea of alien-enemy stated that the persons interested in the insurance were, before the commencement of the suit, severally and respectively indebted to the plaintiff in divers sums of money, exceeding the respective interests of those persons in the goods insured, specifying what sum was due to the plaintiff from each of those persons respectively. Demurrer.

The Court were of opinion that judgment must be for the defendant, on the ground that an action would not lie either by, or in favour of, an alien-enemy. *See* 8 T. R. 71, 166, 548; 1 B. & P. 348; 3 id. 194; 1 Marsh. 158; 1 Camp. 75; 4 East, 396.

(*b*) *If a Plaintiff becomes an Alien-Enemy, &c.*

LE BRET v. PAPILLON, 4 East, 502.

If a plaintiff becomes an alien-enemy after action brought, his disability ought to be pleaded in bar of the *further* maintenance of the suit, and not of the action generally; but although the latter form is inaccurate, the Court are bound *ex officio* to give judgment against the plaintiff, if it appears upon the whole record that the plaintiff has no right to sue.

Per Cur. It appears upon the whole of this record, that although the plaintiff is now an alien-enemy, yet that he was not such at the time of exhibiting his bill. As a right to sue was well vested in the plaintiff at the time of the action brought, the plaintiff's disability ought to have been pleaded in the form in which pleas after the last continuance are generally pleaded, viz. that the plaintiff ought not further to have or maintain his action. It may be considered as a settled rule of pleading, that no matter of defence, arising after action brought, can properly be pleaded in bar of the action generally. But the Court may and ought to give such judgment of the whole record as ought to be given, without regard to the issues found, or to any imperfection in the prayer of judgment. The judgment, therefore, is, that the plaintiff be barred from further having and maintaining his action. *See* 2 Str. 1055; Rep. Temp. Had. 345; Winch, 75; 8 Co. 93; Plowd. 66; Dougl. 106, 112; Forts, 338; 2 Lutw. 1177; Co. Lit. 129 b.; 5 Com. Dig. 87; Plead. F. 4; 1 T. R. 125; 3 id. 186; 6 id. 23; 8 id. 166.

(*c*) *Judgment and Execution refused to be Stayed.*

VENBRYNEN AND OTHERS v. WILSON, 9 East, 320.

Judgment and execution were refused to be stayed on a summary application, because the plaintiffs, after verdict, became alien-enemies.

A motion was made that judgment and execution should be stayed in this case on bringing the money recovered by the verdict into Court, provided it should be deemed necessary, upon the ground that the plaintiffs had, since the verdict, become alien-enemies. No case was cited; but it was said that, in all instances where an *audita querela* would lie, the Court were in the practice of conceding summary relief.

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duct, if granted, might be averred by the plaintiff in reply, and would not need in the first instance to be denied by the defendant. The reason of this exception is, that the plea is regarded unfavourably by the courts, as having the effect of excluding the truth. Steph. *Plead.* 381, 5th ed. But where, although the plea did not negative that the plaintiff had obtained the certificate of the Secretary of State, it alleged that he was here without the license or permission of the Queen, it was held sufficient, since it implied that he had not the license of any person representing the Queen. *Alcenius v. Nygren*, 4 E. & B. 217; 24 L. J. Q. B. 19; 19 Jur. 16. Alien-enemy may be pleaded in abatement (*vide ante*, p. 15), or in bar; but as the Court will not in general allow a defendant to plead alien-enemy with another plea (*see* 1 B. & P. 222; 2 id. 72; 12 East, 206; 10 id. 326), it is in general advisable to plead alien-enemy in abatement; and where the plaintiff was not an enemy at the time the contract was made, as the right is only suspended, the plea must be in abatement. *See* 15 East, 260; 8 Camp. 152. Alien-enemy under a judge's order to plead issuably, is not an issuable plea. *Simeon v. Thompson*, 8 T. R. 71. And the plea of alien-enemy is so much discouraged by the Court, that where, after the defendant was under terms to plead issuably, war broke out between this country and that of which the plaintiff was a citizen, the Court refused to allow the defendant to plead alien-enemy. *Shepeler v. Durant*, 23 L. J. C. P. 140; 2 C. L. Rep. 729.

Per Cur. If the defendant has any such remedy, he may avail himself of it, if advised, but we cannot interfere in the manner proposed. Rule refused. *See* 1 Salk. 93.

(*d*) *The Plea of an Alien-Enemy not pleadable with another Plea.*

Thyatt v. Young, 2 B. & P. 72; S. P. Feron v. Ladd, 2 Black. 1326.

Per Cur. We can in no case allow a plea of alien-enemy, and any other plea inconsistent with that defence, to be pleaded together. The instances cited as to pleas of infancy and coverture are inapplicable, and do not support the claim to the right of pleading *non assumpsit* and alien-enemy. *See* also *Truckenbrodt v. Payne*, 12 East, 206. *Angerstein v. Vaughan*, 1 B. & P. 222 n.

The plea of alien-enemy cannot be pleaded with a plea that admits the plaintiff's right to sue in a British Court, as the general issue and alien-enemy.

(*e*) *Alien-Enemy cannot be given in evidence under the General Issue.*

Harman and others v. Kingston, 3 Camp. 153.

To an action on a policy of insurance, the defendant pleaded the general issue, and tendered evidence to show that the parties interested had become alien-enemies since the loss; but,—

Lord Ellenborough, C. J., was of opinion that it was no bar to the action, since it should have been pleaded in abatement, because, if the parties interested became aliens since the loss, it did not extinguish their right, but merely suspends the remedy. Besides, upon a defence which extends to the disability of the person, the strictest proof is required: here is no such proof; no evidence has been given where the parties were born, or that they were residing in an enemy's country at the time the action was brought. Verdict for plaintiff.

And upon a motion for a new trial, the Court acquiesced in the opinion delivered by *Ellenborough, C. J.* Rule refused.

Alien-enemy cannot be given in evidence under the general issue, and if it be pleaded, proof that the party was born in an hostile state, and that he resided in an enemy's country at the time the action was brought, is indispensable.

(*f*) *Nor Evidence that Plaintiff's Principal is.*

Flindt v. Waters, 15 East, 260.

Per Cur. The objection that the alien principal (on whose behalf the British agent is suing in his own name) has become an enemy since the agent's right to sue on this contract accrued, cannot be proved under the general issue. The defence of alien-enemy must be according to the nature of the transaction out of which it arises. It may go to the contract itself, and operate as a perpetual bar; or the objection may be purely personal, in respect to the capacity of the party to sue upon it. As the matter is pleaded at present it operates as a perpetual bar, whereas the present plea is of a temporary nature. During the continuance of war the plaintiff's right of action is suspended. The contract having been, however, legal at the time, it can be enforced upon the return of peace. The matter cannot be, therefore, pleaded as it now stands, there being no legal disability in the plaintiff on the record. *See* 6 T. R. 23, 35; 4 East, 410, 502; 8 id. 273.

Neither can the fact of an alien on whose behalf a British agent is suing, having become an enemy since the completion of the contract, be taken advantage of under the general issue.

ALIMENT. Sc. L. Support, maintenance. To aliment, to support or maintain.

ALIMONY.[1] *See* Dissolution of Marriage; Divorce Court; Husband and Wife; Judicial Separation.

(A) *What it is*, p. 298.
(B) *The Petition for*, p. 299.
(*a*) *Form of*, p. 299.

[1] From *alimonia: alere*, to nourish or support. An allowance made out of the husband's estate to a wife, either pending a suit for separation, or on its termination.

(C) *The Answer of the Husband*, p. 300.
(*a*) *May be objected to if insufficient*, p. 300.
(*b*) *And Witnesses examined in Support*, p. 300.
(D) *Motion for Decree*, p. 300.

(A) *What it is.*

Is an allowance to a wife ordered by the Divorce Court to be paid to her by the husband, after cohabitation has ceased, and either *pendente lite* or permanently.

The Divorce Court may decree alimony to the wife, either permanently[1] or *pendente lite*.[2]

By 20 & 21 Vic. c. 85, s. 32, "the Court may, if it shall think fit, on any such decree, order that the husband shall, to the satisfaction of the Court, secure to the wife such gross sum of money, or such annual sum of money, for any term not exceeding her own life, as, having regard to her fortune (if any), to the ability of the husband, and to the conduct of the parties, it shall deem reasonable, and for that purpose may refer it to any one of the conveyancing counsel of the Court of Chancery to settle and approve of a proper deed or instrument, to be executed by all necessary parties; and the said Court may in such case, if it shall see fit, suspend the pronouncing of its decree until such deed shall have been duly executed; and upon any petition for dissolution of marriage, the Court shall have the same power to make interim orders for payment of money by way of alimony, or otherwise, to the wife, as it would have in a suit instituted for judicial separation." *See* 28 L. J. P. & M. C. 26, 125; 29 id. 172.

The Court may inquire into the existence of marriage settlements and make orders with reference to the application of the property.

By 22 & 23 Vic. c. 61, s. 5, "the Court, after a final decree of nullity of marriage, or dissolution of marriage, may inquire into the existence of antenuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or a portion of the property settled, either for the benefit of the

[1] It is impossible to reduce to any rule the practice of the Court in making an allowance to the woman by way of permanent provision upon a dissolution of the marriage. The allowance made will have reference to the means and prospects of the husband, to the fortune brought by the wife, to her position in society, to the fact whether her misconduct or his forms the ground of dissolution. See *Pearce v. Pearce*, Macq. *Law of Div.* 151; *Keats v. Keats*, id. 150; and see *Mr. Tyrrell's case*, Macq. H. of L. 644. 31 L. T. 25, 104, 230, 302. 33 L. J. P. & M. C. 49.

[2] An award of alimony will not be made until a marriage *de facto*, at least, is proved or confessed. *Smyth v. Smyth*, 2 Add. 254. *Durant v. Durant*, 1 Hagg. Con. 116. The allowance by the Court is said to be discretionary; but that means a judicial not an arbitrary discretion. *Cooke v. Cooke*, 2 Phill. 41. The wife is entitled to alimony *pendente lite*, whether the petition is at her suit or at the suit of her husband; in either case, it is necessary she should be supported. *Wilson v. Wilson*, 2 Hagg. Con. 204. The petition for alimony ought to be presented at an early stage of the proceedings. *Brisco v. Brisco*, 2 Hagg. Con. 199. Where the wife is charged with adultery, the Court in some cases will order a smaller allowance than if there is no imputation against her; for, although her guilt cannot be assumed, still she ought, while labouring under such a charge, to be content to live in decent retirement. *Rees v. Rees*, 3 Phill. 390. The Ecclesiastial Courts generally awarded one-fifth of the husband's income, to be paid quarterly; but they did not adhere in all cases to this rule, and were guided by circumstances. *Brisco v. Brisco*, 2 Hagg. Con. 201. *Hawkes v. Hawkes*, 1 Hagg. 526. *Rees v. Rees*, 3 Phill. 391. *Kemp v. Kemp*, 2 Hagg. Ecc. 532. *Harris v. Harris*, 1 Hagg. 353. *Smith v. Smith*, 2 Phill. 152. *See* also *Bruere v. Bruere*, 1 Curt. 566. The Court will not, in deciding the amount of alimony, take into consideration an assignment by the husband of his property, if satisfied that it was colourable only. *Brown v. Brown*, 2 Hagg. 6. The award of alimony *pendente lite* will be computed from the return, and not from the issue of the citation (*Bain v. Bain*, 2 Add. 253); unless the return is purposely delayed by the husband, in which event it has been said the wife would be entitled to alimony from the date. *Loveden v. Loveden*, Phill. 209. Debts incurred by the wife since the return of the citation have been allowed to be deducted from the alimony. *Harris v. Harris*, 1 Hagg. 353. *Hamerton v. Hamerton*, 1 id. 27.

children of the marriage or of their respective parents, as to the Court shall seem fit."[1]

By 20 & 21 Vic. c. 85, s. 24, "in all cases in which the Court shall make any decree or order for alimony, it may direct the same to be paid either to the wife herself or to any trustee on her behalf, to be approved by the Court, and may impose any terms or restrictions which to the Court may seem expedient, and may from time to time appoint a new trustee, if for any reason it shall appear to the Court expedient so to do." And the Court may direct whether the alimony shall be paid to the wife or to a trustee, and may impose terms.

(B) *The Petition for.*

Rules of 1858.—R. 25. "When an affidavit establishing the *factum* of a marriage between the parties has been filed, and the husband has appeared in the cause, the wife may proceed to file a petition[2] for alimony, in substance according to the form No. 12, and a copy of such petition shall be served on the husband, or on his proctor, solicitor or attorney, on the same day." After filing affidavit establishing *factum* of marriage, and the husband has appeared, the wife may petition for alimony.

(*a*) *Form of Petition for Alimony* [prescribed by the Rules].

To the Judge Ordinary of Her Majesty's Court for Divorce and Matrimonial Causes.

C. B. v. A. B.

The day of 18

The Petition of C. B., the lawful wife of A. B.

Sheweth,

1. That the said A. B. has for many years carried on the business of at and from such business derives the net annual income of £

2. That the said A. B. holds shares of the Railway Company, amounting in value to £ and yielding a clear annual dividend to him of £

3. That the said A. B. is possessed of stock in trade in the same business of to the value of £

[*And so on for any other faculties which the husband may possess.*]

Your Petitioner therefore humbly prays,

That your Lordship will be pleased to decree her such sum or sums of money by way of alimony *pendente lite* [*or, permanent alimony*], as to your Lordship shall seem meet.

And your Petitioner will ever pray, &c.

Rules of 11 *Jan.* 1860.—R. 9. "The wife being petitioner in a cause may proceed to file her petition for alimony at any time after personal service of the citation on the husband, or after service in some other mode substituted by order of the Judge Ordinary, or after he has dispensed with service on the husband, provided the *factum* of marriage between the parties is established by affidavit filed in the cause; and a copy of such petition shall be served personally on the husband, or application may be made to the Judge Ordinary to substitute some other mode of service, or to dispense with the service of the same." After service of citation, the wife being petitioner, may petition for alimony, which petition must be served on the husband.

The same.—R. 10. "The wife, being the respondent in a cause, must enter an appearance to the citation before she can file a petition for alimony." If she be respondent, she must enter an appearance before she can file her petition for alimony.

[1] *See* 20 & 21 Vic. c. 85, s. 45, enabling the Court, in case the decree is at the petition of the husband, and the wife is entitled to property to her separate use, to order a settlement of such property for the benefit of the innocent party or the children.

[2] The wife is not required to make an affidavit in support of her allegation as to her husband's property. She is at liberty in her petition for alimony to put her husband's income high. It should state the sources from which it is derived. Property to which the husband is entitled in reversion or expectancy may be included. *Stone v. Stone*, 3 Curt. 341.

(C) *The Answer of the Husband.*

The husband must file his answer to the petition within eight days. But he cannot answer the petition until after appearance to the citation.

Rules of 1858.— R. 26. "The husband shall, within eight days after a petition for alimony has been filed, file his answer thereto upon oath, and on the same day deliver a copy thereof to the wife, or to her proctor, solicitor, or attorney."[1]

Rules of 11 *Jan.* 1860.— R. 10. "The husband, being the respondent, must enter an appearance to the citation before he can file an answer to a petition for alimony."

(*a*) *May be objected to if insufficient.*

The wife may object to the sufficiency of the answer of the husband, and move for a fuller answer, or to examine the husband in open court.

The same.— R. 12. "If the wife objects to the answer of the husband to her petition for alimony as insufficient, she may move the Court to order a further and fuller answer to be given by him, or to order the attendance of the husband on the hearing of the petition, for the purpose of being examined thereon in open court."

(*b*) *And Witnesses examined in Support.*

If not satisfied with the answer, the wife may examine witnesses in support of her petition.

Rules of 1858.— R. 27. "The wife, subject to any order as to costs, may, if not satisfied with the husband's answer, examine witnesses in support of her petition for alimony."

No affidavits can be used in opposition to averments in petition or answer, save in reply to allegation of wife having property of her own.

Rules of 11 *Jan.* 1860.— R. 13. "No affidavits can be read or made use of as evidence in support of, or in opposition to, the averments contained in a petition for alimony, or in answer to such a petition. But if the answer alleges that the wife has property of her own, she may answer that allegation by affidavit."

(D) *Motion for Decree.*

After appearance, the wife may move the Court to decree her alimony *pendente lite*.

Rules of 1858.— R. 28. "After the answer of the husband has been filed, the wife may, at its next sitting, move the Court to decree her alimony *pendente lite:* provided that the wife shall, two days at least before she so moves the Court, give notice to her husband, or to his proctor, solicitor, or attorney, of her intention so to do."

The same.— R. 29. "A wife who has obtained a decree of judicial separation in her favour, and has previously filed her petition for alimony, may, unless in cases where an appeal to the full Court is interposed, move the Court to decree her permanent alimony: provided that she shall, eight days at least before making any such motion, give notice to the husband, or to his proctor, solicitor, or attorney, of her intention so to do."

After wife has obtained a decree for judicial separation, and has filed a petition for alimony, she may move for permanent alimony.

Rules of 11 *Jan.* 1860.— R. 11. "The wife may at any time after the answer of the husband to her petition for alimony has been filed, or, in case no answer has been filed, at any time after the expiration of the period allowed for filing an answer, proceed to examine witnesses in support of her petition, and move the Court to decree her alimony *pendente lite*, the same notice of such proceedings and motion as required by rule 28 being first given to the husband, or, in case an appearance has been entered for him, to his proctor, solicitor, or attorney, unless the Court, on motion made, shall have dispensed with the service of such notice."

The wife may after answer, or expiration of time for answering her petition, proceed to examine wit-

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[1] The Court will presume that the husband has in his answer made every possible deduction. *Rees v. Rees*, 3 Phill. 389. It will be construed strictly against him. *Robinson v. Robinson*, 2 Lee, 594. The Court will not require the husband to make a disclosure of partnership concerns, for the rights of his partners might thereby be injuriously affected. *Higgs v. Higgs*, 3 Hagg. 473. In *Harris v. Harris* (1 Hagg. 352) it was held that the answer ought to specify a policy of insurance, capable of being converted into money, and also shares in an insurance company. The answer of a brother of the respondent, who acted as his attorney, has been admitted, where the respondent himself was in India. *Fraser v. Fraser*, 1 Hagg. 527.

ALIO intuitu. *Under a different aspect.* 4 Rob. *Adm. Rep.* 151.

ALIQUID conceditur ne injuria remaneat impunita quod alias non concederetur. *Something will be conceded to prevent a wrong remaining unredressed which otherwise would not be conceded.* Co. Litt. 197 b.

nesses in support of it, and move the Court for a decree of alimony *pendente lite.*

ALIQUIS non debet esse judex in propriâ causâ, quia non potest esse judex et pars. *It is not allowed that a man should be judge in his own case, because he cannot be judge and party.*[1] Co. Litt. 141 a.

I. Interested Judges, p. 301.
II. „ Magistrates, p. 302.
III. „ Jurymen, p. 303.
IV. „ Arbitrators, p. 303.
V. „ Stewards of a Race, p. 303.

I. Interested Judges.

Dimes v. The Grand Junction Railway Comp. 3 H. L. C. 759.

A public company which was incorporated, filed a bill in equity against a landowner in a matter largely involving the interest of the company. The Lord Chancellor had an interest as a shareholder in the company to the amount of several thousand pounds, a fact which was unknown to the defendant in the suit. The cause was heard before the Vice-Chancellor, who granted the relief sought by the company. The Lord Chancellor, on appeal, affirmed the order of the Vice-Chancellor. The landowner appealed to the House of Lords, seeking to reverse the judgment, on the ground that the Lord Chancellor was disqualified by interest.

The possession by a judge of shares in a joint-stock company, party to a suit in which their interest is involved, is a disqualification.[2]

In answer to questions submitted by the House, the judges unanimously returned the following answer:—

"In the case suggested, the order or decree of the Lord Chancellor was not absolutely void on account of his interest, but voidable only. If this had been a procedure in an inferior court, one to which a prohibition might go from a Court in Westminster Hall, such a prohibition would be granted pending the

The judgment is not void, but voidable only, where an interested judge has acted.

[1] This is a well-established maxim of English law. The common law establishes that the slightest degree of pecuniary interest is an insuperable objection to the judge taking any part in disposing of the case. *Matthews v. Ollerton*, 4 Mod. 226. Relationship to either of the parties is also a ground for a judge declining to hear the cause. In *Becquet v. Lempriere*, 1 Knapp's R. 376, the Privy Council decided that a judge could not sit in that character in a cause wherein his deceased wife's nephew was interested, because the feelings of such collateral relationship are not to be considered as determining with the death of the wife. This evinces that the slightest degree of affinity would induce a judge to decline interfering. So great is the delicacy observed by the judges in entertaining jurisdiction in any case where there would be the possibility of doubt, whether they were free from bias, that it is not unusual for them to decline to interfere in a cause after their elevation to the bench on account of their having, even a long time before, been concerned in it as counsel. Anciently, a judge could not try a civil or criminal case in the county in which he was born or inhabited; but that impediment and exclusion being found exceedingly inconvenient, and an indulgence of unnecessary jealousy, was expressly altered by statute. 3 Bl. Com. 59; 3 Chit. *Gen. L.* 9.

[2] See *Mayor of Hereford's case*, 1 Salk. 396. *Brooks v. The Earl of Rivers*, Hardr. 503. *Bonham's case*, 8 Co. Rep. 118. *City of London v. Wood*, 12 Mod. 669. *Bridgman v. Holt*, Show. P. C. 111. *Rex v. Yarpole*, 4 T. R. 71. *Great Charte v. Kennington*, 2 Str. 1173. *Rex v. Justices of Essex*, 5 M. & S. 513; 2 Roll. Abr. 92, Judges, A., pl. 11. So strongly is it a principle of constitutional law that a man cannot be judge in his own cause, that in an early case it was said, "even an act of parliament made against natural equity, as to make a man a judge in his own case, is void in itself; for *jura naturæ sunt immutabilia*, and they are *leges legum*." *Day v. Savadge*, Hob. 85. And this principle is expressly recognised and enforced in perhaps all civilised codes. *See* Justinian's *Inst.* b. 4, tit. 5, law 1; Code de Procedure Civile, part 1, b. 2, tit. 21, art. 378; Code of New York, 1850, c. 16, art. 3, s. 188.

proceedings, upon an allegation that the presiding Judge of the Court was interested in the suit: whether a prohibition would go to the Court of Chancery, it is unnecessary to consider.

And remedy may be by prohibition, or by bringing error in fact.[1]

"If no prohibition should be applied for, and in cases where it could not be granted, the proper mode of taking the objection to the interest of the judge would be in courts of common law, by bringing a writ of error for error in fact, and assigning the interest as the cause of error. The former course was stated to be proper in the case of *Brooks v. Earl Rivers*, Hardr. 503, it being suggested that the Earl of Derby, who was Chamberlain of Chester, had an interest in the suit; and the Court held, that where the Judge had an interest, neither he nor his deputy can determine a cause or sit in court; and if he does, a prohibition lies.

"The latter course was adopted in the case of *The Company of Mercers, &c. v. Bowker*, 1 Str. 639, where it was assigned for error in fact, on the record of a judgment for the Company of Mercers in the Mayor's Court at Chester, that after verdict, and before judgment, one of the Company of Mercers became mayor; and for that reason the judgment was reversed in the Court of Quarter Sessions, and that judgment of reversal affirmed in the King's Bench.

"In neither of these cases was the judgment held to be absolutely void. Till prohibition had been granted in one case, or judgment reversed in the other, we think the proceedings were valid, and the persons acting under the authority of the Court would not be liable to be treated as trespassers. The many cases in which the Court of King's Bench has interfered (and may have gone to a great length), where interested parties have acted as magistrates, and quashed the orders made by the Court of which they formed part, afford an analogy. None of these orders is absolutely void: it would create great confusion and inconvenience if it was. The objection might be one of which the parties acting under these orders might be totally ignorant till the moment of the trial of an action of trespass for the act done; but these orders may be quashed after being removed by *certiorari*, and the Court shall do complete justice in that respect.

"We think that the order of the Chancellor is not void; but we are of opinion, that as he had such an interest which would have disqualified a witness under the old law, he was disqualified as a judge; that it was a voidable order, and might be questioned and set aside by appeal, or some application to the Court of Chancery, if a prohibition would not lie." *See* 12 Beav. 63; 13 Jur. 503; 19 L. J. Ch. 345.

II. Interested Magistrates.

Reg. v. Commissioners for the Paving of Cheltenham, 1 Q. B. 467; S. C. 19 J. D. 167.

If justices partners in a company assessed to a rate the subject of an appeal take part in deciding the question the order is voidable, even although there would have been a majority against the rate if they had retired.[2]

On an appeal to quarter sessions against a rate, eleven to eight of the magistrates held that certain evidence which was objected to was admissible, three of the eleven being partners in a company to which belonged certain premises assessed to the rate in the name of the occupier, and the sessions quashed the rate. The order having been brought up by *certiorari*, on motion to quash the order upon this ground,—

Per Cur. Three magistrates who were interested took a part in the decision. It is enough to show that this decision was followed by an order. We will not inquire what the particular question was, nor how the majority was made up, nor what the result would have been if the magistrates who were interested had retired. The Court was improperly constituted, and that rendered the decision invalid. See *Reg. v. Aberdare Canal Co.* 14 Q. B. 854.

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[1] It is no objection in a cause tried in the Consistory Court that the bishop of the diocese was interested in the cause. 1 C. & B. 609; 22 L. J. Q. B. 169.

[2] See *Reg. v. Inhabitants of Rishton*, 1 Q. B. 479, n. *Reg. v. Justices of Hertfordshire*, 6 Q. B. 753. A justice of the peace, who is interested in a matter pending before the Court of Quarter Sessions, cannot take any part in the proceeding, unless, indeed, all

III. Interested Jurymen.

Esdaile v. Lund, 12 Mee. & W. 734.

Scire facias by the plaintiffs, as trustees of a joint-stock banking company.

The same principle is recognised as applicable to jurymen.[1]

The Court made the plaintiffs undertake to strike out of the list of special jurymen the names of any who were shareholders, saying it was more favourable for the defendant that such course should be pursued than that he should have the right of challenging. *See* Car. & M. 13; 13 Q. B. 815.

IV. Interested Arbitrators.

Matthew v. Ollerton, 4 Mod. 226.

This was an action upon an award, and a verdict for the plaintiff. It was moved in arrest of judgment, that the matter in difference was referred to the plaintiff himself, who made an award, *sed non allocatur*. And the case of Serjeant Hardy was remembered by *Dolben, J.*, namely, the serjeant took a horse from my Lord of Canterbury's bailiff for a deodand, and the archbishop brought his action; and it coming to a trial at the assizes at Kent, the serjeant, by rule of court, referred it to the archbishop to set the price of the horse, which was done accordingly; and the serjeant afterwards moved the Court to set aside the award for the reason now offered, but it was denied by *Lord Hale* and *per totam curiam*.[2]

If a defendant agree to refer the matter to the plaintiff, he cannot object to the award that the arbitrator was a judge in his own cause.

Morgan v. Morgan, 1 Dowl. 611.

This was an application to set aside an award, on the ground that the arbitrator was indebted to the plaintiff, and that this fact was unknown to the defendant at the time he entered into the agreement to refer.

Per Cur. No case has gone the length of saying that an award can be set aside because the arbitrator is indebted to one of the parties. It is, certainly, a matter of suspicion, but is not itself sufficient. No corruption is shown. Rule discharged. See *Drew v. Drew*, H. L. quoted Russ. on Arb. 108.

And an award will not be set aside on the ground merely that the arbitrator was indebted to one of the parties, although the other party was ignorant of the circumstance.

V. Interested Stewards of a Race.

Ellis v. Hopper, 3 H. & N. 766; 28 L. J. Ex. 1; 22 Jur. 1025.

Interpleader issue to determine the right to stakes of a horse-race. The plaintiff claimed as the owner of a horse which had been declared the winner by a majority of the stewards, who, by the conditions of the race, were constituted the judges to determine disputes. The defendant disputed the validity of the decision, on the ground that one of the stewards had a small bet depending on the race against the defendant's horse. The learned Judge at the trial ruled that the decision of the stewards was conclusive. On motion for a new trial,—

This principle is not applicable to persons appointed as stewards of a race, and the circumstance that such steward has a

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parties know that he is interested, and consent either tacitly or expressly to his presence and interference. In such a case it has been held, that the presence of one interested magistrate will render the Court improperly constituted, and vitiate the proceedings, it being no answer to the objection that there was a majority in favour of the decision without reckoning the vote of the interested party. *Reg. v. Justices of Hertfordshire*, 6 Q. B. 753. And on the same principle, where a bill was preferred before the grand jury at the assizes against a parish for non-repair of a road, the liability to repair which was denied by the parish, the Court of Queen's Bench granted a criminal information against the parish, on the ground that two members of the grand jury were large landed proprietors therein, took part in the proceedings on the bill, and put questions to the witnesses examined before them; one of them, moreover, having stated to the foreman that the road in question was useless, and the bill having been thrown out by the grand jury. *Reg. v. Upton St. Leonards*, 16 L. J. M. C. 84.

[1] But one being interested where no collusion is no ground for new trial. 28 L. J. Ex. 2.

[2] *See* also *Hunter v. Dennison*, Hardr. 42. *Parker v. Burroughs*, Collis, *Parl. C.* 257. *Earl v. Stocker*, 2 Vern. 251. *Morgan v. Pirnie*, 9 Bing. 672. *Owdy v. Gibbons*, Comb. 100. *Elliott v. South-Devon Railway Co.* 2 De Gex & S, 17; 12 Jur. 45.

bet depending on a race upon which he arbitrates, will not invalidate their decision as to who is the winner.

Per Cur. The considerations which make it necessary that a judge should have no interest in a matter upon which he adjudicates do not apply to stewards of a race. They are not even, strictly speaking, arbitrators: they are persons appointed with a view to determine on the spot any disputes with reference to the race, in order to avoid litigation or arbitration. Putting the steward who made the bet out of the way, there still remains a majority in favour of the plaintiff; and there is no reason to imply any disqualification on the ground of betting, which it was not improbable the stewards would do, and which might have been expressly made a disqualification had it been considered desirable. Rule refused. *See* 28 L. J. Q. B. 123; 14 Mee. & W. 193; 22 L. J. C. P. 176.

ALIUD est celare, aliud tacere. *It is one thing to conceal, another to keep silence.* 3 Burr. 1910. This maxim applies to cases of fraudulent representation on the sale of property. If a thing is dressed up purposely to conceal defects, and make it appear other than it is, and so deceive a purchaser, the purchaser thus deceived has his action of deceit as much as if the misrepresentation had been by words. As where the vendor of a house, being conscious of a defect in a main wall, plastered it up and papered it over, with a view to conceal the defect. *Anon.* cited in *Pickering v. Dowson*, 4 Taunt. 785. So where a lease was sold which the vendor knew to be forfeited, but failed to disclose the forfeiture, and the purchaser bought the lease in ignorance that it had been forfeited, an action of deceit was maintained. *Stevens v. Adamson*, 2 Stark. 422. But if the defect is patent, and can readily be examined by proper examination, and the purchaser has the means of examination at hand, there is no fraudulent concealment, and the maxim *Caveat emptor* applies. "If I sell a horse that has lost an eye, no action lies against me for so doing; but if I sell him with a false or counterfeit eye, there an action lieth." *Southerne v. Howe*, 2 Roll. Rep. 5; Add. on *Torts*, 652. Either party to a contract may be innocently silent as to grounds open to both to exercise their judgment upon. *Per Lord Mansfield, C. J.*, 3 Burr. 1910. *See* 1 Sugd. V. & P. 1; 1 Hill on *Torts*, 4 n. *Ante*, Acquiescence, p. 128; Admission, p. 195.

ALIUD est possidere, aliud esse in possessione. *To possess is one thing, another to be in possession.* Hob. 103.

ALIUNDE. *From another source.* *See* judgment of Lord Ellenborough, 2 East, 567.

ALL.[1]

[1] The application of this word has very frequently been the subject of legal controversy when used in wills, deeds, powers of attorney, submissions to arbitration, &c. "All my estate," in a will, has been held to carry a fee. 6 Mod. 106, 110; 8 Ves. jun. 604; 4 Kent's *Com.* 535. The words "all his estate" will pass everything a man has; but if the word "all" is coupled with the word "personal," or "a local description," then the gift will pass only personalty or the specific estate particularly described. *Lord Mansfield, C. J.*, Cowp. 299, 306. The question whether the words "all my estate and effects" will include a real estate or not, depends, first, upon the immediate context of the will; secondly, upon the general form and scheme of the will, as demonstrating the intention. *Lord Eldon, C.* 9 Ves. jun. 137, 142. "All my estate real and personal whatsoever," carries a fee, although immediately followed by words descriptive of local situation, as, "that is to say, my land, houses, and all the other buildings situate at S." 7 Taunt. 35; citing 8 Term R. 64. "All my personal estate," in a will, was held to be confined to such part only as should not be otherwise disposed of. 9 Mod. 93. "All my temporal estate" was construed in 3 P. Wms. 295. "All my property, both personal and real, for ever," passes a fee. 11 East, 518. "All and every my property," is as comprehensive as "all I am worth." *Lord Ellenborough*, 14 East, 370. "All my real property," in a will, has been held to import the same as "all my estate." 18 Ves. jun. 193. "All I am worth," without other words to control them, pass real as well as personal estate. 1 Bro. C. C. 437. "All I am possessed of," in a will, construed 5 Ves. jun. 811, 816. "All debts due to me, and whatever debts may be due to me," in a will, pass a bill of exchange and a balance of cash at a banker's. 1 Mer. 541 n.

ALLEGARI non debuit quod probatum non relevat. *That which is irrelevant in proof ought not to be alleged in pleading.*

ALLEGIANCE.[1]

REX v. RICHARD FULLER, 2 Leach, C. L. 790; S. C. 1 East, P. C. 92.

This was an indictment on the 37 Geo. 3, c. 70, which enacts, "that any person who shall maliciously and advisedly endeavour to seduce any person serving in his Majesty's forces by sea or land, from his duty and allegiance to his Majesty, shall, on being legally convicted of such offence, be adjudged guilty of felony, without benefit of clergy. It contained two counts; the first, that the prisoner being, &c. did feloniously, maliciously, and *advisedly endeavour* to seduce one M. L. to become a deserter, whilst in his Majesty's service, and from his duty and allegiance, contrary to the form of the statute. The second count was similar to the first, alleging that the prisoner did, &c. endeavour to excite the said M. L. to commit an act of mutiny, and to act traitorously and be guilty of mutinous practices, contrary to the form of the statute. The prisoner was convicted, but judgment was respited, in order that the opinion of the Judges might be taken on the sufficiency of the indictment.

An indictment on the 37 Geo. 3, c. 70, for endeavouring to seduce any soldier from his allegiance, need not state *how* and by *what* acts the prisoner endeavoured to effect his purpose, nor that he knew the person he was seducing to be a soldier.

The Judges were of opinion, 1st. that an endeavour to entice is a conclusion of fact arising out of a multiplicity of circumstances, consequently the offence was fully comprehended by the term "endeavour;" 2nd. that the charge necessarily includes privity, but, as a more comprehensive answer, that the word "advisedly" was equivalent to the word "knowingly."

21 & 22 Vic. c. 48, after reciting that it is expedient that one oath should be substituted for the oaths of allegiance, supremacy, and abjuration, now required by law, by sec. 1 enacts, that "instead of the oaths of allegiance, supremacy, and abjuration, where the same are now by law required to be taken, and taken and subscribed, the following oath shall be taken and

The oath of allegiance.

See 3 id. 434. In a release, "all claims and demands whatsoever" has been held to be restricted to the subject-matter of the release. 1 Edwards, *Ch. R.* 34. A "release of all demands," will not release a rent before it is due. 2 Show. 90. Nor will it bar a future duty. 2 Mod. 281. In a power of attorney, "all business" is to be construed with reference to the subject-matter, *e. g.* confined to all business necessary for the receipt of money. 9 Bing. 608; 1 Taunt. 356. The largest powers must be construed with reference to the subject-matter. *See* Arbitrators; Covenant; Devise; Power of Attorney; Release; Will; and 9 Mee. & W. 323.

[1] Ligeance is derived *à ligando*, being the highest and greatest obligation of duty and obedience that can be. Legiance is the true and faithful obedience of a liegeman or subject to his liege lord or sovereign. *Ligeantia est vinculum fidei; ligeantia est legis essentia. See* Co. Litt. 129 a. *Macdonald's case*, Fort. 59; Dy. 300 b; Cro. Jac. 539; Hob. 271.

In the words of Mr. Justice Story, "Allegiance is nothing more than the tie of duty of obedience of a subject to the sovereign under whose protection he is; and allegiance by birth is that which arises from being born within the dominions and under the protection of a particular sovereign. Two things usually occur to create citizenship: first, birth locally within the dominions of the sovereign; secondly, birth within the protection and obedience, or, in other words, within the legiance of the sovereign. That is, the party must be born within a place where the sovereign is at the time in full possession and exercise of his power; and the party must also at his birth derive protection from, and consequently owe obedience or allegiance to, the sovereign as such *de facto*. There are some exceptions which are founded upon peculiar reasons, and which indeed illustrate and confirm the general doctrine." 3 Peter's R. (U. S.) 155.

The duty of allegiance, whether natural or local, is founded in the relation which the person stands in to the Crown, and in the privileges which he derives from that relation. Local allegiance is founded in the protection a foreigner enjoys for his person, his family, and effects, during his residence here; and it ceases whenever he withdraws with his family and effects. Natural allegiance is founded in the relation in which every man stands to the Crown, considered as the head of that society whereof he is born a member, and on the peculiar privileges which he derives from that relation, which are with great propriety called his birthright. This birthright nothing but his own demerit can deprive him of; it is indefeasible and perpetual; and consequently the duty of allegiance, which arises out of it, and is inseparably connected with it, is, in

subscribed :—I, A. B., do swear that I will be faithful and bear true allegiance to her Majesty Queen Victoria, and will defend her to the utmost of my power against all conspiracies and attempts whatever which shall be made against her person, crown, or dignity; and I will do my utmost endeavour to disclose and make known to her Majesty, her heirs and successors, all treasons and traitorous conspiracies which may be formed against her or them; and I do faithfully promise to maintain, support, and defend, to the utmost of my power, the succession of the Crown, which succession, by an act intituled 'An Act for the further Limitation of the Crown, and better securing the Rights and Liberties of the Subject,' is and stands limited to the Princess Sophia, Electress of Hanover, and the heirs of her body, being Protestants, hereby utterly renouncing and abjuring any obedience or allegiance unto any other person claiming or pretending a right to the Crown of this realm; and I do declare that no foreign prince, person, prelate, state, or potentate, hath, or ought to have, any jurisdiction, power, superiority, pre-eminence, or authority, ecclesiastical or spiritual, within this realm; and I make this declaration upon the true faith of a Christian. So help me God."

In the case of Quakers,

Sec. 4 provides that "every person of the persuasion of the people called Quakers, and every other person now by law permitted to make his solemn affirmation or declaration instead of taking an oath, shall, instead of taking and subscribing the oath hereby appointed, make and subscribe a solemn affirmation in the form of the oath hereby appointed, substituting the words 'solemnly, sincerely, and truly declare and affirm,' for the word 'swear,' and omitting the words 'and I make this declaration upon the true faith of a Christian. So help me God;' and the making and subscribing of such affirmation by a person hereinbefore authorised to make and subscribe the same, with such omission as aforesaid, shall have the same force and effect as the taking and subscribing by other persons of the oath hereby appointed."

In the case of persons professing the Jewish religion.

21 & 22 Vic. c. 48, s. 5, after reciting "that by a certain act (9 Geo. 4, c. 17), intituled 'An Act for Repealing so much of the several Acts as imposes

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consideration of the law, likewise inalienable and perpetual. Fost. C. L. 183.

Natural allegiance is such as is due from all men born within the dominions of the Crown immediately upon their birth. This allegiance cannot be abjured by the subject. *Nemo patriam in quâ natus est exuere nec ligeantiæ debitum ejurare possit.* It cannot be forfeited, cancelled, or altered by any change of time, place, or circumstance, nor by anything but the united concurrence of the legislature; *originæ propriâ neminem posse voluntate suâ eximi manifestum est.* Cod. 10, 30, 4. *See* 1 Bl. Com. c. 10; Foster, *Cr. Law*, 104; Hale, P. C. 68: Judgment in *Wilson v. Marryat*, 8 T. R. 45; S. C. affirmed in error, 1 B. & P. 430. *Jackson v. White*, 20; Johnson, R. (U. S.) 313. *Shencks v. Dupont*, 3 Peter's R. (U. S.) 246. *Inglis v. Trustees of the Sailors' Snug Harbour*, id. 122. But *see* Vattel, b. 1. c. 19, ss. 220–228. Hence, although a British subject may, in certain cases, forfeit his rights as such by adhering to a foreign power, he yet remains always liable to his duties; and if in the course of such employment he violates the laws of his native country, he will be exposed to punishment when he comes within reach of her tribunals. 2 Steph. Com. 425.

The tie of natural allegiance may, however, be severed with the concurrence of the legislature; for instance, upon the recognition of the United States of America as free, sovereign, and independent states, it was decided that the natural-born subjects of the English Crown adhering to the United States ceased to be subjects of the Crown of England, and became aliens and incapable of inheriting lands in England. *Doe d. Thomas v. Ackland*, 2 B. & C. 779. *Doe d. Stansbury v. Arkwright*, 5 Car. & P. 575.

Local allegiance is such as that which is due from an alien or stranger-born whilst he continues within the dominion and protection of the Crown; but it is merely of a temporary nature, and ceases the instant such stranger transfers himself from this kingdom to another. For, as the prince affords his protection to an alien only during his residence in this realm, the allegiance of an alien is confined, in point of time, to the duration of such his residence, and in point of locality, to the dominions of the British empire (1 Bl. Com. 370; Chit. *Pre. Crown*, 16. See *Wolff v. Oxholm*, 6 M. & S. 92. *Rex v. Johnson*, 6 East, 503); the rule being that *protectio trahit subjectionem, et subjectio protectionem. Calvin's case*, 7 Rep. 51. *Craw v. Ramsay*, Vaughan, R. 279; Co. Litt. 65. And this applies to aliens living here, even though their sovereign is at war with this country, for they equally enjoy the protection of the Crown. Chit. *Pre. Crown*, 12, 13.

the necessity for receiving the Sacrament of the Lord's Supper' as a qualification for certain offices and emoluments, a certain declaration is prescribed to be taken in the cases in the said act mentioned; and that by an act 8 & 9 Vic. c. 52, intituled 'An Act for the Relief of Persons of the Jewish Religion elected to Municipal Offices,' a certain other declaration was permitted to be taken in certain cases by persons professing the Jewish religion, instead of the declaration required to be made and subscribed by the said act, 9 Geo. 4, c. 17; and that it is right to extend the benefit of the last-recited act to all other cases in which the declaration set forth in the said act (9 Geo. 4, c. 17) is by law required to be taken, enacts, 'that in all cases which are not within the provisions of the said act (8 & 9 Vic. c. 52), in which any other of her Majesty's subjects are required by law to make and subscribe the declaration set forth in the said act (9 Geo. 4, c. 17), her Majesty's subjects professing the Jewish religion shall be required instead thereof to make and subscribe the declaration set forth in the said act (8 & 9 Vic. c. 52), which declaration shall, with respect to such person professing the Jewish religion, be of the same force and effect as if he made and subscribed the declaration by the said act (9 Geo. 4, c. 17), and shall be made and subscribed at the same times and places respectively, and preserved of record in the same manner as the last-mentioned declaration is now by law required to be made, subscribed, and preserved." [1]

ALLOCATIONE facienda. A writ allowing to an accountant such sums of money as he has lawfully expended in his office. It is addressed to the Lord Treasurer and the Barons of the Exchequer.

ALLOCATUR, The Master's.[2]

See Costs; Taxation.

(A) *Is conclusive as to the Amount of Costs*, p. 307.

(B) *How enforced*, p. 308 n.

(A) *Is conclusive as to the Amount of Costs.*

The *allocatur* is conclusive as to the amount of costs, unless set aside or altered by the Court.

By 6 & 7 Vic. c. 73, s. 43, upon the taxation and settlement of any attorney's bill, "the certificate of the officer by whom such bill shall be taxed shall (unless set aside or altered by order, decree, or rule of Court) be final and conclusive as to the amount thereof,[3] and payment of the amount certified to be due, and ordered to be paid, may be enforced according to the course of the Court in which such reference shall be made;[4] and in case such reference shall be made in any court of common law, it shall be lawful for such Court, or any Judge thereof, to order judgment to be entered up for such amount, with costs, unless[5] the retainer shall be disputed, or to make such other order thereon as such Court or Judge shall deem proper."

[1] By the 21 & 22 Vic. c. 49, s. 1, the words, "on the true faith of a Christian," may, in the case of Jews returned to serve in Parliament, be omitted by resolution of the House. And by sec. 2, in all other cases where taken by a Jew, these words may be omitted.

[2] When the master has completed the taxation, he thereupon makes his *allocatur*, or certificate of the final result, which on taxation between attorney and client is, in practice, endorsed on the judge's order, and usually states the amount of the bill delivered, the sum deducted or added on taxation, the cost of taxation, and the amount of moneys paid on account, and thus ascertains and allows the balance which is justly due or ought to be refunded. Marsh. on Costs, 232.

[3] A tender of a less sum than the amount for which the *allocatur* is given is bad, although the difference between the tender and the sum mentioned in the *allocatur* was allowed by mistake; for if the party question the correctness of the *allocatur*, he should apply to the proper quarter to have it set right. *Levy v. Drew*, 5 D. & L. 307.

[4] If there was a direction or undertaking in the order of reference for payment of the amount found by the master to be due, proceedings may be had by way of attachment for non-payment of such amount, if default be made therein. *Ryalls v. Emerson*, 2 Dowl. 357. *Harrison v. Ward*, 3 id. 541.

[5] It is not necessary that there should be any writ or declaration whereon to found the judgment. *Griffiths v. Hughes*, 4 D. & L. 719. If there is a substantial objection to the amount allowed, on the ground that the attorney was guilty of negligence, the Court will not allow him to enter up judgment.

ALLLODIAL, or Allodium. A holding of lands without acknowledging any territorial superior. According to Lord Coke, there are no allodial lands in England. Co. Litt. 93 a; 2 Bl. Com. 47; 3 Kent, Com. 488.

ALLONGE. Fr. A paper annexed to a bill of exchange, which is rendered necessary when there are so many successive endorsements to be made that the original paper would not contain them. Byles on Bills, 128. It requires no stamp, id.

ALLOTMENT. *See* Commons, Inclosure of.

ALLUVION. Land gained from the sea by the washing up of sand and soil so as to form *terra firma*. 2 Bl. Com. 61.[1]

ALMANACK. The Court may, where doubtful of a date, or upon what day of the week a particular date fell, refer to an almanack for the purpose of refreshing their memory. The printed calendar was used for this purpose as early as the 9 Hen. 7. *See* Best, *Evid.* 342. *Page v. Faucet*, Cro. Eliz. 227. *Reg. v. Dyer*, 6 Mod. 41; 1 Salk. 681. *Harvey v. Broad*, 6 Mod. 159.

ALSO. *See* And, p. 351; Item. 1 Salk. 239; 5 East, 87; 4 M. & S. 58.

ALTAR. *See* Communion Table.

ALTERATION of Line. See *Nixon v. Brownlow*, 27 L. J. Ex. 509. Of Works, *see* Railway.

ALTERATIONS.

I. Effect of Alteration of Deeds and Instruments other than Wills, p. 309.

(A) *An Alteration vitiates a Deed or other Instrument if made in a material part after Execution, although by a Stranger*, p. 309.

(B) *Thus, if a Bill of Exchange is altered in a material part after it is complete without the privity of the Acceptor, an innocent Indorsee taking it afterwards cannot recover against the Acceptor*, p. 310.

(C) *But notwithstanding Alteration, the Instrument is admissible to prove a Collateral Fact*, p. 310.

Ex-parte Lowless, 5 D. & L. 793; S. C. 17 L. J. C. P. 222. If the order of reference reserves leave to the client to dispute the retainer, the Court will not readily interfere with the discretion of the Judge who made it, for the purpose of striking out such proviso. *In re Pyne*, 5 C. B. 407. Notwithstanding, however, the reservation in the order of reference of the right to dispute the retainer, if that question has, with consent of the parties, been adjudicated upon by the master, such reservation will afford no answer to an application by the attorney for leave to enter up judgment for the amount of the *allocatur*. *Ex-parte Lowless, supra.* An attorney whose bill has been taxed under an undertaking to pay what shall be found due, is a creditor entitled to the most favourable consideration. *Neale v. Postlethwaite*, 1 Q. B. 243.

(B) *How enforced.*

If payment of the amount allowed by the master be enforced by way of attachment, it is necessary, before issuing the attachment, to obtain an order for payment by the client of the amount certified to be due; and if that order be disobeyed, proceedings may then be had by making the order a rule of court, and moving for an attachment upon it. *In re Woodhouse*, 2 C. B. 290. *Ryalls v. Emerson*, 2 Dowl. 357. If by action the *allocatur* is proof of the retainer, and that the business was done. 2 Campb. 496; 3 Car. & K. 13.

[1] The increase *per alluvionem* is described to be when the sea, by casting up sand and earth, by degrees increases the land, and shuts itself within its previous limits. See *Gifford v. Lord Yarborough*, 5 Bing. 163. In general the land thus gained belongs to the Crown, as having been a part of the very *fundus maris;* but if such alluvion be formed so imperceptibly and insensibly that it cannot by any means be ascertained that the sea ever was there, *idem est non esse et non apparere*, and the land thus formed belongs as a perquisite to the owner of the land adjacent. Hale, *De Jure Maris*, pt. i. c. 4, p. 14. *Rex v. Lord Yarborough*, 3 B. & C. 96; S. C. 1 Dowl. N. S. 178. Hall on Sea-shores, 123.

II. What is a Material Alteration, p. 311.

(A) *The Addition of the Name of a Maker to a Promissory Note*, p. 311.

III. Presumption as to Time at which Unexplained Alteration was made, p. 312.

(A) *In the case of Deeds presumed to have been made at Time of Execution*, p. 312.

(B) *But no such presumption in case of Bills of Exchange or other Instruments not under Seal*, p. 312 n.

IV. Alteration of Wills, p. 313.

(A) *Inoperative unless Signed and Attested*, p. 313.

I. Effect of Alteration of Deeds and other Instruments.

(A) *An Alteration vitiates a Deed or other Instrument if made in a material part after Execution, although by a Stranger.*

Davidson v. Cooper, 11 Mee. & W. 778, in Error; 13 Mee. & W. 343.

Any *material*[1] alteration made in an instrument after execution, whether it be or be not under seal, and although made by a stranger, if done without the privity of the party to be affected by it, vitiates the instrument.[2]

Declaration in *assumpsit* on a written guarantee. The defendant pleaded, that while the guarantee was in the plaintiff's hands it was, without the defendant's consent or knowledge, altered by the addition of two seals, opposite the names of the defendant and the other party to it, whereby its apparent nature and effect were wholly altered. Issue having been taken on this plea, the jury found it so altered. On motion for judgment *non obst. vered.*,—

Per Cur. The question is, whether, where an instrument not under seal, and not being a bill of exchange or promissory note, is altered by a stranger in a material part, without the privity of the party to be affected by it, such alteration makes the instrument void. There is no doubt but that in the case of a deed, any material alteration, whether made by the party holding it or a stranger, renders the instrument altogether void from the time when such alteration is made. *Pigot's case*, 11 Rep. 27. This principle, with respect to deeds, was, in the case of *Master v. Miller* (4 T. R. 320, and 2 H. Black. 141), established as to bills of exchange and promissory notes. In *Powell v. Divett*, 15 East, 29, the Court of King's Bench extended the doctrine to the case of bought-and-sold notes, holding that a vendor who, after the bought-and-sold notes had been exchanged, prevailed on the broker, without the consent of the vendee, to add a term to the bought note for his, the vendor's benefit, thereby lost all title to recover against the vendee. The only difference between that and the present case is, that in the former the alteration was made by the

[1] It seems a rule of universal jurisprudence, that imperfections or blemishes apparent on the face of a document, such as interlineations, erasures, &c., do not vitiate the document, unless they are in some *material* part of it. Best, *Evid.* 309, 3d ed. But if the alteration be fraudulently made by the party claiming under the instrument, it does not seem important whether it be in a material or an immaterial part; for, in either case, he has brought himself under the operation of the rule established for the prevention of malpractices; and having fraudulently destroyed the identity of the instrument, he must incur the peril of all the consequences. *Pigot's case*, 11 Rep. 27; Shep. *Touchst.* 68. *Sanderson v. Symonds*, 1 B. & B. 430.

[2] This rule, which was originally propounded with respect to deeds, probably because in former days most written engagements were drawn in that form (*Master v. Miller*, 4 T. R. 330: *per Lord Kenyon*), has since been extended to negotiable securities (*Master v. Miller*, *supra*), bought and sold notes (*Mollett v. Wackerbarth*, 5 C. B. 181), guarantees (*Davidson v. Cooper*, *supra*, in text) and policies of insurance (*Forshaw v. Chabert*, 3 B. & B. 158; 6 Moore, 369. *Fairlie v. Christie*, 7 Taunt. 416; 1 Moore, 114. *Campbell v. Christie*, 2 Stark, R. 64), and may now be said to apply equally to all written instruments which constitute the evidence of contracts. *Davidson v. Cooper*, *supra*.

plaintiffs, who held the written instrument; whereas, in this case, it is not ascertained by whom the alteration was made: the jury finding that the alteration was made by some person to them unknown, whilst the document was in the hands of the plaintiff. After much reflection, we are of opinion that this does not create any distinction between the two cases. Rule discharged.

(B) *Alteration of a Bill of Exchange in a material part.*

Burchfield v. Moore, 3 E. & B. 683; 18 Jur. 727; 22 L. J. Q. B. 261.

And if a bill of exchange is altered in a material part, as by the addition of a place of payment, an indorsee although taking the bill subsequently thereto and without notice, cannot recover on it against the acceptor.[1]

Action on a bill of exchange by an indorsee against the acceptor. The defendant pleaded that the bill had been altered without his consent in a material part. The plaintiff replied, that when the bill was indorsed to him the alleged alteration had been already made, and that he had no notice of such alteration, and that the alteration consisted only of the addition of the words, "payable at the Bull in Aldgate." Demurrer. *Cur. ad. vult.*

Per Lord Campbell, C. J. As soon as it is established that there has been a material alteration in, a bill of exchange, the particular nature of the alteration becomes unimportant, and *Master v. Miller* (4 T. R. 320, in err.; 2 H. Black. 140; *see* note, 1 Sm. L. C. 490) becomes an authority. There, a bill was drawn, payable to Wilkinson and Cooke, while in their possession the date was altered; and the bill being subsequently indorsed to the plaintiffs, who were (like the present plaintiff) *bona fide* indorsees for value, the judgment was, that they could not recover against the acceptor. *Ashurst, J.*, says, "If Wilkinson and Cooke had brought this action, they clearly could not have recovered, because they must suffer from any alteration of the bill while it is in their custody: the same objection 'must also hold with respect to the plaintiffs, who derive title under them.' We conceive, therefore, that in this case the plaintiff's remedy is confined to a right to recover the consideration for the bill as between himself and the party from whom he received it: a similar remedy may be resorted to, till the party is reached through whose fraud or laches the alteration was made. He ought to suffer, for a party who has the custody of an instrument made for his benefit, is bound to preserve it in its original state."

Judgment for the defendant. *See* Byles on Bills, 278, 7th ed.; 2 E. & B. 763; 24 L. J. Q. B. 248.

(C) *But notwithstanding Alteration, the Instrument is admissible to prove a Collateral Fact.*

Earl of Falmouth v. Roberts, 9 Mee. & W. 471.

An instrument notwithstanding an alteration, is admissible for the purpose of proving a collateral fact, as the terms of holding under an expired tenancy may be proved in an action by the landlord on a parol contract to continue the tenancy under the same conditions, notwithstanding an alteration appears in the *habendum*.

The defendant became tenant to the plaintiff of a farm from year to year by parol, but afterwards signed an agreement containing certain stipulations as to the mode of tillage. An action being brought by the landlord for breaches of these stipulations, the agreement on being produced contained an erasure in the term of years mentioned in the *habendum*, which was altered from seven to fourteen.

The Court held that in this action the agreement might be received in evidence without any explanation of the erasure, the term of years being immaterial to the parol contract between the parties to hold from year to year, subject only to the terms of the agreement as to the cultivation of the land.[2]

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[1] This doctrine, which visits upon the person having the care of a document the consequences of an alteration made without his consent by a stranger, has not met with universal approbation. The rule itself has been charged with severity and unfairness. In *Swiney v. Barrey*, Jones, Ex. R. 109, the Irish Court of Exchequer refused to recognise it. And in America, an unauthorised alteration made by a stranger, in the absence of any reason for imputing any fraudulent intent to the party claiming under it, is treated as a mere accidental spoliation, which does not vitiate the instrument. New York Code, Civil, sec. 1794. *United States v. Spalding*, 2 Mas. 482. *Cutts v. U. S.*, 1 Gall, 69; Tayl. *Evid.* s. 1625.

[2] See *Hutchins v. Scott*, 2 Mee. & W. 809. *Agricultural Cattle Insurance Company v. Fitzgerald*, 16 Q. B. 432.

II. What is a Material Alteration.[1]

(A) *The Addition of the Name of a Maker to a Promissory Note.*

GARDNER v. WALSH, 5 E. & B. 83; 24 L. J. Q. B. 285, overruling *Cotton v. Simpson*, 8 Ad. & E. 136.

If a joint and several promissory note after it is complete is altered by the payee, causing another party to sign it as a maker, without the consent of the original makers, it is void as against them.

Action on a joint and several promissory note, made by the defendant and two others. The defendant pleaded that he and one other made the note, and that after it was completed, issued, and negotiated, the plaintiffs, without the consent of the defendant, caused the same to be added to, altered, and changed in a material point, by causing such third person to sign the note, and become a joint-maker. The jury having found for the defendant, and a rule for a new trial having been obtained (*Cur. ad. vult.*),—

Lord Campbell, C. J. "According to principle and authority, the defendant is discharged from his liability upon the note. There would be no difficulty in showing that, under certain circumstances which might have supervened, that alteration might have been prejudicial to the defendant. But we conceive that he is discharged from his liability if the altered instrument, supposing it to be

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[1] As to what amounts to an alteration in a *material* particular, the following cases may be cited as instances:—Any alteration in negotiable securities as to the date (*Outhwaite v. Luntley*, 4 Camp. 179: *per Lord Ellenborough*. *Walton v. Hastings*, id. 223; 1 Stark. R. 215, S. C.); amount or time of payment (*Bowman v. Nichol*, 5 T. R. 537. *Alderson v. Langdale*, 3 B. & Adol. 660); the insertion of words to limit or vary the consideration as originally expressed (*Knill v. Williams*, 10 East, 431); the introduction of a place for payment. *Macintosh v. Haydon*, R. & M. 362: *per Abbott, C. J. Crolly v. Hodges*, 4 Man. & G. 561; 5 Scott, N. R. 221; S. C. *Cowie v. Halsall*, 4 B. & A. 197); the substitution of one place for another (*Tidmarsh v. Grover*, 1 M. & S. 735. *R. v. Treble*, 2 Taunt. 329; R. & R. 164); the addition of a claim for a specific rate of interest (*Warrington v. Early*, 2 E. & B. 763); the converting a joint into a joint and several responsibility (*Perring v. Hone*, 4 Bing. 28; 12 Moore, 135; 2 Car. & P. 401; S. C.); or it seems the cutting off the signature of one of several co-promisers in a joint and several note (*Mason v. Bradley*, 11 Mee. & W. 590. See *Nicholson v. Revell*, 4 Ad. & E. 675; 6 Nev. & M. 192; S. C.; and see *Gardner v. Walsh*, *supra*, in text), will at common law, as against any party not consenting thereto, invalidate the instrument, even in the hands of an innocent holder, and will for the most part prove equally fatal, by virtue of the stamp laws, though made by consent of all parties. (Chit. on Bills, 181, 185; 1 Smith, *Lead. Cas.* 490.) So, where a sold note was altered without the knowledge of the purchaser, by inserting an additional term into the contract (*Powell v. Divett*, 15 East, 29); and where an agreement was apparently converted into a deed, by affixing seals to the signatures of the parties (*Davidson v. Cooper*, 11 Mee. & W. 784; 13 id. 353; S. C. in Ex. Ch.), the respective instruments were held to be vitiated. And, in short, any alteration which causes an agreement or other writing to speak a language different, in legal effect, from what it originally spoke, is material. Taylor, *Evid.* s. 1307.

The insertion of such words as the law would supply, or such as are altogether inoperative, or such as are necessary to correct an obvious error, will not constitute a material alteration, even though made without consent; neither will an instrument be avoided by virtue of the stamp laws, though it be altered after execution in a material particular, provided the parties agree to make such alteration in order to correct a mistake, and in furtherance of their original intention. See *Cluck v. Gompertz*, 7 Ex. 862. *Sanderson v. Symonds*, 1 B. & B. 426; 4 Moore, 42. *Clapham v. Cologan*, 3 Camp. 382. *Walter v. Cubley*, 2 C. & M. 151. *Stevens v. Lloyd*, M. & M. 292. *Jacob v. Hart*, 6 M. & S. 142. Thus, filling in the date of a warrant after execution will not avoid the instrument, for the parties must clearly have intended that the date should be inserted. *Keene v. Smallbone*, 17 C. B. 179. Where the word "hundred" had been accidentally omitted in the second place in which the sum in a bond was mentioned, its insertion by a stranger was held to be immaterial. *Waugh v. Bussell*, 5 Taunt. 707. And where, in a note intended to be negotiable, the words "or order" had been left out by mistake, their insertion by the holder, with the consent of the maker, was held neither to vitiate the instrument nor to render a new stamp necessary. *Byrom v. Thompson*, 11 Ad. & E. 31. *Kershaw v. Cox*, 3 Esp. 246. *Hamelin v. Bruck*, 9 Q. B. 306. *Jacob v. Hart*, 6 M. & S. 142. *Brutt v. Picard*, R. & M. 37. *Robinson v. Touray*, 1 M. & S. 217. *Farquhar v. Southey*, M. & M. 14. *Eagleton v. Gutteridge*, 11 Mee. & W. 465.

genuine, would operate differently from the original instrument, whether the alteration be or be not to his prejudice. If a promissory note, payable at three months after date, were altered by the payee to six months, or if, being made for 100*l.*, he should alter it to 50*l.*, we conceive that he could not sue the maker upon it after the alteration, either in its altered or original form. The alleged maker was no party to a note at three months, or for 50*l.*, and the note at six months for 100*l.*, to which he was a party, is vitiated by the alteration."

III. Presumption as to Time at which Unexplained Alteration was made.

(A) *In the case of Deeds.*

Doe d. Tatum v. Calomore, 16 Q. B. 745.

In the case of deeds, an unexplained alteration will be presumed to have been made when the deed was executed.[1]

In an action of ejectment, the deed on which the lessor of the plaintiff's title depended, when produced, appeared to have an interlineation and erasure in parts not material. Objection was made that the deed was void, unless the lessor of the plaintiff gave evidence to show when the alterations were made. The learned Judge left it to the jury to say whether the alterations were made before the execution of the deed. And it was found that they were. *Cur. ad. vult.*

Lord Campbell, C. J. "In moving for a new trial, it was contended that this question ought not to have been left to the jury without some evidence besides the deed itself. In Co. Litt. 225 b., it is said, that 'of ancient time, if the deed appeared to be erased or interlined in places *material*, the judges adjudged upon their view the deed to be void. But of latter time the judges have left that to the jurors to try whether the raising or interlining were before the delivery.' In a note (n. 1, p. 136) upon this passage in Hargrave and Butler's edition, it is laid down, 'It is to be presumed that an interlining, if the contrary is not proved, was made at the time of making the deed.' This doctrine seems to us to rest upon principle. A deed cannot be altered after it is executed without fraud or wrong, and the presumption is against fraud or wrong. A testator may alter his will without fraud or wrong after it has been

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[1] (B) *But no such presumption in case of Bills of Exchange or other Instruments not under Seal.*

The presumption that an alteration in a deed has been made contemporaneously with its execution, arises from its being a fraud and wrong to alter it after; and this reason not applying to such instruments as bills of exchange or promissory notes, the law presumes nothing as to the time at which an alteration has been made, but leaves the jury to decide, first, by inspecting the instrument itself, whether any alteration has been made, and then, on considering the extrinsic evidence offered, at what time, and under what circumstances, such alteration, if any, was made. *Johnson v. Duke of Marlborough*, 2 Stark. R. 278. *Bishop v. Chambre*, M. & M. 116; 3 Car. & P. 55. *Taylor v. Mosely*, 6 id. 273. *Cariss v. Tatersall*, 2 Man. & G. 890. *Ross v. Gould*, 5 Greenl. 204 (A. R.). *Knight v. Clements*, 8 Ad. & E. 215.

That, however, an erasure or alteration in *a suspicious* place must be explained by the party seeking to enforce the instrument, has been law from the earliest times. 7 Edw. 3, 57 pl. 44, and 27 pl. 13. And this principle is fully recognised at the present day (*Earl of Falmouth v. Roberts*, 9 Mee. & W. 469), especially where an alteration affects the stamp required for a document. *Knight v. Clements*, 8 Ad. & E. 215.

The rule is, that if the instrument on its production appears to have been altered, the party offering it in evidence must explain this appearance, if he be called upon to do so by the issue raised, and if the instrument be not admitted by his opponent under notice (*Parry v. Nicholson*, 13 Mee. & W. 779. *Freeman v. Steggar*, 14 Q. B. 302), because, as every alteration on the face of a written instrument renders it suspicious, it is only reasonable that the party claiming under it should remove the suspicion. *Henman v. Dickenson*, 5 Bing. 183; 2 Moo. & P. 289. *Clifford v. Parker*, 2 Man. & G. 910. *London and Brighton Railway v. Fairclough*, id. 705. *Earl of Falmouth v. Roberts*, 9 Mee. & W. 471. If the alteration is noted in the attestation clause as having been made before the execution of the instrument, it is sufficiently accounted for, and the credit of the instrument is restored. Tayl. *Evid.* s. 16.

executed, and there is no ground for any presumption that the alteration was before the will was executed." Rule refused.[1]

IV. Alteration of Wills.[2]

(A) *Inoperative unless Signed and Attested.*

Alterations made after execution of a will are inoperative unless signed and attested, except so far as the words of the will were not before apparent.

By 7 Wm. 4, and 1 Vic. c. 26, s. 21, "no obliteration, interlineation, or other alteration made in any will after the execution thereof shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent,[3] unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin, or on some other part of the will opposite or near to such alteration, or at the foot or end of, or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will."

ALTERNATIVE. *See* also Bills and Notes; Bonds; Conditions; Contracts; Fines; Guarantee; Liquidated Damages; Penalty.

I. Writs, p. 313.
II. Pleading in the, p. 314.
III. Rules, Orders, and Summons, p. 314.
IV. Contracts and Covenants, p. 314.
V. Bills and Notes, p. 314.
VI. Alternative Interests, p. 315.
VII. „ Awards. *See* Arbitration.

I. Writs.[4]

[1] See *Simmons v. Rudall*, 1 Sim. N. S. 136: *per Lord Cranworth, V. C.*

[2] In the case of wills, the rule as to the presumption of the time at which alterations were made is reversed; the presumption with respect to these documents being that alterations and erasures have been made after execution of the will. *Cooper v. Bockett*, 4 Moo. P. C. C. 419. *Doe d. Shallcross v. Palmer*, 16 Q. B. 747. *Greville v. Tyler*, 7 Moo. P. C. C. 320. *Simmons v. Rudall*, 1 Sim. N. S. 136. *See* also *Gann v. Gregory*, 18 Jur. 1063. Pencil alterations are presumed to be merely deliberative, the presumption being founded on the obvious probability that the deceased would have resorted to a more durable material had he wished to express his final intention. Tayl. *Evid.* s. 133, 3d ed.

[3] *Townley v. Watson*, 1 Curt. 761. (A. R.)

[4] Such as a prerogative *mandamus*, which requires certain acts to be done, or cause to be shown why they are not. Alternative Writs may now, by 17 & 18 Vic. c. 125, s. 78, issue for the specific delivery of chattels, which empowers the Court or Judge, on the application of the plaintiff, in an action for the detention of a chattel, to order that execution shall issue for the return of the same, without giving the defendant the option of retaining it upon paying the value assessed. If the chattel cannot be found, and the Court or a Judge does not otherwise order, the sheriff is to distrain the defendant by his lands and chattels, till he render such chattel; or, at the option of the plaintiff, the sheriff may cause to be made of the defendant's goods the assessed value of the chattel. The plaintiff may, either by the same or a separate writ of execution, have made of the defendant's goods the damages, costs, and interest in the action. This clause does not apply where, at the trial, the value of the chattel has not been assessed, and the Court will review the order of a Judge made under its provisions. *Chilton v. Carrington*, 24 L. J. C. P. 78.

By 19 & 20 Vic. c. 97, s. 2, in actions for breach of contract to deliver specific goods for a price in money, upon a certain course being pursued, the plaintiff may have judgment and execution for the delivery of the goods; and if the goods cannot be found, a similar course may be adopted as suggested above.

II. Pleading in the.[1]

III. Rules, Orders, and Summons.[2]

IV. Contracts and Covenants.[3]

V. Bills and Notes.[4]

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[1] As a rule, pleadings should neither be hypothetical nor in the alternative. Hence, when it was charged that the defendant wrote and published, or caused to be written or published, a certain libel, the information was holden bad for uncertainty. *The King v. Brereton*, 8 Mod. 330. But in an action to recover specific chattels an alternative conclusion in the declaration is expressly authorised (15 & 16 Vic. c. 76, s. 59; 17 & 18 Vic. c. 124, s. 78), and is thus given: "And the plaintiff claims a return of the said goods, or their value, and £ for their detention. See *Chilton v. Carrington*, 15 C. B. 730. *Allon v. Dunn*, 1 H. & N. 572. And in an action on a policy of insurance it may be alleged that A. B. C. and D., or some or one of them, were or was interested, without averring the precise interest of each. Reg. Gen. H. T. 1853; Pl. r. 9. Where a contract is in the disjunctive or alternative, a plea of performance generally would be bad; the defendant should show which of the alternative acts was performed.

[2] A rule *nisi*, and a rule or summons to show cause, are alternative proceedings. Rules are constantly granted to show cause why there should not be a new trial, or a nonsuit, or arrest of judgment, or judgment *non obstante veredicto*, or damages reduced. Indeed, most applications to a judge at chambers, or to the Court, are in the alternative. *See* Judges' Summons; Motions and Rules, &c.

[3] Under an agreement to perform one of two things, the right of election is in the party who is to do either one or the other (*Layton v. Pearce*, 1 Dougl. 16); or, as the rule has been expressed, the party for whose benefit the alternative arises must do the first act, by determining his election (Platt on Covenants, 22): therefore, where a defendant covenanted to pay to M., his executors, &c., at the choice and election of M., within a month after the death of Lady M., 30*l.* or twenty kine, it was decided that he might plead in bar the plaintiff's neglect to make his election within the month, as the covenantor was not obliged to tender both the money and kine; but where the covenant was to deliver to the plaintiff, at such a day and place, 20*l.* or ten kine, at the then choice of the covenantee, the Court were clearly of opinion that the defendant, in pleading performance, ought to show a tender to the plaintiff as well of the 20*l.* as the ten kine. *Fordley's case*, 1 Leon, 68. So where one engaged to make such further assurance within such a time, by fine or feoffment, as the covenantee should choose, it was held to be incumbent on him to elect which of the assurances he would have. *Basset v. Kerne*, 1 Leon, 70. See *Gullini v. Laborie*, 5 T. R. 242. In like manner, on a covenant to do a specific act, or an act to be appointed by a third party, if the latter be chosen, the duty of procuring the appointment falls on the covenantor. 1 Ld. Raym. 279; S. C. 1 Lutw. 213. *Lamb's case*, 5 Co. 236; S. C. Cro. Eliz. 716. Further, if a party covenant with another to pay him a sum of money on one of two events, which should first happen, the plaintiff by deferring his suit until the happening of the later event is not debarred of his right of action. The plaintiff, therefore, need not aver that the first of the events had not happened. *Loggin v. Ornery*, 1 Ld. Raym. 133. *Ashworth v. Lord Jay*, 232.

If a vendor of corn agree to deliver to the purchaser fifty or a hundred quarters of corn by a day named, at so much a quarter, and the purchaser agree to pay the price on the corn being delivered to him, the vendor will have to do the first act, and will have his election to deliver and demand payment for either the fifty or the hundred quarters. *Penny v. Porter*, 2 East, 2. Where the borrower of money agreed "to re-invest 500*l.* in the 3 per cent consols in the name of R. H., or to repay the said amount in bank-notes, on his giving six calendar months' notice in writing," it was held that the giving of the notice was the first act to be performed, and that H. had his election either to take the bank-notes or a re-investment of the amount. *Chippendale v. Thurston*, 4 Car. & P. 98. If goods are delivered to and received by a party on the terms of "sale or return," he who receives the goods must make his election to return them within a reasonable time; and if the return be not made, the contract stands as an absolute sale. *Moss v. Sweet*, 20 L. J. Q. B. 167. See *Webb v. Salmon*, 19 id. 34. By the French law, the election belongs to the debtor if it has not been expressly accorded to the creditor.

A covenant by the lessee of a farm, that he would consume on the premises the crops grown thereon, but that in case he should sell any of the crops, which he should be at liberty to do, he would bring to the premises an equivalent amount of manure, is an alternative covenant, and not an absolute covenant followed by a proviso; consequently the declaration in an action for not consuming the crops on the premises should set out both branches of the covenant, otherwise it is a fatal variance. *Richards v. Black*, 6 D. & L. 325.

[4] A note beginning, "I, A. B., promise, &c.," and signed A. B., or else C. D., is a good note against A. B., but only evidence as against C. D., of a conditional agreement

VI. Alternative Interests.[1]

AMBASSADOR.[2] *See* Consul; Prerogative.

I. Of his Privileges, and to what Ministers they extend, p. 315.

II. „ Servants' Privileges, p. 317.

(A) *What Class of Servants are privileged*, p. 317.

(B) *In what manner Advantage is to be taken of the Privilege*, p. 318.

III. Of the Punishment for Infringing an Ambassador's or his Servant's Privilege, p. 318.

IV. Plea that Defendant is Privileged as the Minister of a Foreign State, p. 319.

I. Of his Privileges, and to what Ministers they extend.[3]

to pay, if A. B. does not. *Ferris v. Bond*, 4 B. & A. 679. In this last case the maker or payer was uncertain; the note, as such, is not available at all if the payee be uncertain. Thus, where the maker promised to pay to A. or to B. and C. a certain sum, *Abbott, C. J.*, said, "I have no doubt this instrument is not a promissory note within the statute of Anne, for if a note is made payable to one or other of two persons, it is payable only on the contingency of its not having been paid to the other, and is not a good promissory note within the statute." *Blanckenhagen v. Blundell*, 2 B. & A. 417.

[1] This is an interest that is only to vest in case the next preceding interest should never vest, in any way, through the failure of the contingency on which such preceding interest depends: as where a testator devises to A. for life, and if he have issue male, then to such issue male and his heirs for ever, and if he die without issue male, then to B. and his heirs for ever; or where a testator bequeaths personal estate to the first son of A., and if A. should have no son, then to B. Smith, *R. & Pers. Pro.* 305.

[2] In international law, a diplomatic minister or agent is a person delegated by one sovereign to another to treat upon affairs of state. 4 Inst. 153. The English Constitution has vested in the king the sole power of sending ambassadors and other ministers abroad, and receiving the representatives of foreign states. 1 Bl. Com. 253. The right of sending ambassadors is confined to those potentates who have sovereign authority (4 Inst. 153; Grotius De Jure, b. & p. l. 2, c. 18), and the privilege cannot be exercised by a subject, however powerful (Moll. De J. Mar. 130; Gro. De J. b. & p. l. 2, c. 18, s. 2). But the Hanse Towns and other free imperial cities (Moll. De J. Mar. 129), or independent states, or any that are in part subject and in part sovereign, *pro parte quâ non sunt subditi*, are equally competent to preserve an international communication, through the medium of ambassadors. Gro. De J. b. & p. l. 2, c. 10, s. 2. A person sent by a sovereign with letters of credence to another is an ambassador, though he be named only envoy or agent (4 Inst. 153); but it seems he need not be appointed by letters patent, or by any other particular instruments, though they universally receive on their appointment some document evidencing their right to fill the situations assigned to them. Chit. jun. on the Prerogatives of the Crown, 40.

The following distinctions between the different classes of public plenipotentiaries are to be observed. An ambassador is invested with the highest authority, acting in all cases as the representative. An envoy appears only as a simple authorised minister acting for another, but not always representing him. A plenipotentiary is a species of envoy, used by courts only on the occasion of concluding peace or making treaties. Deputies are not deputed by sovereigns, although they may be deputed to sovereigns; they have no power to act or speak, but in the name of some subordinate community or particular body. The functions of the first three belong to the minister, those of the latter to the agent.

[3] If the party delegated be not received or admitted as an ambassador, he has no privilege as such (Moll. De J. Mar. 130; Gro. De J. b. & p. l. 2, c. 18, s. 3), or if he continue after the time limited for his departure (*Marshall v. Critico*, 9 East, 447); or is refused to be recognised by the sovereign to whom he is sent (Gro. De J. b. & p. l. 2, c. 18, s. 3; Moll. De J. Mar. 131).

A plenipotentiary, notwithstanding the death of his sovereign, still continues to be the minister of the nation he represents, and as such is entitled to enjoy all the rights and honours annexed to that character. It is his duty to remain in the country to which he has been sent until the pleasure of his new prince be known. If he be recalled or dismissed, though his functions cease, his rights and privileges do not immediately expire. He retains them until his return to his sovereign, to whom he is to make a report of his mission. Vattel, b. 4, c. 9, s. 126.

MARSHALL v. CRITICO, 9 East, 447.

Where the foreign minister had been dismissed and a successor appointed several months before his arrest, it was held that the privilege did not apply, notwithstanding he had not received any official notification of his dismissal.

A motion was made to discharge the defendant on common bail. It appeared that he had been delegated a minister[1] from the Porte, but had been dismissed several months from his employment, and another resident here appointed in his room, but that he had not received any official notification of his dismissal, or of the appointment of his successor.

Per Cur. The defendant is not privileged from being holden to bail. It is only a privilege of the state which he represents, and not a personal privilege.[2] Rule refused. *See* Ca. Temp. Talb. 381, cited Burr. 1480–1.

THE MAGDALENA STEAM NAVIGATION CO. v. MARTIN, 28 L. J. Q. B. 310; S. C. 5 Jur. 1260.

The public minister of a foreign state accredited to and received by

This was an action to recover a call on certain shares of the defendant in a joint-stock company.

Plea. That the defendant was at the commencement of the action, and still is, accredited to and received by her Majesty as Envoy Extraordinary and Minister Plenipotentiary of the Republics of Guatemala and New Granada respectively, and a writ had been sued out against him, and served upon him, to recover an alleged debt, for the purpose of prosecuting this action to judgment

[1] To preserve inviolate the security and independence of public functionaries sent from one state to another, all foreign jurists concur in the opinion that neither an ambassador nor any of his suite can be sued for any debt or contract in the courts of that kingdom wherein he is sent to reside. The sovereign, by the very act of receiving him, tacitly engages to allow him all the liberty and safety necessary to the proper discharge of his functions, without which the admission of a foreigner or public minister would be nugatory. This principle of the law of nations is recognised and confirmed as part of the municipal law of England. The stat. 7 Anne, c. 12, s. 3, declares, "that all writs and processes that shall at any time hereafter be sued forth or prosecuted, whereby the person of any ambassador or other public minister of any foreign prince or state authorised and received as such by her Majesty, her heirs or successors, or the domestics or domestic servants of any such ambassador or other public minister, may be arrested or imprisoned, or his or their goods or chattels may be distrained, seized, or attached, shall be deemed and adjudged to be null and void to all intents, constructions, and purposes whatsoever." But it is added, "that no merchant or other trader whatsoever within the description of any of the statutes against bankrupts, who hath or shall put himself into the service of any such ambassador or public minister, shall have or take any manner of benefit by this act."

The personal chattels of an ambassador cannot be seized for rent or for rates, or taken in execution for the payment of a debt, even when sanctioned by the express permission of the king of the state where the plenipotentiary is resident; for he ought to be exempt from all coercion, as well with reference to that which affects his property as his person: if, therefore, he contracts a debt, he must be applied to by petition; and if he refuses payment, letters of request should be sent to the sovereign by whom he was delegated. Molloy, 141.

An ambassador committing a crime *contra jus gentium*, it has been said, shall be punished as another alien, without being remanded to the state he represents (4 Inst. 153; 1 Roll. 175); but Mr. Justice Foster (*Crown Law*, 187), observes that an ambassador can at worst be considered as an enemy subject to the law of nations, never as a traitor subject to our municipal laws, unless perhaps in case of attempts directly and immediately against the life of the king. See *The King v. Owen*, Roll. Rep. 185, pl. 17.

[2] It seems that an ambassador at common law is privileged from arrest. *Case of Andrew Artemonowitz Matteouf, the Russian Ambassador*, 10 Mod. 4. But a person described as agent of commerce is not privileged. *Buvot v. Barbut*, cited 3 Burr. 1481; S. C. Ca. Temp. Talbot, 281. Neither is a consul. *Buvot v. Barbut, supra. Clarke v. Cretico*, 1 Taunt. 106. *Deserisay v. O'Brien*, Barnes, 375. *Viveash v. Becker*, 3 M. & S. 298. But an envoy is privileged. *Heathfield v. Chilton*, 4 Burr. 2016; S. P. *Cain v. Molineux*, Barnes, 374. And a secretary and councillor of legation of a foreign sovereign, appointed by him, and having charge of the executive of the legation, and acting in the absence of the ambassador as *chargé d'affaires*, is a public minister to whom the privileges of ambassadors apply. *Taylor v. Best*, 23 L. J. C. P. 89. An ambassador does not, like his servants, forfeit his privilege by trading in this country. *Taylor v. Best, supra.* The privilege of the foreign ambassador with respect to duty on exciseable articles does not apply where he has left England, and placed them in the hands of an agent. *The Attorney-General v. Thornton*, M'Clel. 600.

against him while he continues such public minister. And he said by his plea to the jurisdiction of the Court, that by reason of his privilege as such public minister he ought not to be compelled to answer. On demurrer,—

the Sovereign of England, having no real property in England, and having done nothing to disentitle him to the privileges generally belonging to such public minister, cannot be sued in the Courts here.

Per Cur. We are of opinion that the plea is good. The question raised by this record is, whether the public minister of a foreign state, accredited to and received by her Majesty, having no real property in England, and having done nothing to disentitle him to the privileges generally belonging to such public minister, may be sued against his will in the courts of this country for a debt, neither his person nor his goods being touched by the writ while he remains such public minister. It certainly has never hitherto been expressly decided that he is privileged from all liability to be sued here in civil actions; but we think that this follows from well-established principles, and we give judgment for the defendant.[1]

II. Of his Servants' Privileges.

(A) *What Class of Servants are privileged.*

Evans v. Higgs, 2 Str. 797; S. C. Evans v. Hicks, 2 Ld. Raym. 1524; S. P. Wedmore v. Alvereley, Fitzg. 200. Re Count Haslany, Dickins, 274. Toms v. Hammond, C. P. Prac. Reg. 14 *semb. contra.*

Every servant *bonâ fide* employed as the domestic of an ambassador is privileged.

A motion was made to discharge the defendant out of execution, as being an ambassador's servant, viz. his English secretary.

It was objected that he did not lie in the house, and the words of 7 Anne, c. 12, are "domestic servants."

Per Cur. The nature of his employment requires his attendance at the house, and it is not necessary he should lie there. And the general words, "all writs and processes shall be void," take in this case, and therefore the execution must be set aside.[2]

Martin v. Shawpin, Ca. Prac. 65; S. P. Fontainer v. Heyl, 3 Burr. 1731. Deserisay v. O'Brien, Barnes 375; Ca. Prac. C. P. 134.

Persons who are traders or objects of the bankrupt laws are not privileged.

On the defendant being arrested, he moved to be discharged, on the ground that he had a certificate from the Count de Broglio, the French ambassador, of

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[1] In the earlier case of *Taylor v. Best* (14 C. B. 487; 23 L. J. C. P. 89), the Court of Common Pleas, without deciding the question whether an ambassador was liable to be sued against his will, refused, where he had entered an appearance and allowed the action to proceed to issue, at that late stage to stay the proceedings upon the ground of privilege.

[2] Exemption from arrest on the part of an ambassador's servant is the privilege of the master, not of the servant. *Fisher v. Begrez*, 2 Car. & M. 240; 3 Tyr. 184; 2 Dowl. 279. The privilege extends to the domestic servant of an ambassador, although he does not board or lodge in the same house, and whether he be an Englishman or foreigner. *Triquet v. Bath*, 3 Burr. 1478; S. C. 1 Bl. Rep. 471. To confer the exemption from arrest, it is not necessary that the name should be registered in the Secretary of State's office. *Heathfield v. Chilton*, 4 Burr. 2017; S. P. *Darling v. Atkins*, 3 Wils. 33. *Hopkins v. De Roebuck*, 3 T. R. 79. But the mere nominal servant of an ambassador is not privileged. *Crosse v. Salbott*, 8 Mod. 288; S. P. *Triquet v. Bath*, 3 Burr. 1478; S. C. 1 Bl. 471. *Heathfield v. Chilton*, 4 Burr. 2016. Hence, a colourable retainer for the purpose of protection from arrest will not avail. Therefore, where a physician accepted a temporary salary, and ostensibly abandoned his practice, but continued to live in an expensive manner, the Court held that it was a fictitious and colourable appointment, and not within the exemption. *Lockwood v. Dr. Cossgarne*, 3 Burr. 1676. The party claiming the privilege must not combine two distinct characters and fulfil two separate capacities, as secretary to an ambassador and purser of a ship of war. *Darling v. Atkins*, 3 Wils. 33. Or a courier, who is paid for each separate journey. *Deserisay v. O'Brien*, Ca. Prac. 134; S. C. Barnes, 375. And where the servant of an ambassador rented a house, and let a part of it in lodgings, it was held that his goods on the premises, not being necessary for the convenience of the ambassador, were clearly distrainable for the poor-rates; but it seems he could not be arrested. *Novello v. Toogood*, 1 B. & C. 554; S. C. 3 D. & R. 833.

his being master of the horse; but upon its being shown that he was a trader and an object of the bankrupt laws, the Court discharged the rule.[1]

(B) *In what manner Advantage is to be taken of the Privilege.*

HOLMES v. GORDON, Ca. Temp. Hardr. 3; S. P. SEACOMB v. BOWLNEY, 1 Wils. 20.

The affidavit stating the defendant to be an ambassador's servant should state the capacity in which he serves.

The defendant's counsel moved on the stat. 7 Anne, c. 12, to discharge the execution against the defendant, as being a servant to Baron Hopman, resident from the Duke of Mecklenburgh. The defendant was stated to be an officiating servant to the baron, and to have continued in his service till the time of his arrest; and a certificate of his being a servant to the baron being registered in the secretary's office, and also in the sheriff's office, according to the statute, was proved.

Per Cur. No mention is made in what capacity he served: he only swears that he was an officiating servant. A defendant, in order to substantiate his claim to privilege as a domestic to a public minister, ought to show by affidavit, in clear and distinct terms, the particular office with which he is invested.[2]

III. OF THE PUNISHMENT FOR INFRINGING AN AMBASSADOR'S OR HIS SERVANT'S PRIVILEGE.

Persons prosecuting writs against ambassadors or their servants are liable to punishment, provided the name of the servant be registered.

The 4th and 5th sections of the stat. 7 Anne, c. 12, point out and prescribe the manner in which an infraction of the privilege, either of ambassadors or their servants, is to be punished, by enacting, "that in case any person or persons shall presume to set forth or prosecute any writs or process, such person and persons, and all attornies and solicitors, prosecuting and soliciting in such case, and all officers executing any such writs or process, being thereof convicted by the confession of the party, or by the oath of one or more credible witnesses, before the Lord Chancellor, or Lord Keeper of the Great Seal of Great Britain, the Chief Justice of the Court of Common Pleas, for the time being, or any two of them, shall be deemed violators of the law of nations, and disturbers of the public repose, and shall suffer such pains and penalties, and corporal punish-

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[1] So where it appeared that the defendant was a trader, and resided in his own house, and the envoy, under whom he claimed, was abroad, the Court refused to discharge him. *Cain v. Molineux*, Barnes, 374. But the mere circumstance of the party having been in trade seven years ago does not deprive him of protection. *Triquet v. Bath*, 3 Burr. 1478; S. C. 1 Bl. Rep. 471.

[2] See *Widmore v. Alvares*, Fitzg. 200. *Evans v. Higgs*, 2 Str. 797; 2 Ld. Raym. 1524. *Fontainer v. Heyl*, 3 Burr. 1731. *Toms v. Hammond*, Barnes, 370. When the privilege of protected persons has been infringed, the Court from whence the process issued should be moved to discharge them out of custody, or that the bail-bond may be delivered up to be cancelled. The affidavit must, in addition to the capacity in which the defendant serves, state that he was possessed of the appointment at the time of the arrest (*Heathfield v. Chilton*, 4 Burr. 2016), and actually fulfilling the duties attached to his situation (*Fontainer v. Heyl*, 3 Burr. 1731; S. P. *Triquet v. Bath*, 3 Burr. 1478; S. C. 1 Bl. Rep. 471). Merely stating that he is retained as *valet de chambre*, without further description, is too loose and indefinite. *Crosse v. Talbot*, 8 Mod. 288. It is not, however, necessary that every particular act of service should be specified; it is enough if an actual *bonâ fide* engagement be substantiated. The fact of the applicant not being a trader should be shown. *Triquet and others v. Bath*, and *Peach and another v. Bath*, 3 Burr. 1478; S. C. 1 Bl. Rep. 171. An affidavit made by a secretary to a foreign ambassador, who had been arrested jointly with his wife for a debt contracted by her whilst *sole*, "that he, before and at the time of the arrest, was in the actual employment of the ambassador, and in daily attendance upon him, writing despatches and other official documents and communications," was held insufficient, inasmuch as it did not state that he was a domestic servant, nor did it state anything to show that he was within the reason of the privilege when he was first employed," &c. *English v. Caballero*, 3 D. & R. 25.

The Court will not quash a writ of *fi. fa.* against the supposed servant of an ambassador on the application of the sheriff, except upon very distinct and explicit evidence of the party being privileged. *Fisher v. Begrez*, 1 C. & M. 117; 3 Tyr. 184; 1 Dowl. 588.

ments, as the Lord Chancellor, Lord Keeper, and the said Lord Chief Justice, or any two of them, shall judge fit to be imposed and inflicted: Provided that no person shall be proceeded against as having arrested the servant of an ambassador or public minister, by virtue of this act, unless the name of such servant be first registered in the office of one of the principal secretaries of state, and by such secretary transmitted to the sheriff of London and Middlesex, for the time being, or their undersheriffs or deputies, who shall upon the receipt thereof hang up the same in some public place in their office, whereto all persons may resort, and take copies thereof without fee or reward."[1]

IV. Plea that Defendant is Privileged as a Minister of a Foreign State.[2]

AMBIGUA responsio contra proferentem est accipienda *An ambiguous answer is to be taken against him who offers it.* 10 Co. 59.

AMBIGUIS casibus semper præsumitur pro Rege. *In doubtful cases the presumption is always in favour of the Crown.* Lofft. 248.

AMBIGUITAS verborum patens nullâ verificatione excluditur. *A patent ambiguity cannot be cleared up by extrinsic evidence.* This rule applies not only to deeds, but to written contracts in general, and wills. Lofft. *Max.* 249.

AMBIGUITAS verborum latens verificatione suppletur, nam quod ex facto oritur ambiguum verificatione facti tollitur. *A latent ambiguity may be supplied by extrinsic evidence, for an ambiguity which is raised by an extrinsic fact may be removed in the same manner.*[3] Bac. *Max.* 23.

AMBIGUITY.[4] *See* also Award; Contract; Deed; Devise; Judgment; Mercantile Terms; Mercantile Usage; Will.

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[1] An infraction of the law of nations would, independently of the statute, have been a misdemeanour, punishable at the discretion of the Court by fine or imprisonment. The act does not appear to have introduced any new regulation, beyond specifying the tribunal and medium through which the punishment shall be inflicted. *See* Bl. Com. 255; 3 M. & S. 291. Registration is necessary to render parties liable criminally for infringing the privilege (*Hopkins v. De Roebeck*, 3 T. R. 79); and if the name be not registered, the officer may execute the process. *Seacomb v. Boulney*, 1 Wils. 20. When a sheriff has refused to execute process against the servant of a minister, the plaintiff may prove that the servant's appointment was colourable. *Delvalle v. Plomer*, 3 Camp. 47.

In general, when the sheriff refuses to execute process against a party claiming the privilege, who is not *bonâ fide* and without collusion an ambassador's servant, the plaintiff has an election either to bring an action against him for a false return, or to rule him to return the writ. By either of these means the question of the defendant's title to the privilege of exemption from arrest will be brought directly before the Court, and receive a full investigation.

[2] *See* a plea to the jurisdiction that the defendant is an alien, and is ambassador and public minister of a foreign state, and received as such by the Queen, 28 L. J. Q. B. 310; and authorities, 14 C. B, 487.

[3] Thus, if I grant my manor of S. to J. F. and his heirs, here appeareth no ambiguity at all; but if the truth be, that I have the manors both of South S. and North S., this ambiguity is matter in fact, and therefore it shall be holpen by averment, whether of them was that the party intended should pass. *See* 1 Powell on Devises, 477; 2 Kent's Com. 556. In other words, where the ambiguity itself is produced by extraneous circumstances, its explanation must of necessity be sought for through the same medium. 1 Steph. Com. 463. Latent ambiguity may be supplied by evidence, for an ambiguity which arises by proof of an extrinsic fact may in the same manner be removed. Broom's *Max.* 260. *Vide supra.*

[4] A written instrument is not ambiguous, because an ignorant and uninformed person is unable to interpret it. It is ambiguous only if found to be of uncertain meaning, when persons of competent skill and information are unable to do so. Wigram, 174. Language may be *inaccurate*, without being *ambiguous;* and it may be *ambiguous*, although perfectly *accurate*. If, for instance, a testator having one leasehold house in a given

I. Patent Ambiguity, p. 320.
(A) *Distinguished from Latent*, p. 320.
(*a*) *In general cannot be explained by Parol Evidence*, p. 320.
II. Latent Ambiguity, p. 321.
(A) *May be explained by Parol Evidence*, p. 321.

I. Patent Ambiguity.

(A) *How distinguished.*

Clayton v. Lord Nugent, 13 Mee. & W. 200.

In general, extrinsic evidence is not admissible to explain a patent ambiguity in a will.

A testator devised his real estates, "first to R., then to ——, then to L., then to M., &c." and the will referred to a card as showing the parties designated by the letters in the will, which card, however, was not shown to have been in existence at the time of the execution of the will: it was held clearly inadplace, and no other house, were to devise his freehold house there to A. B., the description, though inaccurate, would occasion no ambiguity. If, however, a testator were to devise an estate to John Baker of Dale, the son of Thomas, and there were two persons to whom the entire description accurately applied, this description, though accurate, would be ambiguous. It is obvious, therefore, that the whole of that class of cases in which an inaccurate description is found to be sufficient, merely by the rejection of words of surplusage, are cases in which no ambiguity really exists. The meaning is certain, notwithstanding the inaccuracy of the testator's language. Wigram, 175, 176.

Two kinds of ambiguity occur in written instruments: the one is called *ambiguitas latens*, *i. e.* where the writing appears on the face of it certain and free from ambiguity, but the ambiguity is introduced by evidence of something extrinsic, or by some collateral matter out of the instrument; the other species is called *ambiguitas patens*, *i. e.* an ambiguity apparent on the face of the instrument itself.

A simple instance of *ambiguitas patens* presents itself where a blank occurs in some part of a written contract. Wigr. *Extr. Evid.* p. 88, 3d ed. See *Saunderson v. Piper*, 5 Bing. N. C. 425. *Clayton v. Lord Nugent*, 13 Mee. & W. 200. "A latent ambiguity," says *Alderson, B.*, in *Smith v. Jeffries*, 15 Mee. & W. 561, "is where you show that words apply equally to two different things or subject-matters; and then evidence is admissible to show which of them was the thing or subject-matter intended." The word "ambiguous" is, it may further be remarked, sometimes not quite correctly used in reference to that which is comprehensive or general. Properly speaking, an expression is "ambiguous" only when, from its very terms, it may mean either one thing or another. The use of a *nomen generale*, under which several different things may be included, does not necessarily create an ambiguity in the instrument containing it. See *per Pollock, C. B., Ashworth v. Mounsey*, 9 Ex. 186. "*Ambiguitas patens*," says Lord Bacon, "cannot be holpen by averment, and the reason is, because the law will not couple and mingle matter of specialty, which is of the higher account, with matter of averment, which is of the lower account in law, for that were to make all deeds hollow, and subject to averment; and so, in effect, to make that pass without deed which the law appoints shall not pass but by deed (Bac. *Max.* reg. 25, commented on 2 Phill. *Evid.* 9th ed. 313. *Doe d. Tyrrell v. Lyford*, 4 M. & S. 550. *Lord Cholmondeley v. Lord Clinton*, 2 Mer. 343: Judgment. *Doe d. Gord v. Needs*, 2 Mee. & W. 139; S. P. *Stead v. Barrier, Sir T. Raym.* 411); and this rule, as above stated and explained, applies not only to deeds, but to written contracts in general (see *Hollier v. Eyre*, 9 Clark & Fin. 1. *Goldshide v. Swan*, 1 Ex. 154); and especially to wills.

In the language of Lord Bacon, all ambiguity of words within the deed may be helped by construction in some cases, by election, but never by averment, but rather shall make the deed void for uncertainty. Bac. *Max.* reg. 25: *per Tindall, C. J.*; 7 Scott, N. R. 36. Wigram, *Extrin. Evid.* 3d ed. 83, 101. The general rule, however, as to patent ambiguity must be received with this qualification; viz. the extrinsic evidence is unquestionably admissible for the purpose of showing that the uncertainty which appears on the face of the instrument does not, in point of fact, exist; and that the intent of the party, though uncertainly and ambiguously expressed, may yet be ascertained, by proof of facts, to such a degree of certainty as to allow of the intent being carried into effect. In cases falling within the scope of this remark the evidence is received, not for the purpose of proving the testator's intention, but of explaining the words which he has used. 2 Phill. *Evid.* 9th ed. 314. Suppose, for instance, a legacy to one of the children of A. by her late hus-

missible in evidence; the Court observing that this was a case of a patent ambiguity, and that, according to all the authorities on the subject, parol evidence to explain the meaning of the will could not legally be admitted.[1]

SAUNDERSON v. PIPER, 5 Bing. N. C. 425; S. C. 7 Scott, 408.

A bill of exchange was expressed in *figures* to be drawn for 245*l.*, and in words for two hundred pounds, value received, with a stamp applicable to the higher amount; evidence to show that the words "and forty-five" had been omitted by mistake was held inadmissible, for the doubt being on the face of the instrument, extrinsic evidence could not be received to explain it. The instrument, however, was held to be a good bill for the smaller amount, it being a rule laid down by commercial writers, that, where a difference appears between the figures and the words of a bill, it is safer to attend to the words. *See* Byles on Bills, 70. Or in a bill of exchange.

II. LATENT AMBIGUITY.

(A) *May be explained by Parol Evidence.*

DOE D. THOMAS v. BEYMON, 12 Ad. & E. 431.

A devise was made of land to M. B. for life, remainder to her three A latent ambiguity may

band B.; suppose, further, that A. had only one son by B., and that this fact was known to the testator, the necessary consequence, in such a case, of bringing the words of the will into contact with the circumstances to which they refer, must be to determine the identity of the person intended, it being the form of expression only, and not the intention, which is ambiguous; and evidence of facts requisite to reduce the testator's meaning to certainty would not, it should seem, in the instance above put, be excluded; though it would be quite another question if A. had more sons than one, or if her husband were living. Wigram, *Ex. Evid.* 3d ed. 66.

"In the case of a patent ambiguity," remarks Sir T. Plumer, "that is, one appearing on the face of the instrument, as a general rule, a reference to matter *dehors* the instrument is forbidden. It must, if possible, be removed by construction and not by averment; but, in many cases, this is impracticable where the terms used are wholly indefinite and equivocal, and carry on the face of them no certain or explicit meaning, and the instrument furnishes no materials by which the ambiguity thus arising can be removed: if in such cases the Court were to reject the only mode by which the meaning could be ascertained, viz. the resort to extrinsic circumstances, the instrument must become inoperative and void. As a minor evil, therefore, common sense and the law of England (which are seldom at variance) warrant the departure from the general rule, and call in the light of extrinsic evidence." *Per Sir Thos. Plumer, M.R., Colpoys v. Colpoys*, 1 Jac. R. 463, 464. *Collison v. Curling*, 9 Clark & Fin. 88.

[1] On this principle, a devise to "one of the sons of J. S.," cannot be explained by parol proof. *Strode v. Russell*, 2 Vern. 624. *Cheyney's case*, 5 Rep. 68. See *Castledon v. Turner*, 3 Atk. 257. *Harris v. Bishop of Lincoln*, 2 P. Wms. 136, 137. *Per Tindal, C. J., Doe d. Winter v. Perratt*, 7 Scott, N. R. 36. And if there be a blank in the will for the devisee's name, parol evidence cannot be admitted to show what person's name the testator intended to insert. *Baylis v. Attorney-General*, 2 Atk. 239. *Hunt v. Hort*, 3 Bro. C. C. 311, cited 8 Bing. 234. It being an important rule that in expounding a will the Court is to ascertain, not what the testator actually intended, as contradistinguished from what his words express, but what is the meaning of the words he has used. *Per Parke, J., Doe d. Gwillim v. Gwillim*, 5 B. & Adol. 129. If, as observed by Sir James Wigram, the Statute of Frauds merely had required that a nuncupative will should not be set up in opposition to a written will, parol evidence might in many cases be admissible to explain the intention of the testator, where the person or thing intended by him is not adequately described in the will; but if the true meaning of that statute be that the writing which it requires shall itself express the intention of the testator, it is difficult to understand how the statute can be satisfied by a writing merely, if the description it contains have nothing in common with that of the person intended to take under it, or not enough to determine his identity. To define that which is indefinite, is to make a material addition to the will. *See* Wigram, *Extrin. Evid.* 3d ed. 120, 121. If a testator's words, aided by the light derived from the circumstances with reference to which they were used, do not express the intention ascribed to him, evidence to prove the sense in which he intended to use them is, as a general proposition, inadmissible: in other words, the judgment of a Court in expounding a will must be simply declaratory of what is in the will. Wigram, id. 87. See *Goblet v. Beechey*, 3 Sim. 24.

be explained by extrinsic evidence, as where it is raised by a plurality of persons answering the description of devisees in a will.

daughters, Mary, Elizabeth, and Ann, in fee as tenants-in-common. At the date of the will M. B. had two legitimate daughters, Mary and Ann, living, and one illegitimate, named Elizabeth. Extrinsic evidence was held admissible to rebut the claim of the last-mentioned, by showing that M. B. formerly had a legitimate daughter named Elizabeth, who died some years before the date of the will, and that the testator did not know of her death, nor of the birth of the illegitimate daughter.[1] See *Doe d. Allen v. Allen*, 12 Ad. & E. 451.

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[1] "The general rule," said *Tindal, C. J.*, "I take to be, that where the words of any written instrument are free from ambiguity in themselves, and where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instruments, or the subject-matter to which the instrument relates, such instrument is always to be construed according to the plain common meaning of the words themselves, and evidence *dehors* the instrument is inadmissible. *Shore v. Wilson*, 5 Scott, N.R. 1037. But if one devise to his son John, when he has two sons of that name (*Counden v. Clerke*, Hob. 32. *Jones v. Newman*, 1 W. Black. 601. *Cheyney's case*, 5 Rep. 68: *per Tindal, C. J. Doe d. Winter v. Perratt*, 7 Scott, N. R. 36); or to the eldest son of J. S. and two persons, as in the case of a second marriage, meet that designation (*per Erskine, J.*, 5 Bing. N. C. 433. *Doe d. Gora v. Needs*, 2 Mee. & W. 129. *Richardson v. Watson*, 4 B. & Ad. 792), evidence is admissible to explain which of the two was intended. Wherever, in short, the words of the will in themselves are plain and unambiguous, but they become ambiguous by the circumstance that there are two persons, to each of whom the description applies, then parol evidence may be admitted to remove the ambiguity so created. *Per Alderson, B.*, 13 Mee. & W. 206; and in *Smith v. Jefferys*, 15 id. 561. *The Duke of Dorset v. Lord Hawarden*, 3 Curties' *Eccl. R.* 80.

In all cases, indeed, in which a difficulty arises in applying the words of a will to the thing which is the subject-matter of the devise, or to the person of the devisee, the difficulty or ambiguity, which is introduced by the admission of extrinsic evidence, may be rebutted and removed by the production of further evidence upon the same subject, calculated to explain what was the estate or subject-matter really intended to be devised, or who was the person really intended to take under the will, and this appears to be the extent of the maxim as to *ambiguitas latens*. *Miller v. Travers*, 8 Bing. 247, 248: *per Abbott, C. J. Doe d. Westlake v. Westlake*, 4 B. & Ald. 58. The characteristic of these cases is, that the words of the will do describe the object or subject intended, and the evidence of the declarations of the testator has not the effect of varying the instrument in any way whatever; it only enables the Court to reject one of the subjects or objects to which the description in the will applies, and to determine which of the two the devisor understood to be signified by the description which he used in the will. Judgment, *Doe d. Gora v. Needs*, 2 Mee. & W. 140. *Lord Walpole v. Earl of Cholmondeley*, 7 T. R. 138. It is true, moreover, that parol evidence must be admissible to some extent to determine the application of every written instrument.

"Speaking philosophically," said *Rolfe, B.*, "you must always look beyond the instrument, itself to some extent, in order to ascertain who is meant; for instance, you must look to names and places" (13 Mee. & W. 207), and in every specific devise or bequest it is clearly competent and necessary to inquire as to the thing specifically devised or bequeathed: *per Lord Cottenham, C., Shuttleworth v. Greaves*, 4 Mylne & C. 38. Thus, if the word "Blackacre" be used in a will, there must be evidence to show that the field in question is Blackacre. *Doe d. Preedy v. Holtom*, 4 Ad. & E. 82; recognised *Doe d. Norton v. Webster*, 12 Ad. & E. 450. *Doe d. Freeland v. Burt*, 1 T. R. 701, 704. *Paddock v. Fradley*, 1 C. & J. 90. *Doe d. Beach v. Earl of Jersey*, 3 B. & C. 670. In these cases the instrument appears on the face of it to be perfectly intelligible and free from ambiguity, yet extrinsic evidence must nevertheless be received, for the purpose of showing what the instrument refers to: *per Patteson, J.*, and *Coleridge, J.*, 4 Ad. & E. 81, 23. See *Doe d. Norton v. Webster*, 12 id. 442. *Reg. v. Inhabitants of Wooldale*, 6 Q. B. 549. The rule as to *ambiguitas latens* may likewise be applied to mercantile instruments, with a view to ascertain the intention, though not to vary the contract of the parties. *Smith v. Jefferys*, 15 Mee. & W. 561. In the case of a guarantee, for instance, as of a will, the circumstances under which the document was executed may be looked at, not to make the document, but to show its construction. *Goldshede v. Swan*, 1 Ex. R. 164.

Accordingly, parol evidence may be given to show that a written guarantee, addressed to one person, was meant to create a responsibility to a firm in which he was a partner. *Garrett v. Handley*, 4 B. & C. 664; S. C. 7 D. & R. 144; 3 B. & C. 467. And a general receipt on a bill of exchange may also be explained by parol. *Graves v. Key*, 3 B. & Adol. 313.

So where a guarantee was expressed to be in consideration of the plaintiff having this day advanced a sum of money, it was held to be sufficiently ambiguous to admit of evidence to show that the advance was not a past one, but was made simultaneously with the execution of the guarantee. *Goldshede v. Swan*, 1 Ex. R. 154. So where a

AMBIGUUM placitum interpretari debet contra proferentem. *An ambiguous pleading ought to be construed against the party whose it is.* Co. Litt. 303.[1]

AMBIT. *See* Parcel or no Parcel; Parish.

AMBULATORIA est voluntas defuncti usque ad vitæ supremum exitum. *The will of a deceased person is ambulatory until the last moment* (end) *of life.* Dig. 34, 4, 4.

AMBULATORY. *Movable.* The Court of Queen's Bench was formerly called an *Ambulatory Court*, because it followed the king's person. The will of a testator is ambulatory until death. 2 Vern. 77. The return of a sheriff till it is filed. Wilmot, J., 2 Burr. 1644.

AMENDMENT.

See also		
Abatement	*Certiorari*	Mis-joinder
Affidavit	Dower	Non-joinder
Arbitration	Ejectment	*Quo Warranto*
Attorney	*Habeas Corpus*	Replevin
Bail	*Mandamus*	Sessions
	Misnomer	Warrant of Attorney.

I. In Civil Proceedings in the Superior Courts, p. 324.

(A) *Jurisdiction of Court and Judges respecting*, p. 324.

(*a*) *Defects or Errors in Proceedings may at all times be Amended*, p. 324.

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contract was in these words, "Sold 18 pockets Kent hops, at 100s.," and it appeared that a pocket contained more than a cwt., evidence was admitted to show that, by the usage of trade, a contract so worded was understood to mean 5*l.* per cwt. *Spicer v. Cooper*, 1 Q. B. 424. So where a corn-merchant in Ireland sent written instructions to a factor and *del credere* agent in London, to sell oats of a certain quality at a certain price on his (the merchant's) account; it was held that evidence was admissible to show that, by the custom of the London corn-trade, the factor was warranted by such instructions in selling in his own name. *Johnston v. Usborne*, 11 Ad. & E. 549. So where there is a variance between a bought and a sold note, evidence of mercantile usage is admissible to explain it. *Bold v. Raynor*, 1 Mee. & W. 343. So evidence is admissible to explain the meaning of a warranty given on a sale of goods. *Powell v. Horton*, 3 Scott, 110. And where a theatrical manager contracted with an actress to engage her for three years at a certain salary, it was held that parol evidence might be given to show, that, according to the uniform usage of that profession, the plaintiff was to be paid only during the theatrical season in each of those years. *Grant v. Maddox*, 15 Mee. & W. 737. In fine, whenever a contract is entered into with reference to a known and recognised use of particular terms employed by the contracting parties, or with reference to a known and established usage, evidence may be given to show the meaning of those terms, or the nature of that usage, amongst persons conversant with the particular branch of commerce or business to which they relate. *Robertson v. Jackson*, 2 C. B. 412. *Grant v. Maddox*, 16 L. J. Ex. 227; S. C. 15 Mee. & W. 737. *See post*, Contracts; Evidence; Mercantile Terms.

[1] In pleading it is a general rule, that where two different meanings present themselves, that construction shall be adopted which is most unfavourable to the party pleading. Steph. *Plead.* 415, 5th ed. *Howard v. Gossett*, 14 L. J. Q. B. 376: *per Coleridge, J.* Thus, in debt on a bond conditioned to make assurance of land, if the defendant pleads that he executed a release, the plea is bad if it does not express that the release concerns the same lands. Com. Dig. Pleader, E. 5, *Manvers' case*, 2 Rep. 3. So a plea of set-off, which alleged that the plaintiff was, at the commencement of the action, indebted, without adding "and still is," has been held insufficient, for it would not be inferred that the debt had not since been satisfied. *Dendy v. Powell*, 3 Mee. & W. 442. After pleading over, however, ambiguities such as the above are cured, and that construction of the ambiguous expression will be adopted which is favourable to the party by whom it is used. *Hobson v. Middleton*, 6 B. & C. 295. *Fletcher v. Pogson*, 3 id. 192. *Boydell v. Harkness*, 3 C. B. 171. *See* Demurrer.

(B) *Of Amendments before Trial*, p. 325.
(*a*) *In the Writ*, p. 325.
(*b*) „ *Particulars of Demand*, p. 327.
(*c*) *Of Pleadings: Declaration*, p. 328.
(1) *Amendment of Pleas*, p. 330.
(2) *Withdrawal and Waiver of Pleas*, p. 331.
(*d*) *Order to Stay*, p. 331.
(*e*) *Order for Reference*, p. 331.
(*f*) „ *Writ of Trial*, p. 331.
(*g*) *Mis-joinder or Non-joinder of Parties: of Plaintiffs*, p. 331.
(*h*) „ „ „ *of Defendants*, p. 332.
(*i*) *When and how leave to Amend obtained*, p. 332.
(C) *Amendments at the Trial*, p. 333.
(*a*) *Amendment of Pleadings*, p. 333.
(1) *As to Non-joinder or Mis-joinder of Parties*, p. 333.
(2) „ „ *of Plaintiffs*, p. 333.
(3) „ „ *of Defendants*, p. 334.
(*b*) *Amendment of Issue*, p. 335.
(D) *After the Trial*, p. 335.
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(*b*) „ *Postea*, p. 336.
(*c*) „ *Jury Process*, p. 336.
(*d*) „ *Pleadings*, p. 336.
(*e*) „ *Judgment*, p. 337.
(*f*) *Of Rule* Nisi *for New Trial*, p. 337.
(*g*) *Of Writ of Trial*, p. 337.
(E) *Of the Effect of the Rule or Order*, p. 337.
(F) „ *Costs of Amendments*, p. 338.
(G) *Amendment of Writs of Execution*, p. 339.

I. In Civil Proceedings in the Superior Courts.

(A) *Jurisdiction of Court and Judges respecting.*

The Court or any Judge may at all times amend defects in the proceedings.

15 & 16 Vic. c. 76, s. 222. "It shall be lawful for the superior courts of common law,[1] and every judge thereof, and any judge sitting at Nisi Prius, at all times to amend all defects and errors in any proceeding in civil causes, whether there is anything in writing to amend by or not; and all such amendments may be made with or without costs, and upon such terms as to the Court or Judge may seem fit; and all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties shall be so made.

A similar provision is contained in the Common Law Procedure Act of 1854.

17 & 18 Vic. c. 125, s. 96. "It shall be lawful for the superior courts of common law, and every judge thereof, and any judge sitting at Nisi Prius, at

[1] Inferior courts of record have not the extended powers of amendment given by the Common Law Procedure Acts, these statutes applying only to the superior courts. Full powers of amendment are given to County Court Judges, by 19 & 20 Vic. c. 108, s. 57. *Post*, 344. *See* statutes of jeofails, and particularly the 3 & 4 Wm. 4, c. 42, s. 23. *Wicks v. Groves*, 20 Jur. 212; 4 W. R. 253.

all times to amend all defects and errors in any proceedings under the provisions of this act, whether there is anything in writing to amend by or not; and all such amendments may be made with or without costs, and upon such terms as to the Court or Judge may seem fit; and all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties shall be so made, if duly applied for."

So in the Act, 1860.[1]

23 & 24 Vic. c. 126. "It shall be lawful for the superior courts of common law, and every judge thereof, and any judge sitting at Nisi Prius, at all times to amend all defects and errors in any proceedings under the provisions of this act, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend or not; and all such amendments may be made with or without costs, and upon such terms as to the Court or Judge may seem fit; and all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties shall be so made, if duly applied for."

Cross v. Metcalfe, 5 Ad. & E. 800; S. C. 1 Nev. & P. 232.

After a cause has been referred, the consent of the party to be affected by the amendment is indispensable.[2]

After verdict on the trial of this action, all matters, by consent, were referred to arbitration. The replication to one of the pleas being informal, the arbitrator certified to the Court that it would be agreeable to the justice of the case to allow the plaintiff to amend the replication, by substituting for a special replication the general replication *de injuriâ*.

On motion for that purpose,—

Per Cur. Can we alter the terms in which the verdict was taken, and the reference made, without consent? It would be exceeding our jurisdiction.

(B) *Of Amendments before Trial.*[3]

(*a*) *In the Writ.*

By 15 & 16 Vic. c. 76, power is given

15 & 16 Vic. c. 76, s. 20. "If the plaintiff or his attorney shall omit to insert in or indorse on any writ or copy thereof any of the matters required by

[1] These sections only authorise such amendments as are necessary for determining the real question in controversy, *i.e.* the real question which the parties intended to have tried, not any point which may come in controversy in the course of the trial, and which was not in controversy before. *Wilkins v. Reid*, 15 C. B. 192. The courts have, at common law, a discretionary power to amend the proceedings in an action up to judgment. See *Alder v. Chip*, 5 Burr. 756; 3 Bl. Com. 407; Co. Litt. 260. *R. v. Bishop of Llandaff*, 1 Str. 1011. Several old statutes also give power to the Court to amend any mistake owing to the misprision of the officers of the court, in writing one syllable or letter too much or too little (14 Edw. 3, c. 5, s. 1; 8 Co. 157 a), after as well as before judgment (4 Hen. 6, c. 3. *See* also 8 Hen. 6, cc. 12, 15. *Cheese v. Scales*, 10 Mee. & W. 488; 2 Dowl. N. S. 438), though not as regards proceedings in outlawry. Mistakes and defects in pleadings, which otherwise might have been taken advantage of on demurrer, are often cured by the verdict; as where the facts set forth in the defective pleading were necessarily proved at the trial of the issue, or must be presumed to have been so. So defects are often cured by the acts of the opposite party, as by his admitting that which was defectively stated through pleading over. *Wilkinson v. Sharland*, 10 Ex. 724. Also the mistakes and omissions in pleadings, mis-joining of issue, miscontinuance, and discontinuance, are aided after verdict by the statutes of jeofails, 32 Hen. 8, c. 30; 18 Eliz. c. 14; 24 Jac. 1, c. 13; 16 & 17 Car. 2, c. 8; and after judgment by confession, by the stat. 4 & 5 Anne, c. 16, s. 2. Also all defects in writs, original or judicial, are aided after verdict by 5 Geo. 1, c. 13. The older statutes, however, except 32 Hen. 8, c. 30, do not extend to penal actions. *Wynne v. Middleton*, 2 Str. 1227. *Richards v. Brown*, 1 Dougl. 115. *Atcheson v. Everett*, Cowp. 382. *R. v. Miden*, 1 Str. 62. Where these statutes apply, the Court treats the amendment as virtually, though it is not actually, made. 3 Bl. Com. 407. Therefore, if error is brought for the defect so cured, the plaintiff in error will get no costs. *Condon v. Coulter*, Hardr. 314.

[2] It is doubtful whether the Court has power to order a special case, stated by consent of the parties to be amended, if either of the parties dissent from the proposed amendment. See *Notman v. The Anchor Assurance Co.* 6 C. B. (N. S.) 536. *The Mersey Docks and Harbour Board v. Jones*, 2 L. T. (N. S.) 248.

[3] It is entirely discretionary in the Court or Judge to make the amendment asked. *Ritchie v. Van Gelder*, 9 Ex. 762.

to amend the writ or indorsements in any respect.

this act to be inserted therein, or indorsed thereon, such writ or copy thereof shall not on that account be held void; but it may be set aside as irregular, or amended upon application to be made to the Court out of which the same shall issue, or to a judge; and such amendment may be made, upon any application to set aside the writ, upon such terms as to the Court or Judge may seem fit."

By s. 21, if by mistake one of the writs of summons prescribed by the act is substituted for any another, the writ may be amended.[1]

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[1] Under the general power to make any amendment necessary for determining the real question in controversy between the parties, the Court of Queen's Bench amended the indorsement upon a *pluries* writ of summons issued more than five months before the C. L. P. Act of 1852 came into operation, by altering the date of the first writ to its true date, in order to save the Statute of Limitations. But the Court refused to make a similar amendment in the copy of the *pluries* writ served upon the defendant. *Cornish v. Hockin*, 22 L. J. Q. B. 142. A writ issued under the Bills of Exchange Act may be amended so as to turn it into a writ under the Common Law Procedure Act. *Leigh v. Bake*, 2 C. B. (N. S.) 367; 26 L. J. C. P. 220; 3 Jur. N. S. 668. The Court will amend an indorsement of the writ of summons, though the effect may be to take away from the defendant the defence of the Statute of Limitations. *Cornish v. Hockin*, 1 E. & B. 602.

The courts now enjoy a much more extended jurisdiction to amend errors and defects in the writ of summons than they possessed under the Uniformity of Process Act: the general power given by the 222d sect. of the 15 & 16 Vic. c. 76, to make all such amendments as may be necessary for the determining of the real question in controversy applying to writs of summons. *Cornish v. Hockin*, 22 L. J. Q. B. 142. A review of the decisions under the former act is still, however, useful. The Courts were not quite uniform in the construction of their powers to amend the writ, and the extent to which it should be exercised. In *Baker v. Meaver* (1 C. & M. 112; S. C. 1 Dowl. 616), which was an action by the assignees of a bankrupt, the Court of Exchequer allowed the declaration to be amended, by adding the name of the official assignee as a plaintiff, upon payment of costs; but it does not appear that the writ was amended; or that, if the amendment had not been made, the Statute of Limitations would have been a bar. In *Horton v. The Inhabitants of Stamford* (1 C. & M. 773; S. C. 2 Dowl. 96), the plaintiff had, by mistake, proceeded against the inhabitants of the hundred, instead of the borough of Stamford, in an action for damage by rioters, under the 7 & 8 Geo. 4, c. 31, and the Court amended the writ and subsequent proceedings in the above particular, the time for bringing a fresh action having expired. "If," said *Bayley, B.*, in this case, "the record were to go uncorrected to trial, justice would be defeated, merely because the advisers of the plaintiff have been guilty of a slip." There are instances, even in cases of penal actions, where the courts have permitted amendments, and have given as their reason for such amendments that the parties would be too late if the amendments were not allowed. Again, in *Edge v. Shaw* (2 C., M. & R. 415; S. C. 4 Dowl. 189), an amendment was allowed, on granting a rule for a new trial of a case before the sheriff, by reducing the amount indorsed upon the writ, so as to bring it within his jurisdiction. In *Kirk v. Dolby* (6 Mee. & W. 636; S. C. 8 Dowl. 766), the *præcipe* for the writ bore date the 4th of May, whereas the writ itself bore date the 4th of April; and it was held that a judge had power to order an amendment of the writ, so as to make it correspond with the *præcipe*. In this case, *Parke, B.*, in delivering judgment, observed: "We are disposed to think that this amendment might be made under the Statute of Amendments, on the ground of its being a misprision of the clerk. We wished, however, to come to a uniformity of decision on the point, and have therefore consulted the Judges of the Courts of Queen's Bench and Common Pleas, and the result is, that we think this exception also might be introduced (that is, in addition to cases where the Statute of Limitations would bar a fresh action), that an amendment may be made by which a writ of summons is made to correspond with a *præcipe*." Again, in *Eccles v. Cole* (8 Mee. & W. 537; S. C. 1 Dowl. N. S. 34), the writ was amended by altering the cause of action from debt to *assumpsit*, on affidavit, that if a fresh action were commenced the Statute of Limitations would be a bar. And in the two subsequent cases of *Bilton v. Clapperton*, 1 Dowl. N. S. 386; S. C. 9 Mee. & W. 473; and *Plock v. Pacheco* (9 id. 342; S. C. 1 Dowl. N. S. 380), where the question as to amending arose upon the writ of *capias*, the principle acted upon appears to have been, that an amendment in the writ will not be allowed where the sole object is to save costs, but that it will be permitted where the refusal would deprive the party of his remedy, or where justice seems to require it, and the situation of the parties will not be changed by the amendment. See *Williams v. Williams*, 10 Mee. & W. 476. *Brown v. Fullerton*, 13 id. 556. *Moore v. Magan*, 16 id. 95; 4 D. & L. 267; 16 L. J. Ex. 67. In the subsequent case of *Goslin v. Cotterell* (14 Mee. & W. 71; S. C. 2 D. & L. 893),

(*b*) *Particulars of Demand.*

STAPLES v. HOLDSWORTH, 4 Bing. N. S. 717; 6 Dowl. P. C. 715; 6 Scott, 605.

Particulars of demand amended under peculiar facts, after lapse of ten years from their delivery.[1]

Assumpsit for money had and received to the use of the plaintiff. The action was commenced in 1827, and a declaration and particulars of demand delivered, but no further step taken until 1836, when a term's notice was given, and a plea demanded and delivered. The Court subsequently allowed the particulars to be amended, it appearing that the defendant had been in a confidential situation in the employment of the plaintiffs, and that their first particulars were framed on an account delivered by him, which was subsequently found to be incorrect.

Alderson, B., refused to allow the writ to be amended, by reducing the amount indorsed thereon, so as to bring it within the jurisdiction of the sheriff. In *Culverwell v. Nugee* (4 D. & L. 30; S. C. 15 Mee. & W. 559; 15 L. J. Ex. 308), the Court, in order to save the Statute of Limitations, allowed an *alias* and a *pluries* writ of summons to be amended, by indorsing upon them the day of the date of the first writ of summons, and the return thereto. In *Christie v. Bell* (4 D. & L. 690; S. C. 16 Mee. & W. 699; 16 L. J. Ex. 179), the ground of the application to amend was likewise to save the statute, and the Court permitted the amendment to be made, by describing the plaintiffs as assignees of a bankrupt, and the defendants as the registered officers of a banking co-partnership.

In *Mavor v. Spalding* (1 D. & L. 878. *See* also *Palmer v. Beal*, 9 Dowl. 529), the plaintiff was allowed to amend the indorsement on the *alias* and *pluries* writs, by adding the date of the return of the first writ, so as to comply with the terms of the stat. 2 Wm. 4, c. 39, s. 10, although the defendant had pleaded the Statute of Limitations.

In *Trotter v. Bass* (3 Dowl. 407; S. C. 1 Bing. N. C. 516. See *Tubsum v. Tenant*, 1 B. & P. 481), the Court of Common Pleas held that a judge at chambers has no power to permit an alteration in the amount indorsed on a writ of summons.

In *Campbell v. Smart* (5 C. B. 196), an application was made to alter the date of the original and *alias* writs of summons, in order that a *pluries* writ might issue within a month after the date of the *alias*, for the purpose of saving the Statute of Limitations: the Court, however, refused to allow the amendment, on the ground that the Uniformity of Process Act requires the true date to be stated upon the writ, and that the Statute of Limitations is expressly meant for the benefit of a defendant under circumstances similar to the above. And even since the Common Law Procedure Act the Court has no power to alter the date of a writ of summons, by directing it to be dated of a day prior to that on which it was really issued, for the purpose of preventing the operation of the Statute of Limitations. *Clark v. Smith*, 27 L. J. Ex. 155.

As to the amendments of the writ with respect to parties, the name or names of a plaintiff or plaintiffs improperly joined or omitted in any action may be struck out or added by leave of the Court, or without such leave after a plea in abatement, with the consent of the parties whose names are so added or struck out. 15 & 16 Vic. c. 76, s. 34. Reg. Gen. (Pr.) H. T. 1853, r. 6: *see post*, p. 333. In the case of the joinder of too many defendants in any action of contract, the Court or a Judge may strike out the name or names of such as have been improperly joined, if no injustice will be done thereby. 15 & 16 Vic. c. 76, s. 37: *see post*, p. 334. Before the Common Law Procedure Act the Courts were in the habit of allowing the name of a plaintiff to be added, if in the case of the issuing of a new writ the Statute of Limitations would bar the action. *Brown v. Fullerton*, 2 D. & L. 251; 13 Mee. & W. 556. But they would not allow the name of a co-defendant to be added, notwithstanding the Statute of Limitations had become a bar since the commencement of the suit. Thus, in *Goodchild v. Leadham* (17 L. J. Ex. 90; S. C. 5 D. & L. 383; 1 Exch. Rep. 707), the Court, after declaration and plea, declined to allow an amendment of the writ by adding the name of a co-defendant, although the Statute of Limitations had become a bar since the commencement of the suit. The Court there expressly distinguished between the addition of the name of a plaintiff and that of a defendant, under the circumstances which were then disclosed to them, observing that the plaintiff appears before the Court, and consents to what is done, whereas the Court has no power over the party proposed to be made a defendant against his own consent.

In *Roberts v. Bate* (6 Ad. & E. 778), the non-joinder of a co-defendant was pleaded in abatement, and the Court of Queen's Bench refused to set aside the plea, or allow the writ to be amended by adding the name of the omitted party, although facts were stated in the affidavit showing an equitable claim to the indulgence asked. *See* p. 329.

[1] An amendment will, on payment of costs, be allowed in the particulars, where an equitable ground is raised for the application; as, if an item be omitted by mistake, or if the defendant has kept back accounts

(*c*) *Of Pleadings: Declaration.*[1]

MOODY v. ASLATT, 1 C., M. & R. 771; 3 Dowl. P. C. 486.

Amendments are only permitted when necessary for the success of the proceedings.

Action for negligence. The cause had proceeded to issue in the wrong Christian name of the plaintiff; the Court refused to amend the proceedings by inserting the right name, because it was only a misnomer, which was immaterial, there being no plea to that effect.

STORR v. WATSON, 2 Scott, 842.

Even after issue joined, and a peremptory undertaking given, the declaration may be amended by the substitution of one count for another.

In an action on the case for negligence with respect to goods entrusted by the plaintiff to the care of the defendant, after issue joined, and a peremptory undertaking to try the case, the record was withdrawn, with a view to obtain leave to amend the count, or to add thereto a count in trover.

On motion for that purpose,—

Per Cur. We think plaintiff ought to be allowed to turn the present count into a count of trover, upon payment to the defendant of costs.

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for the purpose of occasioning difficulty; and the terms upon which an application to amend particulars will be granted will, of course, be determined by an exercise of the discretionary jurisdiction of the Court or Judge (*Staples v. Holdsworth*, 4 Bing. N. C. 717. *Preston v. Whitehead*, 5 Dowl. 720. *Jones v. Corry*, 8 Scott, 515); but there should be no unnecessary delay in making the application. See *Staples v. Holdsworth*, *supra*.

The Court allowed the plaintiff to amend his particulars pending a reference, by adding thereto items alleged to have accrued during the space of time covered by the particulars already delivered, there being no suggestion on the part of the defendant that he would not have consented to the reference, if the items in question had been originally inserted. *Blunt v. Cooke*, 5 Scott, N. R. 232.

The Court has power, even after the reference of a cause to arbitration, by the order of a judge under C. L. P. Act, 1854, s. 3, to amend the particulars of demand. *Gibbs v. Knightly*, 2 H. & N. 34; 26 L. J. Ex. 294. The acceptance of amended particulars is a waiver of any objection to those first delivered. *Jones v. Fowler*, 4 Dowl. 232. But often, in cases of reference by virtue of the consent of the parties, if no power of amendment is reserved, no amendment of the particulars can be made after the cause is referred, except with the consent of both. *Morgan v. Tarte*, 11 Ex. 82. Though particulars are indorsed on the writ, the plaintiff may, without leave of a judge, deliver fresh particulars with the declaration, and proceed thereon. *Fromant v. Ashley*, 1 E. & B. 723.

Where particulars are delivered which are insufficient for not being specific, the opposite party should apply to a judge to amend them, and cannot, after the verdict against him, move for a new trial on that ground. *Hull v. Bolland*, 27 L. T. 221.

[1] When a defect or omission is discovered, either in form or substance, in the declaration, the plaintiff should take out a summons calling on the opposite attorney to show cause why leave should not be given to amend; and when it appears to be for the furtherance of justice, the Judge will grant an order to that effect; and such order will, if the defendant is under terms of pleading issuably, release him from the restriction. *Hutt v. Giles*, 11 Mee. & W. 756; S. C. *nom. Chapman v. Giles*, 1 D. & L. 389. *Children v. Mannering*, 8 Dowl. 120.

If the declaration is so framed as to prejudice or embarrass the fair trial of the action, the defendant may apply to have it amended. *Norcutt v. Mottram*, 7 Scott, 176.

Since the 15 & 16 Vic. c. 76, an amendment of the date of a judgment has been allowed in an action upon it, after a plea of *nul tiel record*. *Noble v. Chapman*, 23 L. J. (N. S.) 56, C. P. As to the amount claimed in the declaration, *Hunter v. Emmanuel*, 24 id. 16; and by striking out the name of one defendant, *Cowburn v. Wearing*, 23 id. 81, Ex.

According to the general rule the plaintiff is at liberty to have his declaration amended at any time (*Welsh v. Hall*, 9 Mee. & W. 14); before verdict or interlocutory judgment (*per Abbott, C. J., Brazier v. Jones*, 6 B. & C. 199. *Bonfield v. Milner*, 2 Str. 1098. Prior to the Common Law Procedure Acts an amendment has been allowed after issue joined (*Executors of the Duke of Marlborough v. Widmore*, 2 Str. 899. *Norcutt v. Mottram*, 7 Scott, 176); after the record has been withdrawn (*Mace v. Lovett*, 5 Burr. 2833. *Cross v. Kaye*, 6 T. R. 543. See *Wood v. Grimwood*, 10 B. & C. 689); after a demurrer has been delivered (*Jones v. Edwards*, 3 Mee. & W. 218); but after verdict upon issue in fact there can be no amendment on demurrer. *Crucknell v. Trueman*, 9 Mee. & W. 684. (As to an amendment after error brought, see *Spencer v. Haggiadur*, 5 D. & L. 68.) The amendment may be in matter either of form or substance, on summons or motion in court. Such questions are entirely for the discretion of the Court or

DALE v. GORDON, 3 M. & Scott, 339.

A new count may be added when its introduction is to raise the real question between the parties.

This was an action against the sheriff for taking insufficient sureties in a replevin. On a rule to show cause why the plaintiff should not be at liberty to amend his declaration by adding a count, alleging that the plaintiff in the replevin cause did not prosecute his suit with effect or without delay, and that the arrears of rent due to the plaintiff had not been paid or satisfied,—

Per Cur. The amendment ought to be allowed, as it was merely intended by the introduction of certain facts upon the face of the record to raise the question whether or not the defendant, as sheriff, was liable.

LAKIN v. WATSON, 2 Dowl. 633; 2 C. & M. 685; 4 Tyr. 839.

So, after a plea in abatement of non-joinder, writ and declaration were allowed to be amended by adding the name of the omitted co-defendant to avoid the action being barred by time.

This was an action on a promissory note by executors, in which, after a plea in abatement of non-joinder, a rule had been obtained to amend the writ by adding the name of a co-executrix. The affidavit on which the rule was granted was, that her name was omitted through mistake, and that the Statute of Limitations would be a bar, and the debt be lost, if a new action be commenced. The Court allowed the amendment, but stated that in future no amendment of the kind ought to be allowed, except where it appears to the Court that the result of a refusal would be to deprive the plaintiff of all remedy. *See* 1 C. & M. 773; id. 112; and *Roberts v. Bates*, 6 Ad. & E. 778.

WOOD v. GRIMWOOD, 5 M. & R. 584.

But amendment in a *qui*

In an action for penalties under the stat. 12 Anne, c. 16, the declaration

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Judge. The discretion is to be so exercised, and upon such terms, as to do justice between the parties. *Per Best, C. J., Taylor v. Lyon*, 5 Bing. 335. See *Jones v. Edwards*, 3 Mee. & W. 218, 220: *per Tindal, C. J. Matthews v. Swift*, 1 Bing. N. C. 736. "Amendments," it has been said (*per Park, J., Taylor v. Lyon, supra*), "are now generally allowed at every stage of the pleadings for the advancement of justice. The question usually is, Will any injustice be done by what is proposed? and if not, the amendment is allowed." An amendment has accordingly been allowed in the date and title (*Strott v. Herbert*, 1 Wils. 242. *Symonds v. Parmenter*, id. 78. *Contanche v. Le Reux*, 1 East, 133); in the form of action (*Billing v. Flight*, 6 Taunt. 419. *Billing v. Pooley*, id. 422. *Aylwin v. Lodd*, 1 Bing. N. C. 170); in the parties (*Palmer v. Beale*, 9 Dowl. 529. *Holmes v. Pinney*, 6 Dowl. 627); in the statement of the cause of action (*Aylwin v. Todd*, 1 Bing. N. C. 170); as by adding counts (*Legge v. Boyd*, 8 Scott, 502. *Langford v. Wood*, 7 Man. & G. 625. *Morris v. Evans*, 1 Dowl. 657. See *Dyer v. Cowley*, 17 L. J. Q. B. 360); and in the amount of damages (*Havers v. Bannister*, 1 Wils. 7. *Collins v. Aaron*, 6 Dowl. 423. *Dew v. Katz*, 8 Car. & P. 315). The declaration may also be amended by altering the venue; see *Stroud v. Tilly*, 1 Str. 1162. *Rivet v. Cholmondely*, id. 1202. *Petre v. Croft*, 4 East, 433. *Diver v. Mestaer*, id. 435; though, as it is the plaintiff's own fault that he did not lay the venue correctly in the first instance, reasonable ground must be shown in support of the application. *Fife v. Bousfield*, 2 Dowl. N. S. 705. *Ayres v. Buston*, 6 Taunt. 408. When permitted, the amendment has, of course, the same effect as would be obtained by motion to change the venue, which motion cannot regularly be made at the instance of the plaintiff. *Stroud v. Tilly, supra.* But it was held before the late act that an amendment would not be allowed, the object of which was to introduce into the declaration a new substantive cause of action (see *Maddock v. Hammet*, 7 T. R. 55: *per Willes, J., Mace v. Lovett*, 5 Burr. 2833), where there had been unnecessary delay in applying for it: *per Parke, B., Jones v. Edwards*, 3 Mee. & W. 219, citing Tidd. *Prac.* 711.

Where the order for leave to amend is upon payment of costs, the payment of costs is a condition precedent, and hence, where after demurrer, such an order was made for amending the declaration, and the plaintiff did amend, and delivered his amended declaration, but did not tender the amount of costs as ascertained by the Master's *allocatur*, it was held that an interlocutory judgment signed by him for want of a plea was irregular. In such a case, moreover, the full amount of the *allocatur* must be tendered, although there may be a mistake therein. *Leon v. Drew*, 5 D. & L. 307.

If the plaintiff applies to amend his declaration, and has leave to do so upon certain terms, which, however, he does not think proper to accept, he may proceed to trial upon the declaration as it originally stood, without having the order for leave to amend rescinded. *Black v. Sangster*, 1 C., M. & R. 521.

tam action will not be allowed, where the plaintiff has withdrawn the record.

contained fifty-two counts. The plaintiff set the cause down for trial, and then withdrew the record. On motion for leave to amend by adding sixteen counts more,—

Per Cur. We cannot grant the amendment; we think a party, who, after he has commenced such an action, has been guilty of any delay, is not entitled to any indulgence. Here the action was commenced in September, 1829, and plaintiff did not proceed to trial.

No new notice to plead need be given; but the other party has two days to plead to amended pleading. In case he does not plead *de novo*, the original pleadings stand.

15 & 16 Vic. c. 76, s. 90. "When an amendment of any pleading is allowed no new notice to plead thereto shall be necessary, but the opposite party shall be bound to plead to the amended pleading within the time specified in the original notice to plead, or within two days after amendment, whichever shall last expire, unless otherwise ordered by the Court or a Judge; and in case the amended pleading has been pleaded to before amendment, and is not pleaded to *de novo* within two days after amendment, or within such other time as a Court or a Judge shall allow, the pleadings originally pleaded thereto shall stand and be considered as pleaded in answer to such amended pleading."

(1) *Amendment of Pleas.*

HUBER v. STEINER, 2 Dowl. P. C. 781.

Pleas may be amended or added, even after issue joined.

This was an action on a promissory note; after pleas, that the defendant did not draw the note, and Statute of Limitations, on which issue was joined, the defendant applied for leave to add a plea, showing that, by the French law, the plaintiff's right of action was barred by lapse of time. The Court allowed the plea to be added, after imposing the terms of the defendant admitting the handwriting, and consenting to a judgment as of the term.

JONES v. ROBERTS, 2 Dowl. P. C. 698.

And after a replication and motion for judgment on an issue on *nul tiel record*.

On motion for judgment on replication of *nul tiel record*, a counter-application was made for leave to amend, by striking out the allegation of the judgment, as it had since been discovered there had been a judgment by default. The Court allowed the amendment.

KELLY v. FLINT, 5 Dowl. 293.

After replying damages *ultra* to a plea of payment, the plaintiff may amend and accept the money in satisfaction on payment of costs.

To a plea of payment of money into court, the plaintiff replied that he had sustained damages to a greater amount. The plaintiff not proceeding to trial, judgment was moved for as in case of a nonsuit. On showing cause, the plaintiff applied to amend, by accepting the money paid into court.

The Court allowed the amendment, upon the plaintiff paying all the costs subsequent to the payment into court.

COOPER v. PHILLIPS, 1 C., M. & R. 649; 5 Tyr. 166; 3 Dowl. 167.

Leave may be obtained to amend after argument on demurrer.

To an action for goods sold, the defendant pleaded that he, being in embarrassed circumstances, agreed with his creditors to pay a composition, and that he was ready to pay the same, but that the plaintiff refused to receive it. On demurrer after argument, the Court held the plea bad, but gave leave to amend. *See* Demurrer.

ATKINSON v. BAYNTUN, 1 Bing. N. S. 74; S. C. 1 Scott, 424.

And even after judgment on demurrer it has been permitted, on an affidavit of the discovery of material facts.

After demurrer by defendant to plaintiff's replication and argument, and judgment against the defendant, he applied to a judge at chambers; and on affidavit that new and important matters had come to his knowledge, obtained an order to amend. The Court, after some hesitation, discharged a rule to rescind such order; at the same time they expressed an opinion that the course

pursued by the defendant was irregular, as he should have applied to amend before argument and judgment. The defendant was directed to pay the costs of the rule and of the amendment.

(2) *Withdrawal and Waiver of Pleas.*

Reg. Gen. (Pr.) H. T. 1853, r. 8. "The defendant shall not be at liberty to waive his plea, or enter a *relicta verificatione* after a demurrer, without leave of the Court or a Judge, unless by consent of the plaintiff or his attorney."[1]

The defendant is not at liberty to waive his plea without leave, unless by consent.

(*d*) *Order to Stay.*

Oldershaw v. King, 26 L. J. Ex. 384.

The Court amended an order to stay, so as to make it express that which was the real intention of the parties, the order as drawn being ambiguous.

So may an order to stay.

(*e*) *Order for Reference.*

Belt v. Postlethwaite, 5 E. & B. 695.

A rule for compulsory reference has been amended by inserting a clause giving the arbitrator power to give costs.

Or an order for a compulsory reference.

(*f*) *Order for Writ of Trial.*

Attwell v. Baker, 5 Dowl. 462.

Issue, before the Secondary, had been delivered in the ordinary form, as at Nisi Prius; and, after judge's order obtained to try before the Secondary, a motion was made to set it aside. The Court discharged the rule, giving the plaintiff leave to amend on payment of costs.

Where a judge's order has been obtained to try before the sheriff, it may be amended so as to accord with the prescribed form.

(*g*) *Mis-joinder or Non-joinder of Parties: of Plaintiffs.*

15 & 16 Vic. c. 76, s. 34. "It shall and may be lawful for the Court or a Judge, at any time before the trial of any cause, to order that any person or persons not joined as plaintiff or plaintiffs in such cause shall be so joined; or

The Court or Judge may order plaintiffs to be added or struck out.

[1] The defendant may, however, it would appear, notwithstanding this rule, in the case of a plea not demurred to, and no costs incurred, simply withdraw such plea, without the leave of the Court or a Judge.

The defendant may in general obtain an order to amend or substitute pleas upon payment of costs. 1 Chit. Rep. 76. Pleas in abatement, however, are not amendable, because they are dilatory pleas, and do not go to the merits of the action. *Ca. Prac.* C. P. 29; *ante*, 34. If the application to amend is reasonable, the order may be obtained at any time, and although previous orders to amend have been granted. Thus, a plea of judgment recovered by an executor, was allowed to be amended in the sum for which the judgment was recovered after issue joined. 1 H. Black. 238; 8 Moore, 584. See *Storor v. Seldon*, 2 Chit. 27. And, under favourable circumstances, the Court allowed a defendant to add a plea that there was no contract in writing, within the meaning of the Statute of Frauds (*Smith v. Dixon*, 1 Har. & W. 668); but, in an action for slander after verdict for the plaintiff, the Court refused to allow the defendant to add a plea of justification upon any terms. *Kirby v. Simpson*, 3 Dowl. P. C. 791.

In a recent case, where the defendant had pleaded never indebted to an action for money lent, and issue had been joined thereon, the Court refused to allow the substitution of a plea that the money was lent for the purpose of purchasing shares in a foreign lottery and re-selling them in England. *Ritchie v. Van Gelder*, 9 Ex. 762.

It is not necessary, in applying to amend the pleadings by adding pleas, to set aside the judge's order to plead the original pleas (*Turquand v. Hawtrey*, 1 Dowl. N. S. 927); nor need a rule to add pleas be drawn up on reading such order. *Smith v. Goldsworthy*, 2 Gale & D. 189. If the added pleas are nullities, yet the plaintiff cannot sign judgment, provided that the original pleas did not entitle him to do so. *Badman v. Pugh*, 2 Dowl. N. S. 907.

that any person or persons originally joined as plaintiff or plaintiffs shall be struck out from such cause, if it shall appear to such Court or Judge that injustice will not be done by such amendment, and that the person or persons to be added as aforesaid consent, either in person or by writing, under his, her, or their hands, to be so joined, or that the person or persons to be struck out as aforesaid were originally introduced without his, her, or their consent, or that such person or persons consent in manner aforesaid to be so struck out; and such amendment shall be made upon such terms as to the amendment of the pleadings (if any), postponement of the trial, and otherwise, as the Court or Judge, by whom such amendment is made, shall think proper; and when any such amendment shall have been made, the liability of any person or persons who shall have been added as co-plaintiff or co-plaintiffs shall, subject to any terms imposed as aforesaid, be the same as if such person or persons had been originally joined in such cause."[1]

After notice of non-joinder or plea in abatement, plaintiff may amend without order.

15 & 16 Vic. c. 76, s. 36. "In case such notice be given, or any plea in abatement of non-joinder of a person or persons as co-plaintiff or co-plaintiffs, in cases where such plea in abatement may be pleaded by the defendant, the plaintiff shall be at liberty, without any order, to amend the writ and other proceedings before plea, by adding the name or names of the person or persons named in such notice or plea in abatement, and to proceed in the action without any further appearance, on payment of the costs (if any) occasioned by such amendment only, and in such case the defendant shall be at liberty to plead *de novo*." *See ante*, p. 19.

By Reg. Gen. (Pr.) H. T. 1853, r. 6, "whenever a plaintiff shall amend the writ, after notice by the defendant, or a plea in abatement of a non-joinder, by virtue of the Common Law Procedure Act, 1852, s. 36, he shall file a consent, in writing, of the party or parties whose name or names are to be added, together with an affidavit of the handwriting, and give notice thereof to the defendant, unless the filing of such consent be dispensed with by order of the Court or Judge."

(*h*) *Of Defendants.*

In actions of contract the names of defendants improperly joined may be ordered to be struck out.

15 & 16 Vic. c. 76, s. 37. "It shall and may be lawful for the Court or a Judge, in the case of the joinder of too many defendants in any action on contract, at any time before the trial of such cause, to order that the name or names of one or more of such defendants be struck out, if it shall appear to such Court or Judge that injustice will not be done by such amendment, and the amendment shall be made upon such terms as the Court or Judge, by whom such amendment is made, shall think proper."[2]

(*i*) *When and how leave to Amend obtained.*[3]

[1] An amendment was allowed before trial in an action of ejectment against a tenant, by adding the names of co-devisees with the plaintiff as plaintiffs. *Sawyer v. Olley*, 1 F. & F. 637.

[2] A judge made an order for amending a declaration by striking out one of the defendants, the other to be at liberty to plead the non-joinder of a co-defendant in abatement, and also *de novo*. The plaintiff had previously brought an action against the defendant for some part of the same subject-matter, but failed to prove the joint liability of the defendants; and on an application for a new trial on the ground of surprise stated that he could have proved the joint liability, but the Court refused to let him amend by striking out one defendant. The plaintiff now stated that his evidence would be similar to that relied on in the former trial, and it was held the judge was right in ordering the amendment. *Cowburn v. Wearing*, 9 Ex. 207.

[3] A party must, in general, apply for the amendment within a reasonable time. *Wood v. Grimwood*, 10 B. & C. 689. The suitor must obtain the leave of the Court or a Judge, and cannot, in general, of his own accord, amend his own proceeding. *Bate v. Bolton*, 4 Dowl. 677. *Wright v. Skinner*, 5 Dowl. 92. *Siggers v. Sansom*, 2 Dowl. 745. The application should generally be made to a judge at chambers for a summons to show cause why the party should not have leave to amend (*Duke of Brunswick v. Sloman*, 5 C. B. 218); and the Court seldom interferes with the decision of

(C) *Amendments at the Trial.*

(*a*) *Of Pleadings.*

MAY v. TOOTNER, 5 E. & B. 505.

The Judge has power to alter the form of action: thus, where an action of trespass *quare clausum fregit* had been brought, and at the trial it appeared the plaintiff was not in possession of the premises, but had let them to a tenant, the Judge amended the declaration so as to meet the case of an injury to the reversion.[1]

The Judge may amend, although the form of action is thereby changed.

(1) *Non-joinder or Mis-joinder of Parties.*

(2) *Of Plaintiffs.*

15 & 16 Vic. c. 76, s. 35. "In case it shall appear at the trial of any action that there has been a mis-joinder of plaintiffs, or that some person or persons, not joined as plaintiff or plaintiffs, ought to have been so joined, and the defendant shall not, at or before the time of pleading, have given notice in writing that he objects to such non-joinder, specifying therein the name or names of such person or persons, such mis-joinder or non-joinder may be amended as a variance at the trial by any court of record holding plea in civil actions, and by any judge sitting at Nisi Prius, or other presiding officer, in like manner as to the mode of amendment and proceedings consequent thereon,

The non-joinder or mis-joinder of plaintiffs may be amended at the trial.

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the Judge. *Doe v. Errington*, 3 Nev. & M. 646. *R. v. Archbishop of York*, id. 433. *Atkinson v. Bayntun*, 1 Bing. N. C. 740. The appeal to the Court against the decision of the Judge should be promptly made (*Baden v. Flight*, 6 Dowl. 177); and before receiving the costs of the amendment. *King v. Simmonds*, 7 Q. B. 289. If the opposite party has obtained a rule *nisi* to set aside the proceedings for irregularity, the proper course is to obtain a cross rule to amend. *Bell v. Haydon*, 9 Jur. 711.

[1] What the real question in controversy between the party is, is a matter of fact to be determined by the Judge at the trial from the pleadings and evidence. *Wilkin v. Reed*, 15 C. B. 192.

As a general rule, the Court *in banco* will not interfere to revise the decision of a judge at Nisi Prius, when he refuses to amend the pleadings. Where injustice has arisen, it seems the proper course is, not to move for a new trial on that ground, but to apply to the Court to amend the record. *Brennan v. Howard*, 20 Jur. 546. See *Tennison v. O'Brien*, 5 E. & B. 497.

The following are cases in which judges at Nisi Prius have allowed or refused to allow amendments. An allegation of a tender of a lease in the declaration has been amended at the trial by the introduction of an allegation of the tender having been dispensed with, the only point in controvery being as to the value of the premises. *Pelling v. Langdon*, 1 F. & F. 718. In *Carpenter v. Parker*, 3 C. B. (N. S.) 206, a declaration was amended in an action for quiet enjoyment, by inserting that the eviction alleged was by one claiming "by, from, or under the defendant."

In an action for not accepting a cargo, the Judge amended the declaration by substituting an excuse for non-performance, instead of the averment of readiness and willingness to deliver. *Tennison v. O'Brien*, 5 E. & B. 497. To a declaration for money had and received, the defendant pleaded that the debt was for money due from the defendant jointly with A., and that the plaintiff had already sued A. in trover, and recovered judgment for 150*l.*, and that the causes of action, for which the plaintiff then recovered judgment, included all the present causes of action. The evidence was, that the defendant and A. had wrongfully converted the plaintiff's goods by selling them, but that the defendant alone had received the proceeds, 150*l.*, that the plaintiff had sued A. in trover and recovered 100*l.* as the value of the goods at the time of the conversion. The Judge was held rightly to have amended the plea by striking out the allegation that the debt was for money due from the defendant and A. jointly, and substituting that the money sued for was money received as the proceeds of the sale of the goods in the declaration mentioned. *Buckland v. Johnson*, 15 C. B. 145. Where the Judge at the trial allowed a declaration to be amended by inserting a claim of interest, and after an objection to the stamp the plaintiff abandoned the claim of interest, the Judge, it was held, rightly gave leave to alter the record again, by striking out the part inserted to which the defendant had objected. *Morgan v. Pike*, 14 C. B. 473. Where in ejectment on a joint demise by H. W., & M. his wife, the proof was that the property had been devised to H. W. in trust for the sole and separate use of M., the Court held that the Judge properly declined to allow the declaration to be amended by striking out the name of the wife, on the ground that the proposed amendment was not warranted by 3 & 4 Wm. 4, c. 42, s. 23. *Doe d. Hilton v. Beck*, 15 C. B. 329.

In an action for breach of warranty of a

or as near thereto as the circumstances of the case will admit,[1] as in the case of amendments of variances under 3 & 4 Wm. 4, c. 42, if it shall appear to such Court or Judge, or other presiding officer, that such mis-joinder or non-joinder was not for the purpose of obtaining an undue advantage, and that injustice will not be done by such amendment, and that the person or persons to be added as aforesaid consent, either in person or by writing, under his, her, or their hands, to be so joined, or that the person or persons to be struck out as aforesaid, were originally introduced without his, her, or their consent, or that such person or persons consent in manner aforesaid to be so struck out; and such amendment shall be made upon such terms as the Court or Judge, or other presiding officer by whom such amendment is made, shall think proper; and when any such amendment shall have been made, the liability of any person or persons who shall have been added as co-plaintiff or co-plaintiffs shall, subject to any terms imposed as aforesaid, be the same as if such person or persons had been originally joined in such action.

As to joinder of too many plaintiffs, *see* 23 & 24 Vic. c. 126, s. 19; *ante*, p. 19.

(3) *Of Defendants.*

So may the mis-joinder of defendants.

15 & 16 Vic. c. 76, s. 37. "In case it shall appear at the trial of any action on contract that there has been a mis-joinder of defendants, such mis-joinder may be amended as a variance of the trial, in like manner as the mis-joinder of plaintiffs has been hereinbefore directed to be amended, and upon such terms as the Court or Judge, or other presiding officer by whom such amendment is made, shall think proper."[2]

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liquor "as gin," the words "or hollands" were allowed to be inserted in the declaration at the trial. *Markwell v. Parker*, 1 F. & F, 634. So in an action for a false representation that a business brought in so much, the declaration was amended by inserting the words "over the counter." *Roles v. Davies*, 1 H. & N. 484; 28 L. J. Ex. 287; 1 F. & F. 563. So the declaration has been allowed to be amended at the trial by the addition of a count for work and labour. *Robson v. Turnbull*, 1 F. & F. 365. And a plea may be allowed to be added; but permission will not be given if the proposed plea would raise a defence not before in question between the parties. *Adams v. Smith*, 1 F. & F. 311. And leave to insert a count for an assault in a declaration for false imprisonment has been refused at Nisi Prius. *Rowe v. Hawkins*, 1 F. & F. 91. As to the power of the Judge to add a plea, see *Mitchell v. Crasswaller*, 13 C. B. 237.

There is not a uniformity of opinion upon the question whether, if the amendment is one which would not be prejudicial, but which would aid in a claim or a defence which, although legally available, is one which ought not to be countenanced on moral considerations, the Judge ought to be influenced thereby in withholding his consent. *Crowder, J.*, thought it ought not (*Hughes v. Bury*, 1 F. & F. 374. *Martin, B.*, in *Saunders v. Teech*, 1 F. & F. 474, apparently thought it ought, since he refused to alter a date in an action for suing out execution prematurely, on the ground that the Judge who had made an order for setting aside the execution had expressed an opinion that no action should be brought.

[1] Under the 3 & 4 Wm. 4, c. 42, the amendment must have been made during the trial and before verdict, and the Judge could not afterwards, without the consent of both parties, give leave. *Brashier v. Jackson*, 6 Mee. & W. 549. *Bennett v. Long*, 9 Car. & P. 773. See *Roberts v. Snell*, 1 Man. & G. 577. *Serjeant v. Chafey*, 6 Nev. & M. 819. But if the parties agreed that it should be made after the trial, this was no ground for a new trial. *Jones v. Hutchinson*, 10 C. B. 515. If an amendment be improperly allowed or refused, a new trial has sometimes been granted. *Whitwell v. Scheer*, 8 Ad. & E. 309. As to costs under that act, see *Smith v. Brandram*, 2 Man. & G. 244; 2 Scott, N. R. 539. *Skinner v. London and Brighton Railway Co.* 4 Ex. 885. An amendment by adding the name of a partner of the plaintiff has been made at the trial. *Williams v. Grover*, 1 F. & F. 341.

[2] Where it appears at the trial that there is a mis-joinder, the record may be amended by striking out the name of a defendant improperly joined, notwithstanding judgment by default has been signed. *Greaves v. Humphreys*, 4 E. & B. 851. The Judge will not allow a mis-joinder to be cured if he is satisfied that the joinder of the defendant, whose name it is proposed to strike out, was not by inadvertence, but designedly, with the view of attempting to fix him with liability. It is too late after verdict to apply for an amendment in this respect. *Wickens v. Steel*, 2 C. B. (N. S.) 488; 26 L. J. C. P. 241. Where one of the defendants appears at the trial to be not liable, the proper course is for the plaintiff to apply to amend under this 37th section, for the Court cannot afterwards amend the defect under sect. 222. *Robson v. Doyle*, 3 E. & B. 396. The allowing of an amendment to cure a mis-joinder of defendants is in the discretion of the Judge

(*b*) *Amendment of Issue.*

Cox v. Painter, 1 Nev. & P. 581; 6 Ad. & E. 491.

In general, the issue may be amended in any stage of the proceedings.

On examining the Nisi Prius record, there did not appear to be any date stated to the writ of summons. *Parke, B.*, being applied to to amend, it was contended for the defendant that he had no power under the 3 & 4 Wm. 4, c. 32, s. 23, to amend, as this was not a variance, but an omission on the record. His lordship doubted the power to amend; but stated, as he had made such an amendment once before, and it had not been appealed against, he would amend; and he called for the production of the writ itself on which the date appeared.

Per Cur. By rule H. T. Wm. 4, the power of amending is clearly given by the rule itself, and the power is not confined to any particular stage of the proceedings.

(D) *After the Trial.*

(*a*) *The Verdict.*

Ernest v. Brown, 4 Bing. N. S. 162.

A verdict may be amended according to the actual finding of the jury.

In an action for work and labour, the evidence was very contradictory whether the work was done gratuitously or not; there was a second count for goods sold; and one on an account stated. Upon the count for goods sold, defendant paid a small sum into court. The jury found a verdict for the plaintiff for one shilling, which was entered on the *postea* generally.

On a question as to costs, the Court said, The question is, how the verdict is to be entered; and looking at the facts of the case, it is impossible not to see that the jury negatived the plaintiff's right of action on the first and third counts. The verdict is merely for nominal damages, and no man of common sense can apply the one shilling otherwise than to the second count. We are not precluded from advancing justice by correcting a mistake in entering the verdict of the jury. We certainly cannot alter the verdict against the intention of the jury; but here we answer, and we think from the clearest evidence, that we are only giving effect to that intention. We think the record should be amended.[1]

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at Nisi Prius; and the Court will not review his exercise of it in case he has refused to allow an amendment. *Holden v. Ballantyne*, 6 Jur. N. S. 451. *See* also *ante*, p. 19.

[1] The Court cannot amend the verdict of the jury in point of substance. *Spencer v. Goter*, 1 H. Black. 78. *Sandford v. Porter*, 2 Chitt. R. 351. Yet they may give it its legal effect; as where, by mistake, single damages were taken for treble damages (*Baldwin and Turner's case*, Godb. 245), or single value for treble value in an action for not setting out tithes. *Sandford v. Clarke*, 2 Chit. R. 352. If the jury exceed the damages laid in the declaration, the Court may allow the plaintiff to enter a *remittitur* as to the excess. *Usher v. Dansey*, 4 M. & S. 94. *Pickwood v. Wright*, 1 H. Black. 643. The Court will also allow judgment to be entered as amended in certain cases in replevin, under 17 Car. 2, c. 7, s. 2. *Rees v. Morgan*, 3 T. R. 349. *Gamon v. Jones*, 4 id. The Court may also at common law amend the *postea* where there has been a mistake in recording the verdict, and, if necessary, refer to the judge's notes for that purpose (*Richardson v. Mellish*, 11 Moore, 104; 1 B. & C. 819. *Per Lord Truro, L. C., in Marianski v. Cairns*, 1 Macq. *App. C*, 212, 766. *Pechell v. Watson*, 8 Mee. & W. 691. *R. v. Vivrier*, 12 Ad. & E. 317. *Recce v. Lee*, 7 Moore, 269); as where the associate entered 1*d.* damages instead of 174*l.* (Bull. N. P. 320. *Newcombe v. Green*, 1 Wils. 33); where no notice was taken of one of the issues (*Petrie v. Hannay*, 3 T. R. 659. *Isles v. Turner*, 3 Dowl. 211); where a general verdict was taken by mistake (*Wallis v. Goddard*, 3 Scott, N. R. 295), some of the counts being bad (*Eddowes v. Hopkins*, 1 Dougl. 376. *Taylor v. Whitehead*, 2 id. 746. *See* as to a penal action, *Holloway v. Bennett*, 3 T. R. 448. *Hardy v. Cathcart*, 5 Taunt. 2), if it clearly appear the damages were calculated on evidence given on the good counts only. *Epson v. Griffin*, 11 Ad. & E. 186. *Williams v. Breedon*, 1 B. & P. 329. *Spicer v. Teesdale*, 2 id. 49. So, where there has been a general verdict with contingent damages, or an issue in law afterwards found for the defendant, the judge may amend the *postea*. *Ferguson v. Mahon*, 11 Ad. & E. 179. The application to amend the *postea* should be made to the judge who tried the cause. (*Newton v. Harland*, 1 Man. & G. 956; 9 Dowl. 65; 1 Scott, N. R. 503. *Harrison v. King*, 1 B. & A. 163), and it may be made even after error brought (*Richardson v. Mellish*, 1 B. & C. 819; 11 Moore, 109; 3 Bing. 334. *Mari-*

(*b*) *The Postea.*

COOPER v. PEGG, 16 C. B. 264.

The *postea* may be amended.

In an action of trespass a verdict was taken for plaintiff, subject to the award of an arbitrator, who was to have the power of a judge at Nisi Prius, and to enter the verdict as he thought fit, and the verdict having been entered for the plaintiff for less than 40*s*., and no certificate being given, it was held the plaintiff was entitled to have the *postea* amended, by striking out the words, "and for those costs to 40*s*." *See* Cases, p. 335 n.

(*c*) *Of the Jury Process.*[1]

(*d*) *Of the Pleadings.*

CLARK v. BULMER, 11 Mee. & W. 243.

After verdict an amendment of the declaration has been allowed under special circumstances.

The plaintiff sued on a count for goods sold and delivered, and had a verdict. The count ought properly to have been framed as for work and labour; and a new trial was moved for upon this ground.

Per Cur. The objection in this case is, that there was no contract of sale at all; but one for work and labour on the defendant's land, and materials used in the course of that work. The rule must be absolute, but the plaintiff may amend on payment of the costs of the amendment only; and it is to be regretted that an application was not made for the same purpose on the trial.[2]

EDWARDS v. HODGES, 15 C. B. 477.

Plea amended after trial.

The Court allowed the defendant to amend a plea of not guilty by statute, by inserting in the margin statutes necessary to justify the trespass complained of, after verdict for the defendant, and a rule *nisi* to set it aside.[3]

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anski v. Cairns, 1 Macq. *App. C.* 212, 776), though the lapse of a great time may be a ground for refusal. *Harrison v. King*, 1 B. & A. 163. In such cases a court of error will not question the discretion of the judge. *Sandford v. Alcock*, 10 Mee. & W. 689; 2 Dowl. N. S. 463. *Newton v. Harland*, 1 Scott, N. R. 503. *Daintry v. Brocklehurst*, 3 Ex. 691.

[1] The Court may amend the jury process at any time for defects arising from the misprision of the clerks. 8 Hen. 6, c. 12. The *distringas* may be amended by the *venire*, and the *venire* by the award of it on the roll. When the sheriff's return to the *distringas* has not been indorsed, the record may be withdrawn and the indorsement made, and the cause re-entered. *Patterson, J., Masters v. Lewis*, 2 M. & Rob. 59. All formal defects in the jury process are aided by verdict. *See* the 21 Jac. 1, c. 13; 2 Salk. 454; and Ld. Raym. 1143; 1 Str. 136; 2 id. 1214.

Except in trials at bar, the writ of *venire facias juratores* may be tested on the day on which the issues are made, returnable forthwith; and the writ of *distringas juratores* or *habeas corpora juratorum* may be tested on any day subsequent to the teste of the writ of *venire*, whether in term or vacation (3 & 4 Wm. 4, c. 67), and if it is found necessary to amend the day of the teste and return of the *distringas* or *habeas corpora*, or of the clause of Nisi Prius, the order of a judge may be obtained to authorise the amendment, and in such case it may be granted *ex parte*.

[2] See *Wilde v. Hardy*, 2 Str. 1151.

[3] In an action against the maker of a non-negotiable note the defendant pleaded *non fecit;* and it appeared the note had been lost, but that defence could not be set up under the plea. On a motion for a new trial, the Court refused leave to amend by pleading the loss of the note, for before the defendant could do so he ought first to show that a non-negotiable note must be produced at the trial. *Charnley v. Grundy*, 14 C. B. 608. The Court will entertain an application to set aside the judgment, even after satisfaction thereof, in order to allow the plaintiff to correct a mistake in his particulars of demand, the defendant being put in the same position as if the mistake had not been made and the application been made within a reasonable time. *Cannon v. Reynolds*, 5 E. & B. 301. *See* also the record reformed on a motion for a new trial, *Parsons v. Alexander*, 5 id. 266. Even after error brought, and the case has been set down for argument, the Court below may make any amendment in the proceedings before the sitting day of the Court of Error. *Wilkinson v. Sharland*, 11 Ex. 33.

(*e*) *Of the Judgment.*

RICHARDSON v. MELLISH, 3 Bing. 334; 7 B. & C. 819; 11 Moore, 104; 2 M. & Scott, 191.

After a general verdict, *postea* may be amended by judge's notes, so as to confine it to one count, the other being bad, even after error brought and argued.[1]

A general verdict was found for the plaintiffs on a declaration containing different counts. Several of them were bad, but all the evidence went to prove a valid count. After motion in arrest of judgment, the cause was removed by writ of error into the Court of King's Bench, and now after argument on error, but before the Court of King's Bench had pronounced judgment, it having been suggested that a general verdict had been given, and that some of the counts in the declaration were bad, a motion was made for leave to amend the *postea* by entering the verdict on the first count only of the declaration, pursuant to the notes of the Judge who tried the cause.

Per Cur. It is a rule of law, that when a general verdict has been given on two counts, one of which is bad, and it appears by the Judge's notes that the jury calculated the damages on evidence applicable to the good count only, the Court will amend the verdict by entering it on that count, though evidence was given applicable to the bad count also. We have applied to the proper source—to the Judge who tried this cause. He has furnished us with his notes, and has expressed himself satisfied, not only that this amendment may be made, but that it ought to be made, and we are clearly of opinion that this rule ought to be made absolute.

(*f*) *Of Rule* Nisi *for New Trial.*

DRAYSEN v. ANDREWS, 10 Ex. 472.

Rule *nisi* for new trial may be amended.

The Court allowed a rule *nisi* for a new trial to be amended, by stating the grounds more specifically.

(*g*) *Of Writ of Trial.*

PERCIVAL v. CONNELL, 3 Bing. N. C. 877; 5 Scott, 91; 6 Dowl. 68.

The writ of trial may be amended.

After this cause had been tried before the sheriff, and the plaintiff had obtained a verdict, the defendant discovered that there was a variance between the writ of summons and the writ of trial. On motion to set aside the latter,—

Per Cur. We cannot set aside the writ of trial, but we will suspend this motion, in order to enable the plaintiff to apply for leave to amend.

(E) *Of the Effect of the Rule or Order.*

BLACK v. SANGSTER, 1 C., M. & R. 521; 5 Tyr. 171; 3 Dowl. 206.

After obtaining an order that the party

On motion for a new trial, it appeared that the plaintiff, previously to the assizes, obtained a judge's order, giving him liberty to amend, and the defend-

[1] The Court has power at common law to amend the judgment, both in substance and form. *Usher v. Dansey*, 4 M. & S. 94. *Lainy v. Whalley*, 3 H. & N. 901. *Simmons v. King*, 2 D. & L. 786. Even after error brought, though not after judgment in error. *Jackson v. Galloway*, 1 C. B. 280. The Court may also, by statute, amend for misprision of the officers of the court. 8 Hen. 6, c. 12; 8 id. c. 15. Thus it has altered a judgment *de bonis propriis* against an executor into one *de bonis testatoris*. *Short v. Coffin*, 5 Burr. 2730. *Green v. Bennett*, 1 T. R. 783. *Dunbar v. Hitchcock*, 3 M. & S. 591. But the Court have refused to amend a judgment against an executor, where it was to his prejudice. *Burroughs v. Stevens*, 5 Taunt. 554. *Prince v. Nicholson*, 6 Taunt. 45. They will also amend for clerical errors. *Paddon v. Bartlett*, 3 Ad. & E. 887. *Blackey v. Birmingham*, 2 Str. 1132. *Slicer v. Thompson*, id. 1156.

Though error has been brought upon the judgment, the application to amend should be made to the Court below (*Wilkinson v. Sharland*, 11 Ex. 33. *Newton v. Boodle*, 6 D. & L. 351. *De Tastet v. Rucker*, 3 B. & B. 65); and the Court of Error will seldom interfere with the decision of the Court below. *Mellish v. Richardson*, 1 Clark & Fin. 224. *Scales v. Cheese*, 1 D. & L. 657.

shall be at liberty to amend, it may be abandoned.[1]

ant was to have two days' time to plead anew; the plaintiff afterwards delivered the issue, and took no further notice of the order, either by amending or rescinding it; and, though the defendant returned the issue as irregular, the plaintiff proceeded to trial and got a verdict. The Court refused to set aside the verdict as irregular. As the order, in the present case, gave liberty to amend, the plaintiff therefore had an option.

(F) *Of the Costs of Amendments.*

JONES v. ROBERTS, 2 Dowl. 374.

After demurrer when the party has leave to amend upon payment of costs, costs for matter not connected with the demurrer should not be claimed.[2]

After demurrer to the plaintiff's rejoinder, the defendant had leave to amend on payment of costs. He accordingly amended; and upon the taxation of costs the plaintiff claimed for making up paper-books with the issues of fact, and for briefs. Before the amendment there were issues of facts and of law, but after the amendment all the issues were issues of fact. On a question of costs,—

Per Bayley, B. "In making up the demurrer-books there was no necessity to notice the issues of fact. The briefs for arguing the demurrer are allowed. The paper-books of the issue of fact, and the briefs on those issues, are not allowed, because either you had no right to make them up, or, if you had, they will be costs in the cause, as they will be still necessary, with a little addition occasioned by the amendment, and that addition will be costs in the cause."

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[1] Where liberty is given to amend "upon payment of costs," that means, that if the party avail himself of the liberty, he shall, *in the first place, pay the costs.* He *may* do it, provided he pay the costs. For the words, "upon payment of costs," do not amount to a direction to pay, or an undertaking to pay. *Pugh v. Kerr*, 6 Mee. & W. 17. *Scarrall v. Horton*, Barnes, 283. *Ante*, p. 3, n.[3].

[2] Where application is made to the Court or Judge for leave to amend pleadings and other proceedings, the Court or the Judge has an absolute discretion as to the costs of the amendment. This discretion is expressly recognised by both the Common Law Procedure Acts. In each the Court or a Judge is empowered to order defects and errors to be amended, "with or without costs, and upon such terms as to the Court or Judge may seem meet."

Where a judge at chambers allowed an amendment to a declaration after plea in abatement to be made *without costs*, the Court refused to interfere. *Wall v. Lyon*, 9 Bing. 411. And even where after demurrer the Judge gave leave to the party to amend the pleadings objected to on payment of only 6*s.* 8*d.* costs, although the demurrer had been drawn by a pleader and other expenses incurred, the Court declined to review the exercise of the Judge's discretion. *Tomlinson v. Bolland*, 4 Q. B. 642. And in *Solomons v. Lyon* (1 East, 369) the Court allowed a replication to be amended without payment of costs, in order to discountenance an attempt to embarrass the plaintiff by a sham plea, to which the replication applied. In general, however, where leave is given to a party to amend his pleadings, the condition is annexed that it be "upon payment of costs." And in that case payment of the costs of the amendment is a condition precedent. *Levy v. Drew*, 5 D. & L. 307. *Field v. Sawyer*, 6 C. B. 71. But inasmuch as it is optional whether the party shall avail himself of the liberty or not, if he elect not to amend, and the other side has gone to expense in anticipation of the amendment, such expense must, whatever the issue of the suit be, be borne by the party by whom it has been incurred. *Brown v. Millington*, 22 L. J. 138, Ex. Before plea there are no costs payable on amending the declaration, except the costs of the application. And the plaintiff may amend his declaration in matter of *form* after the general issue pleaded, and before entry, without paying costs or giving an imparlance; but if the amendment be in matter of substance, or after the general issue is entered, he must pay costs, or give an imparlance. Hull, L. of C. 342. The costs of proceedings rendered nugatory by the amendment must be paid by the party in whose favour the amendment is made. But his liability is confined to the costs necessarily occasioned, or the expense of proceedings necessarily rendered fruitless by the amendment. Idem. For when an amendment is allowed during the course of a cause, "on payment of costs," it means the costs really and substantially occasioned by the amendment. And in taxing such costs, therefore, the master will allow the proper costs of all such proceedings as have been rendered useless by reason of the amendment. The costs of proceedings as amended are costs in the cause, as if they had been originally framed as amended. Dax. 106. Thus, if the declaration be amended after the defendant has pleaded, the defendant will be

(G) *Amendment of Writs of Execution.*[1]

M'Cormach v. Melton, 3 Nev. & M. 881; 1 Ad. & E. 331. Arnell v. Weatherby, 3 Dowl. P. C. 464. S. C. 1 C., M. & R. 831.

The sum indorsed on a *ca. sa.* may be made to correspond with the judgment.

A *ca. sa.* was indorsed for 34*l.* 10*s.*; the sum recovered was 33*l.* 10*s.* After the defendant was taken into custody, *Taunton, J.*, ordered the *ca. sa.* to be amended.

On motion to discharge his order,—

Per Cur. *Lord Kenyon*, in *Laroche v. Wasbrough*, 2 T. R. 737, says, "The justice of the case requires that we should permit the plaintiff to amend; if the defendant had, indeed, suffered by the excess in the execution, that might have varied the case, but here he has not sustained any damage by it: it was so in the present case. The defendant is not damaged; and if he has suffered any inconvenience it was his own fault, in not paying what he owed."[2]

Green v. Glassbrook, 2 Bing. N. S. 143.

And a return to a *fi. fa.* of too large a sum may be amended.

The plaintiff having paid his attorney all costs due, and required him to deliver up the judgment-paper and *fi. fa.*, the Court held that he had no

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entitled to plead *de novo*, and to the costs of the old pleas. *Rishworth v. Dawes*, 16 Mee. & W. 440. So, if a plea be amended after replication, the plaintiff is at liberty to reply *de novo*, if he judge proper. At all events he ought to be allowed the expense of attending, and consulting, and seeing counsel, in order to advise whether it be proper to reply *de novo*. But where he does not judge proper to dissent from his former replication and reply *de novo*, but only makes such alterations in it as merely preserve, and are the natural and necessary consequences of the alterations made in the plea by the defendant, and which alterations in the replication do not deface the record, nothing more ought to be allowed than in proportion to such necessary alterations and amendments in the replication and its several dependencies. *Rex v. Phillips*, 2 Burr. 757. See *Lees v. Warlters*, 2 B. & P. 465. So if the defect is discovered at the trial, and the trial is postponed to allow of its being cured, the costs of the day will fall upon the party whose the defective pleadings are. For instance, if a variance is discovered, and the Judge give the plaintiff leave to withdraw the record and amend the declaration, the plaintiff is liable to the costs of the day, even although the order is silent as to costs. *Skinner v. The London, Brighton, and South-Coast Railway Co.* 1 L., M. & P. 189. So where the cause is made a *remanet*, to allow the defendant to amend a plea (*Waller v. Blacklock*, 15 Mee. & W. 715). Where an amendment in the declaration is made at the trial, which has the effect of reducing the plaintiff's claim to a smaller sum than that demanded, if the defendant admit that claim, and show that he did not contest such smaller claim, but went down to trial to oppose the larger demand, as to which he could not pay money into court without admitting it, he will be entitled to costs from the time he might, if the plaintiff's demand had been restricted within its true limits, have paid money into court; but if he contest the demand after the amendment, he will be entitled to the costs of the amendment only. *Smith v. Brandram*, 2 Man, & G. 244.

[1] The Court has an extended power under the 15 & 16 Vic. c. 76, s. 222, to amend proceedings which apply to writs of execution. Before the statute these writs have been amended by the Court or Judge, even after they have been executed and returned in the teste (*Engleheart v. Dunbar*, 2 Dowl. 202), the return, the names of the parties (*Thorpe v. Hook*, 1 id. 501), the sum recovered by the judgment (*Arnell v. Weatherby*, 3 id. 464), and the like, or where there has been a misprision of the clerks. 6 Hen. 6, c. 12. An amendment may be allowed after a rule *nisi* obtained to set the writ aside. *Engleheart v. Dunbar, supra.* But it will not be allowed where it would prejudice the rights of third persons, or where the defendant after the execution has become bankrupt. *Webber v. Hutchins*, 8 Mee. & W. 319. *Brooks v. Hodson*, 8 Scott, N. R. 223. The amendment may be made by the award of execution on the roll (*Atkinson v. Newton*, 2 B. & P. 336); or by the record of the judgment. *Thorpe v. Hook*, 1 Dowl. 501. The Court will also allow the indorsement to be amended, if by mistake it has been indorsed to levy too large a sum, unless the defendant has suffered by the mistake. *Laroche v. Wasbrough*, 2 T. R. 737. *M'Cunnell v. Melton*, 1 Ad. & E. 331.

[2] *See* also *Evans v. Manero*, 7 Mee. & W. 463; 9 Dowl. 256. If too little has been indorsed by mistake, the Court or a Judge may, on conditions, allow the plaintiff to take out a *fi. fa.* for the residue. *Hunt v. Pasmore*, 2 Dowl. 414.

authority to take any further steps; and having procured the return to be made for a greater sum than had come to the plaintiff's hands, the Court allowed it to be amended according to the fact.

II. Amendment in Criminal Proceedings.

(A) *Of Indictments and Informations*, p. 340.
(*a*) *In case of Variance between Document and Recital or setting forth of same*, p. 340.
(*b*) *In case of other Variances*, p. 340.
(B) *On Appeals at Quarter Sessions*, p. 343.
(C) *Of Case stated by Justices*, p. 343.

(A) *Of Indictments and Informations.*

Indictments and informations may be amended at the trial where a variance appears between matter in writing or print, and the recital or setting forth thereof.[1]

11 & 12 Vic. c. 46, s. 4, after reciting that "a failure of justice frequently takes place in criminal trials, by reason of variances between writings produced in evidence and the recital or setting forth thereof in the indictment, and the same cannot now be amended at the trial, except in cases of misdemeanor," for remedy thereof enacts, "that it shall and may be lawful for any court of oyer and terminer and general gaol delivery, if such court shall see fit so to do, to cause the indictment or information for any offence whatever, when any variance or variances shall appear between any matter in writing or in print, produced in evidence, and the recital and setting forth thereof in the indictment or information, whereon the trial is pending, to be forthwith amended in such particular or particulars, by some officer of the court; and after such amendment the trial shall proceed in the same manner in all respects, both with regard to the liability of witnesses to be indicted for perjury and otherwise, as if no such variance or variances had appeared."

The same power of amending variances may be exercised by courts of general or quarter sessions.

12 & 13 Vic. c. 45, s. 10. "Every court of general or quarter sessions of the peace on the trial of any offence within its jurisdiction, whenever any variance or variances shall appear between any matter in writing or in print produced in evidence, and the recital or setting forth thereof in the indictment, shall have the same power in all respects to cause the indictment to be amended which is given to courts of oyer and terminer and general gaol delivery, with regard to offences tried before such last-mentioned courts, by virtue of an act of the twelfth year of her Majesty's reign, intituled 'An Act for the Removal of Defects in the Administration of Criminal Justice,' and after such amendment the trial shall proceed in the same manner in all respects, both with regard to the liability of witnesses to be indicted for perjury and otherwise, as if no such variance or variances had appeared."

And courts have power by virtue of the

By the 14th & 15th Vic. c. 100, after reciting that offenders frequently escape conviction on their trials by reason of the technical strictness of criminal

[1] Before this act variances might, by virtue of the 9 Geo. 4, c. 15, be amended in the case of indictments, or informations for misdemeanour, where variance appeared between a matter in writing or print and the recital or setting forth of the same.

Under this statute an amendment was refused where no variance would have occurred had common care been used in setting forth the instrument. *Jelf v. Oriel*, 4 Car. & P. 22. So where the date of a bill of exchange was misdescribed (*Bentzing v. Scott*, 4 id. 24), and where a judgment was stated upon the record to be of one court, and appeared when produced to be of another court, Lord Tenterden allowed the record to be amended. *Briant v. Eicke*, Moo. & M. 359. Where in an indictment for perjury an affidavit was described as being sworn and entitled in a cause of the Commissioners of Charitable Donations and Bequests in Ireland against J. S.; but the affidavit was in fact entitled "the commissioner" (in the singular number), an amendment was allowed. *Reg. v. Christian*, Car. & M. 388. *See* also *Reg. v. Newton*, 1 C. & Kir. 469.

proceedings in matters not material to the merits of the case, "and whereas such technical strictness may safely be relaxed in many instances, so as to ensure the punishment of the guilty, without depriving the accused of any just means of defence; and whereas a failure of justice often takes place on the trial of persons charged with felony and misdemeanor by reason of variances between the statement in the indictment of which the trial is had, and the proof of names, dates, matters, and circumstances therein mentioned, not material to the merits of the case, and by the mis-statement whereof the person on trial cannot have been prejudiced in his defence;" it is therefore enacted, that "from and after the coming of this act into operation, whenever on the trial of any indictment for any felony or misdemeanor there shall appear to be any variance between the statement in such indictment and the evidence offered in proof thereof, in the name of any county, riding, division, city, borough, town corporate, parish, township, or place mentioned or described in any such indictment, or in the name or description of any person or persons, or body politic or corporate, therein stated or alleged to be the owner or owners of any property, real or personal, which shall form the subject of any offence charged therein, or in the name or description of any person or persons, body politic or corporate, therein stated or alleged to be injured or damaged, or intended to be injured or damaged, by the commission of such offence, or in the Christian name and surname, or both Christian name and surname, or other description whatsoever, of any person or persons whomsoever therein named or described, or in the name or description of any matter or thing whatsoever therein named or described, or in the ownership of any property named or described therein, it shall and may be lawful for the Court before which the trial shall be had, if it shall consider such variance not material to the merits of the case, and that the defendant cannot be prejudiced thereby in his defence on such merits, to order such indictment to be amended according to the proof by some officer of the court or other person, both in that part of the indictment where such variance occurs, and in every other part of the indictment which it may become necessary to amend, on such terms as to postponing the trial to be had before the same or another jury as such Court shall think reasonable; and after any such amendment the trial shall proceed, whenever the same shall be proceeded with, in the same manner in all respects, and with the same consequences, both with respect to the liability of witnesses to be indicted for perjury and otherwise, as if no such variance had occurred; and in case such trial shall be had at Nisi Prius, the order for the amendment shall be indorsed on the *postea*, and returned together with the record; and thereupon such papers, rolls, or other records of the court from which such record issued as it may be necessary to amend shall be amended accordingly by the proper officer, and in all other cases the order for the amendment shall either be indorsed on the indictment, or shall be engrossed on parchment and filed, together with the indictment, among the records of the court: Provided that, in all such cases where the trial shall be postponed as aforesaid, it shall be lawful for such Court to respite the recognizances of the prosecutor and witnesses, and of the defendant, and his surety or sureties, if any, accordingly; in which case the prosecutor and witnesses shall be bound to attend to prosecute and give evidence respectively, and the defendant shall be bound to attend to be tried, at the time and place to which such trial shall be postponed, without entering into any fresh recognizances for that purpose, in such and the same manner as if they were originally bound by their recognizances to appear and prosecute and give evidence at the time and place to which such trial shall have been so postponed: Provided also, that where any such trial shall be to be had before another jury, the Crown and the defendant shall respectively be entitled to the same challenges as they were respectively entitled to before the first jury was sworn."

14 & 15 Vic. c. 100, to amend variances between indictment and proof in various other cases.

By the 2d section it is enacted, that "every verdict and judgment which shall be given after the making of any amendment under the provisions of this act, shall be of the same force and effect in all respects as if the indictment had

And verdict and judgment after such amendment

of equal force as if no amendment had been made.

originally been in the same form in which it was after such amendment was made."

The record ought to be drawn up in the amended form.

By sect. 3 it is enacted, that "if it shall become necessary at any time, for any purpose whatsoever, to draw up a formal record in any case where any amendment shall have been made under the provisions of this act, such record shall be drawn up in the form in which the indictment was after such amendment was made, without taking any notice of the fact of such amendment having been made."[1]

FROST'S CASE, 1 Dears. C. C. R. 427; 24 L. J. M. C. 116.

A variance between the Christian names of the prosecutor alleged in the indictment and proved on the trial, may be amended in the case of a person of title, whose title is also alleged, by the jury finding that the person mentioned was a person having such title, omitting the Christian names.

On a case reserved for the Court of Criminal Appeal, the facts were these:—The prisoners were charged on an indictment with having by night, in pursuit of game, entered the lands of George William Charles Frederick Duke of Cambridge. On the trial a witness proved that George William were two of the Duke's Christian names, and that he had others; no proof was given what they were. The prosecutor prayed an amendment of the indictment by striking out the name "Frederick Charles." This the Court refused, and left the case to the jury, who, being satisfied as to the identity of the Duke, convicted the prisoners.

The Court quashed the conviction, *Parke, B.*, saying, "The Court of Quarter Sessions have a power of amending given them by the statute 14 & 15 Vic. c. 100, s. 1; but they have a discretion: they are not bound to allow an amendment; having omitted to amend at the trial, they cannot amend now. If they had asked us whether they ought to have done so, it is clear that, upon the evidence before them, they were perfectly right in refusing to make the amendment prayed for; but that they would have been equally wrong in refusing to amend, had the amendment asked for been to strike out all the Christian names of the Duke of Cambridge. The indictment described the Duke as George William Frederick Charles. According to the usual rule, the prosecutor must prove all matter of description alleged, though it were not necessary to allege it. The proper course would have been for them to have found that the person mentioned was a person who had the title of the Duke of Cambridge, and to have omitted all the Christian names."

REX v. DAVIS, 1 Car. & P. 470.

The caption of an indictment may be amended.

In the caption of the indictment, as stated in the Nisi Prius record, the names of the grand jurors who found the bill were not set out; but it was only stated that by the oath of twelve good and lawful men, sworn and charged to inquire, &c., it was presented, &c.

Parke, J. "As the caption may be amended if it be wrong, I shall not stop the case on such an objection."

THE ATTORNEY-GENERAL v. SMITH, 5 Mee. & W. 372.

At the instance of the Crown, an information may be amended by adding counts after plea.

This was an information with respect to British spirits for concealment, with intent to defraud her Majesty of the duty. The defendants claimed the property, gave bail, and pleaded, when the Attorney-General obtained a side-bar rule to add two counts to the information. On application to rescind the order for the amendment, on the ground that, in a case where bail had been given, the Crown was not entitled to amend, as it might prejudice the bail, and would be

[1] The two questions for consideration before making an amendment will always be —1st, whether the variance is material to the merits of the case; and, 2dly, whether the defendant can be prejudiced by the amendment in his defence upon the merits: for, of course, in one point of view, he must always be prejudiced by an amendment, inasmuch as he might altogether escape conviction if it were not made. Broom's Com. 995.

a great hardship on the defendants, who were brought into court upon a charge of fraud, and pleaded to that charge, to have afterwards a new charge set up against them.

Sed per Cur. The Crown may amend. The recognizance is, to pay the costs occasioned by the claim; and that is entered into before the information is filed: the amendment makes no difference, because the bail must take the chance of what the Crown may do.

(B) *On Appeals at Quarter Sessions.*

12 & 13 Vic. c 45, s. 3. "Upon the hearing of an appeal to any Court of General or Quarter Sessions of the Peace, no objection on account of any defect in the form of setting forth any ground of appeal shall be allowed, and no objection to the reception of legal evidence, offered in support of any ground of appeal, shall prevail, unless the Court shall be of opinion that such ground of appeal is so imperfectly or incorrectly set forth, as to be insufficient to enable the party receiving the same to inquire into the subject of such statement, and to prepare for trial: Provided always, that in all cases where the Court shall be of opinion that any objection to any ground of appeal, or to the reception of evidence in support thereof, ought to prevail, it shall be lawful for such Court, if it shall so think fit, to cause any such ground to be forthwith amended by some officer of the court, or otherwise, on such terms as to the payment of costs to the other party, or postponing the trial to another day in the same sessions, or to the next subsequent sessions, or both payment of costs and postponement, as to such Court shall appear just and reasonable."

If a court of quarter sessions, upon objection taken, think the form of setting forth the grounds of appeal is so defective as to prejudice the respondent, they may amend the same and postpone trial.

12 & 13 Vic. c. 45, s. 7. "If upon the trial of any appeal to any Court of General or Quarter Sessions of the Peace, against any order or judgment made or given by any justice or justices of the peace, or if, upon the return to any writ of *certiorari*, any objection shall be made on account of any omission or mistake in the drawing up of such order or judgment;[1] and it shall be shown to the satisfaction of the Court that sufficient grounds were in proof before the justice or justices making such order or giving such judgment to have authorised the drawing up thereof, free from the said omission or mistake, it shall be lawful for the Court, upon such terms as to payment of costs as it shall think fit, to amend such order or judgment, and to adjudicate thereupon as if no such omission or mistake had existed," &c.

They may also amend the order or judgment of justices appealed against; and the Court has the like power, on the return to a *certiorari*, if satisfied that the proof before them would have justified the justices in drawing up the order or judgment free from the omission or mistake.

Sect. 9. "The decision of the Court of General or Quarter Sessions of the Peace, upon the hearing of any appeal as to the sufficiency of any statement of any grounds of appeal, and as to the amending, or refusing to amend any order or judgment of a justice or justices appealed against, or the statement of any ground or grounds of appeal, and as to the substitution of any new recognizance or recognizances as aforesaid, shall be final, and shall not be liable to be reviewed in any Court by means of a writ of *certiorari* or *mandamus*, or otherwise.

And the decision of the court of quarter sessions upon the allowance of such amendments is final.

(C) *Of Case stated by Justices under* 20 & 21 *Vic. c.* 43.[2]

[1] A magistrate may draw up his conviction in a more formal shape than it was at first drawn, before he returns it to the sessions, or upon a *certiorari*. *R. v. Barker*, 1 East, 186. *Gray v. Cookson*, 16 id. 21. But he cannot do even this with an order (*R. v. Justices of Cheshire*, 5 B. & Adol. 439), or warrant of commitment (*Hutchinson v. Lowndes*, 4 id. 118); nor can he remedy defects by amendment or otherwise in other proceedings. Under the power to amend orders brought up by *certiorari*, the Court of Queen's Bench have amended an order of justices brought up on *certiorari*, by inserting the words "in and" before the words "for the borough of," &c., in that part of the order in which the justices described their jurisdiction. *Reg. v. Inhabitants of Hellingley*, 28 L. J. Q. B. 167; 5 Jur. N. S. 626.

[2] The Court of Queen's Bench in one case refused, before the case came on for argument, to entertain a motion to refer back the case to the justices to be amended. *Christie v. Guardians of St. Luke, Chelsea*, 27 L. J. Q. B. 214. But in another instance the

III. Amendment of Proceedings in the County Court.

I. Amendments necessary to determine real Question may be made, p. 344.

(A) *As to Parties*, p. 344.

(*a*) *Name of Defendant*, p. 344.

(*b*) *Description of Plaintiff or Defendant with respect to representative Character*, p. 344.

(*c*) *Name or Description of Plaintiff in Summons*, p. 345.

(*d*) „ „ *Defendant*, p. 345.

(*e*) *By Non-joinder or Mis-joinder of Wife*, p. 345.

(*f*) *By Mis-joinder of Plaintiffs*, p. 345.

(*g*) *By Non-joinder of Plaintiffs*, p. 345.

(*h*) *By Mis-joinder of Defendants*, p. 345.

(*i*) *Or Non-service upon Defendants*, p. 346.

I. Amendments necessary to determine real Question may be made.

The Judge may make any amendment necessary for determining the real question in controversy.

19 & 20 Vic. c. 108, s. 57. "The Judge of a County Court may at all times amend all defects and errors in any proceeding in such court, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend or not; and all such amendments may be made with or without costs, and upon such terms as to the Judge may seem fit; and all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties shall be so made, if duly applied for.[1]

(A) *As to Parties.*

(*a*) *Name of Defendant.*

Name of defendant may be amended.

County Court Rules of 1857.—R. 91. "Where a person other than the defendant appears at the hearing, and admits that he is the person whom the plaintiff intended to charge, his name may be substituted for that of the defendant, if the plaintiff consents, and thereupon the cause shall proceed, as to set-off and other matters, as if such person had been originally named in the summons, and the costs of the person originally named as defendant shall be in the discretion of the Judge."

(*b*) *Description of Plaintiff or Defendant.*

The description of a party suing or sued in a representative character may be amended by making him sue or be sued in his own right.

Id. R. 92. "Where a party sues or is sued in a representative character, but at the hearing it appears that he ought to have sued or been sued in his own right, the Judge may, at the instance of either party, and on such terms as he shall think fit, amend the proceedings accordingly, and thereupon the cause shall proceed, as to set-off and other matters, as if the proper description of the party had been given in the summons."

Id. R. 93. "Where a party sues or is sued in his own right, but at the hearing it appears that he ought to have sued or been sued in a representative character, the Judge may, at the instance of either party, and on such terms as

So, if he ought to have sued or been sued in a representative character instead of in his own

Court of Common Pleas, on motion before the case came on for argument, sent a case back to be amended by the justices by the insertion of a document, which they were informed upon affidavit had been in evidence upon the hearing. *Yorkshire Fire, &c. Co. v. Rotherham Local Board of Health*, 27 L. J. C. P. 235.

[1] If part of the causes of action in the summons or plaint is within the jurisdiction of the County Court, and other part is not within the jurisdiction, the same may be amended by striking out such part as is beyond the jurisdiction. *Welsh v. Jonides*, 1 E. & B. 383; 22 L. J. Q. B. 137

he shall think fit, amend the proceedings accordingly, and thereupon the cause shall proceed, as to set-off and other matters, as if the proper description had been originally such as it appears after the amendment had been made." right, the proceedings may be amended accordingly.

(*c*) *Name or Description of Plaintiff in Summons.*

Id. R. 94. "Where the name or description of a plaintiff in the summons is insufficient or incorrect, it may at the hearing be amended, at the instance of either party, by order of the Judge, on such terms as he shall think fit, and thereupon the cause shall proceed, as to set-off and other matters, as if the name or description had been originally such as it appears after the amendment has been made." And the name or description of plaintiff in summons may be amended.

(*d*) *Of Defendant.*

Id. R. 95. "Where the name or description of a defendant in the summons is insufficient or incorrect, and the defendant appears and objects to the description, it may at the hearing be amended, at the instance of either party, by order of the Judge, on such terms as he shall think fit, and thereupon the cause shall proceed, as to set-off and other matters, as if the name or description had been originally such as it appears after the amendment has been made; but if no objection is taken to the name or description the cause may proceed, and in the judgment, and all subsequent proceedings founded thereon, the defendant may be named and described in the same manner." And so may the name or description of defendant.

(*e*) *By Non-joinder or Mis-joinder of Wife.*

Id. R. 96. "In actions by or against a husband, if the wife be improperly joined or omitted as a party, the summons may at the hearing be amended, at the instance of either party, by order of the Judge, on such terms as he shall think fit, and thereupon the cause shall proceed, as to set-off and other matters, as if the proper person had been made party to the suit." If the wife of either of the parties be improperly joined or omitted, the summons may be amended.

(*f*) *By Mis-joinder of Plaintiffs.*

Id. R. 97. "Where it appears at the hearing that a greater number of persons have been made plaintiffs than by law required, the name of the person improperly joined may, at the instance of either party, be struck out by order of the Judge, on such terms as he shall think fit, and thereupon the cause shall proceed, as to set-off and other matters, as if the proper party or parties had alone been made plaintiffs." So a mis-joinder of plaintiffs may be amended.

(*g*) *By Non-joinder.*

Id. R. 98. "Where it appears at the hearing that a less number of persons have been made plaintiffs than by law required, the name of the omitted person may, at the instance of either party, be added by order of the Judge, on such terms as he shall think fit, and thereupon the cause shall proceed, as to set-off and other matters, as if the proper persons had been originally made parties; and if such person shall, either at the hearing or at some adjournment thereof, personally or by writing, signed by him or his agent, consent to become a plaintiff in manner aforesaid, the Judge shall then pronounce judgment as if such person had originally been made a plaintiff: but if such person shall not consent to become a plaintiff in manner aforesaid, either at the hearing or at the adjournment thereof, judgment of nonsuit shall be entered." And likewise a non-joinder.

(*h*) *By Mis-joinder of Defendants.*

Id. R. 99. "Where it appears at the hearing that a greater number of persons have been made defendants than by law required, the name of the person improperly joined may, at the instance of either party, be struck out by order of So in case of mis-joinder of defendants.

the Judge, on such terms as he shall think fit, and thereupon the cause shall proceed, as to set-off and other matters, as if the proper party or parties had alone been made defendants, and the costs of the person improperly joined as a defendant shall be in the discretion of the Judge."

(i) Or Non-service.

Or non-service upon defendants.

Id. R. 100. "Where two or more persons are made defendants, and some of them have not been served, the name or names of the defendant or defendants who have not been served may, at the instance of either party, be struck out by order of the Judge, on such terms as he shall think fit, and thereupon the cause shall proceed, as to set-off and other matters, as if the party or parties whose name or names have not been struck out had alone been made defendant or defendants."

AMENDS, Tender of. *See* Constable; Costs; Justice of the Peace; 11 & 12 Vic. c. 44, s. 11.

AMERCEMENT.[1] *See* Courts; Fines; Leet. A pecuniary fine assessed by the jury in a court-baron or court-leet. *See* 2 Scriv. on Copyholds, 621, *et seq.*

Persons charged with murder, assault with intent to commit murder, piracy, arson, robbery, or forgery, escaping hence to America, or from America coming within her Majesty's jurisdiction, may be delivered up.

AMERICA. By the 6 & 7 Vic. c. 76, provision is made for carrying out the conditions of a treaty for the mutual delivering up by the one country to the other of offenders fleeing from justice. Sect. 1 recites that, by the 10th article of the treaty, "it was agreed that her Majesty and the said United States should, upon mutual requisition by them or their ministers, officers, or authorities respectively made, deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either of the high contracting parties, should seek an asylum, or should be found within the territories of the other: Provided that this should only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged should be found, would justify his apprehension and commitment for trial if the crime or offence had been there committed; and that the respective judges and other magistrates of the two governments should have power, jurisdiction, and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, so that he might be brought before such justices or other magistrates respectively, to the end that the evidence of criminality might be heard and considered; and if on such hearing the evidence should be deemed sufficient to sustain the charge, it should be the duty of the examining judge or magistrates to certify the same to the proper executive authority, that a warrant might issue for the surrender of such fugitive, and that the expense of such apprehension and delivery should be borne and defrayed by the party making the requisition and recovering the fugitive." *See* also 8 & 9 Vic. c. 102, which makes provision "for giving more immediate effect to the warrant of any one of her Majesty's principal Secretaries of State for the better execution of the said convention and treaty respectively."

[1] An amercement differs from a fine; the latter is the act of the Court, the former the act of the jury. In justifying a trespass for seizing a chattel as an amercement the warrant must be set forth. *Matthews v. Cary*, 3 Mod. 137; 1 Show. 41; 3 Salk. 52. And if it were by the lord of a leet the custom must be stated. *Fletcher v. Ingram*, 5 Mod. 127; 1 Ld. Raym. 69. *See* further as to plea of justification, *Stephens v. Haughton*, 2 Str. 847; Fitz. 108. *Duchess of Hamilton v. Incledon*, 1 Str. 225. The jury may amerce in a court-leet without an affeerment. *Brook v. Hustler*, 11 Mod. 76. See *Morgan's case*, 8 Mod. 296. A private injury committed to the waste does not entitle the lord of the manor to an amercement. *Wood v. Loveatt*, 6 T. R. 511.

AMICUS Curiæ. A stander-by, who may inform the Court when doubtful or mistaken. 2 Co. Litt. 178.

AMOTION.[1] *See* Corporations; *Mandamus;* Office; *Quo Warranto.*

AMOVEUS Manus. *See* Extent. The judgment in favour of the defendant in an issue upon seizure of lands under an extent for a debt claimed to be due to the Crown.

AN.—Ann.—Anne.[2]

ANATOMY.[3] *See* Burial.

ANCESTOR.[4]

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[1] A putting or turning out. *Ouster* is an amotion of possession. The wrongful taking of personal chattels. The removal of an *officer* of a corporation, 2 Salk. 436; 1 Str. 640. "Disfranchisement" is the term applied to the removal of members. Such a power is incident to every corporation at common law. Grant on Corporations, 240.

[2] L. Fr. year. *De an en an*, "from year to year."

[3] To disinter a dead body, even for the purpose of dissection, is a misdemeanour at common law, and punishable with fine or imprisonment, or both. *R. v. Lynn*, 2 T. R. 733. *R. v. Gillies*, R. & Ry. 366 n. *R. v. Cundick*, D. & R. N. P. C. 13.

3 & 4 Wm. 4, c. 73, an act for regulating Schools of Anatomy, sect. 7, enacts, that "it shall be lawful for any executor or other party having lawful possession of the body of any deceased person, and not being an undertaker, or other party intrusted with the body for the purpose only of interment, to permit the body of such deceased person to undergo anatomical examination, unless to the knowledge of such executor or other party such person shall have expressed his desire, either in writing at any time during his life, or verbally in the presence of two or more witnesses during the illness whereof he died, that his body after death might not undergo such examination, or unless the surviving husband or wife, or any known relative of the deceased person, shall require the body to be interred without such examination."

Sect. 8 makes provision for the case of persons directing that after their death anatomical examination should be made.

Sect. 9 requires that the body shall not be removed until after forty-eight hours from the person's decease, and makes a certificate of the medical attendant, or notice to the inspector for the district, necessary before removal.

Sect. 10 enacts, that "it shall be lawful for any member or fellow of any college of physicians or surgeons, or any graduate or licentiate in medicine, or any person lawfully qualified to practise medicine in any part of the United Kingdom, or any professor, teacher, or student of anatomy, medicine, or surgery, having a license from his Majesty's principal Secretary of State, or chief secretary as aforesaid, to receive or possess for anatomical examination, or to examine anatomically, the body of any person deceased, if permitted or directed so to do by a party who had at the time of giving such permission or direction lawful possession of the body, and who had power, in pursuance of the provision of this act, to permit or cause the body to be so examined, and provided such certificate as aforesaid were delivered by such party, together with the body."

By sect. 18, "any person offending against the provisions of this act in England or Ireland shall be deemed and taken to be guilty of a misdemeanour, and being duly convicted thereof shall be punished by imprisonment, for a term not exceeding three months, or by a fine not exceeding 50*l.*, at the discretion of the Court before which he shall be tried."

It has been held that an indictment for removing a body for dissection without leave was not sustained by evidence that the prisoner, who was the master of a workhouse, caused a mock funeral to be enacted, with a view to prevent the relatives dissenting to the body of a pauper, who died in the workhouse, being disposed of for dissection. *Reg. v. Fiest*, 27 L. J. M. C. 164; 8 Cox, C. C. 18.

[4] L. Fr. *Auncestre*. L. Lat. *Antecessor;* from *antecedere*, to go before. A deceased person from whom an estate has passed to another by operation of law, in consequence of his decease. The person last seised of an estate of inheritance, and from whom such estate is transmitted by descent to the heir. 2 Bl. Com. 200, 208; 1 Steph. Com. 218.

In 3 & 4 Wm. 4, c. 106, "descent" is defined to be "the title to inherit land by reason of consanguinity, as well *where the heir shall be an ancestor or collateral relation*, as where he shall be a child or other issue." 1 Steph. Com. 257, n. b. *Ancestor* is here used in the sense of a living person in the ascending line of kindred, and in such connexion with the word "heir" as to confound the established relation between the terms. Ancestor and heir are, in law, strictly the correlatives of each other, having a fixed

ANCHORAGE.[1] *See* also Ports; Tolls; Wharf and Wharfinger.

ANCIENT. *See* Easements; Lights; Mill; Watercourse.

ANCIENT and Accustomed Rent.[2] *See* Powers.

ANCIENT Demesne.[3]

ANCIENT Documents.[4]

(A) *There is a Presumption in favour of their Genuineness*, p. 348.

(B) *Provided it appear that they have come from the proper Custody*, p. 349.

(C) *And of this some Evidence must be given*, p. 350.

(D) *But it is not Essential to show that the Document was acted upon*, p. 350.

(A) *There is a Presumption in favour of their Genuineness.*

Clarkson v. Woodhouse, 5 T. R. 413.

There is a presumption in favour of the genuineness of ancient documents.

In an action of trespass to lands, the plaintiff, in order to prove that after an allotment of moss had been made, and the moss cleared away, the following ground was to be held by the lord free from common, produced several counterparts of old leases from among the muniments of the lords of the manor, in which the following ground appeared to have been demised by the lord; but

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meaning, and not admitting of being interchangeably or indifferently applied, as between two given persons. An ancestor is a *deceased* person from whom an estate has passed, just as an heir is the *living person* to whom it has passed; nor can the same person properly be said to stand in the relations both of ancestor and heir to another. See Descent; Heir; and *Nemo est Hæres viventes*.

[1] A toll for every anchor cast in port. Hale, De Jur. Mar. par. 2, c. 6. As to anchors, *see* 9 & 10 Vic. c. 99, and Ship and Shipping.

[2] That shall be deemed the ancient rent which was the rent at the time the power was reserved, or when the last lease before was made, if the estate was not then under lease. 2 Vern. 542, cited *Doe v. Lock*, 2 Ad. & E. 724; S. C. 4 M. & N. 807. 1 Platt on Leases, 414–465.

[3] Ancient demesne are lands held of manors that were formerly in the possession of the Crown. 2 Bl. Com. c. 6; Burt, s. 1283; Co. Litt. 596. This tenure exists in those manors only which belonged to the Crown in the reign of Edward the Confessor and William the Conqueror, and in Domesday Book are denominated "Terræ Regis Edwardi," or "Terræ Regis." 2 Scr. Cop. 687. The tenants are freeholders, and possess certain ancient immunities, the chief of which is a right to sue and be sued only in their lord's court. Before the abolition of fines and recoveries, these proceedings, being judicial in their nature, could only take place as to lands in ancient demesne in the lord's court; but as the nature of the tenure was not always known, much inconvenience frequently arose from the proceedings being taken by mistake in the usual Court of Common Pleas at Westminster, and these mistakes have given to the tenure a prominence in practice which it would not otherwise have possessed. Such mistakes, however, have been corrected, as far as possible, by the recent act for the abolition of fines and recoveries, 3 & 4 Wm. 4, c. 74, ss. 4–6; and for the future the substitution of a simple deed in the place of those assurances makes such mistakes impossible. So that this peculiar kind of socage tenure now possesses but little practical importance. Wms. *Real Pro.* 112; Smith's P. & R. P. 111.

[4] An ancient deed, by which is meant one more than thirty years old, having nothing suspicious about it, is presumed to be genuine, without express proof, the witnesses being presumed dead; and if it be found in the proper custody, and be corroborated by evidence of ancient or modern corresponding enjoyment, or by other equivalent or explanatory proof, it will be presumed to have constituted part of the actual transfer of property therein mentioned, because this is the usual course of such transactions. Tayl. *Evid.* 436.

"The elder civilians," says Mr. Best, "applied with tolerable justice the term *piscatio anguillarum* to the proof of immemorial possession." Bonnier, *Traité des Preuves*, s. 732; Best. *Evid.* 615, 3d ed.

there was no proof of any enjoyment under them. The oldest of them was dated in 1670; the latest in 1702. It was objected on the trial, and now on a motion for a new trial, that these leases should not have been received, because unaccompanied by proof of enjoyment.

Lord Mansfield. "It is clear that the leases might be given in evidence; they only show the existence of a fact, that at the time of the dates of the deeds the lord granted the land after the moss was taken away. There can be no objection to the deeds, unless they be forged; the lord had the proper custody of the counterparts, and of the originals after the leases were expired, so that they are from the proper repository, and they are so old that nobody can speak to possession under them."

(B) *Provided it appear that they have come from the proper Custody.*

Bishop of Meath v. Marquis of Winchester, 3 Bing. N. C. 201.

Provided it appear that they have come from the proper custody.[1]

In *quare impedit* against the Bishop of Meath, to recover the advowson of the parish church of Killucan, in the diocese of Meath, the Judge at the trial admitted in evidence against the Bishop a case touching the right of jurisdiction to a living by the Bishop of Meath, stated for the opinion of counsel, and found in the family mansion of the descendants of that bishop.

Tindal, C. J., delivering the opinion of the Judges in favour of the admissibility of the document, laid down the principle applicable to these

[1] The poorhouse of a union has been considered not an improper repository for the documents of any parish within the union. *Slater v. Hodson*, 2 Sess. Cas. 488. And an old chartulary of a dissolved abbey has been admitted when found in the possession of the owner of part of the abbey lands, though not of the principal proprietor. *Bullen v. Michell*, 2 Price, 413. The strictly proper custody for such a document as this last would have been the Augmentation Office. *Per Lord Redesdale*, 4 Dow, 321. And as between the different proprietors of the abbey lands it might naturally be supposed to have been deposited with the largest, still the Court held that its actual place of custody was one where it might reasonably be expected to be found. *Bishop of Meath v. Marquis of Winchester*, 2 Bing. N. C. 201, 202: *per Tindal, C. J.* So an old book of a collector of tithes would be equally well authenticated, whether produced from the custody of the successor or executor of the incumbent, or from the hands of the successor of the collector. (Id. referring to *Jones v. Waller*, 2 Gwill. 346.) So also an unproved will, more than thirty years old, disposing of real and personal estate, and produced from the custody of a younger son of the testator, who, in common with his brothers, derived a benefit under it, has been admitted, though it was contended that it should have been deposited in the Ecclesiastical Court of the diocese. *Doe v. Pearse*, 2 M. & Rob. 240: *per Coleridge, J.* Where an expired lease was produced from the custody of the lessor, and proof was given that he had received it from a former occupier of the demised premises, who had paid for several years the precise rent reserved by it, and who, subsequently to the expiration of the term, had procured it from two strangers, who claimed no interest in it, the Court held the deed to be admissible, without proof in what manner it had come into the hands of these strangers, because, by the act of giving it up to the occupier, they admitted his right to the possession of it, and were, consequently, presumed to have held it on his account. *Rees v. Walters*, 3 Mylne & K. 527. Again, a case stated for counsel's opinion by a deceased bishop respecting his right of presentation to a living, has been admitted against a subsequent bishop of the same see, in a question touching the same right, though the paper was not found in the public registry of the diocese, but among the private family documents of the descendants of the former bishop. *Bishop of Meath v. Marquis of Winchester*, 3 Bing. N. C. 183. So, where a mortgagee in fee brought an action of ejectment, and the defendant's case was that the mortgagor, his father, had, previously to the mortgage, conveyed the estate to trustees in settlement, reserving to himself only a life interest, the Court permitted the son to put in the deed of settlement, it being more than thirty years old, though it was produced from among the papers of his late father, against whom its provisions were intended to operate, and though it was strongly urged that the trustees, or their representatives, were the parties entitled to its custody; and the more especially so, as, by the deed having been permitted to remain with the settlor, he had been enabled to practise a fraud on the mortgagee. *Doe v. Samples*, 8 Ad. & E. 151; 3 Nev. & P. 254, S. C. *See* also *Bertie v. Beaumont*, 2 Price, 307. *Lord Trimblestown v. Kemmis*, 9 Clark & Fin. 774.

On the ground that the possession was

questions, thus: "The result of the evidence upon the order of exceptions we think is this, that these documents were found in a place in which, and under the care of persons with whom, papers of Bishop Dipping might naturally and reasonably be expected to be found; and that is precisely the custody which gives authenticity to documents found within it, for it is not necessary that they should be found in the best and most proper place of deposit. If documents continue in such custody, there never would be any questions as to their authenticity; but it is when documents are found in other than their proper place of deposit that the investigation commences, whether it was reasonable and natural, under the circumstances in the particular case, to expect that they should have been in the place where they are actually found: for it is obvious that, while there can be only one place of deposit strictly and absolutely proper, there may be many and various that are reasonable and probable, though differing in degree, some being more so, some less; and in those cases the proposition to be determined is, whether the actual custody is so reasonably and probably to be accounted for, that it impresses the mind with the conviction that the instrument found in such custody must be genuine. That such is the character and description of the custody which is held sufficiently genuine to render a document admissible, appears from all the cases."

(C) *And of this some Evidence must be given.*

Evans v. Rees, 10 Ad. & E. 151.

And of this some evidence must be given.[1]

On a question of boundary, the plaintiff's counsel proposed to read certain manor-books, without proving the custody whence they came, on the ground that they belonged to the lord, who was admitted to be the real plaintiff; the Court held that they could not be read, *Mr. Justice Coleridge* observing, that unless some one was sworn for the purpose of proving their custody they might have been from a grocer's shop.

(D) *But it is not Essential to show that the Document was acted upon.*

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unconnected with any interest in the property, the following documents have been rejected as evidence of title:—A manuscript found in the Heralds' Office, enumerating the possessions of a dissolved monastery (*Lygon v. Strutt*, 2 Anstr. 601); a curious manuscript book, entitled the *Secretum Abbatis*, preserved in the Bodleian Library at Oxford, and containing a grant to an abbey (*Michell v. Rabletts*, cited 3 Taunt. 91); an old grant to a priory, brought from the Cottonian MSS. in the British Museum (*Swinnerton v. Marquis of Stafford*, 3 Taunt. 91); and two ancient writings, purporting respectively to be an endowment of a vicarage and an inspeximus of the endowments under the seal of a bishop, both of which had been purchased at a sale as part of a private collection of manuscripts (*Potts v. Durant*, 3 Anstr. 789), have been held to be inadmissible; the possession of the documents being unconnected with the interest in the property. *Bishop of Meath v. Marquis of Winchester*, 2 Bing. N. C. 201: *per Tindal, C. J.*

In the case of *Randolph v. Galen* (5 Price, 312) this doctrine was carried to its extreme limit. There the defendant, who was grandson of a former rector, produced a book, which purported to be the book of such rector, but as he did not show that he had found it among his grandfather's papers, or that it had come into his possession in a legitimate manner, it was rejected.

For the American authorities, see *Barr v. Gratz*, 4 Wheat. 213, 221. *Winn v. Patterson*, 9 Peters, 663, 675. *Clarke v. Courtney*, 5 id. 319, 344. *Jackson v. Laroway*, 3 John's Cas. 283, approved in *Jackson v. Luguere*, 5 Cowen, 221. *Hewlett v. Cock*, 7 Wend. 371. *Duncan v. Beard*, 2 Nott & M'C. 400. *Middleton v. Mass*, id. 55.

[1] If, however, the witness producing the document swear that he received it from the representative of the person originally entitled to it, as a paper which had belonged to such person, it seems that this evidence will, in ordinary cases, be sufficient, without calling the representative himself to explain how he became possessed of the document. *Earl v. Lewis*, 4 Esp. 1: *per Heath, J.* In one or two settlement cases, however, the respondents have been permitted to produce old certificates, which purported to have been granted to them by the appellants, without giving any account respecting their custody. *R. v. Ryton*, 5 T. R. 259. *R. v. Netherthong*, 2 M. & S. 337.

Doe d. Egremont v. Pulman, 3 Q. B. 622.

Ejectment. It became necessary to show that the land in question had been part of the estate of the lessor's ancestor, Sir William Wyndham; and in order to establish this fact, there was produced from the muniment-room of the property which had descended from Sir William what appeared to be a counterpart of a lease of this land made by him; but it purported to be executed only by the lessee, and there was no proof given of actual possession under it.

But it is not essential to show that the document was acted upon.[1]

Lord Denman, C. J. "The question in the case was, whether certain evidence was rightly admitted by my brother Rolfe. The evidence was offered for the purpose of proving that Sir William Wyndham had been seised of certain land. In order to establish this, there was produced from the muniment-room of the property which had descended from Sir William Wyndham what appeared to be a counterpart of the lease of this land made by him; but it purported to be executed only by the lessee, and the part executed by Sir William Wyndham was not produced. No proof was given of actual possession under this lease. On this point we thought right to consult with some of the other learned judges, and all with whom we have consulted are of opinion that the evidence was admissible. The document was found where such an instrument would properly be: if Sir William Wyndham was a landlord really granting such a lease, his muniment-room was the fit place for keeping the counterpart."

ANCIENT House. *See* Easement; Support.

ANCILLARY.[2]

AND. Conjunction. Couples sentences together, so that former adverbs refer to all the verbs subsequent; in this way preventing repetition and tautology. *See* 4 Rep. 4, *Case of Appeals and Indictments.*[3]

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[1] Mr. Phillips has urged that, in order to render ancient documents admissible, proof, if possible, must be given of some act done with reference to them; and that where the nature of the case does not admit of such proof, acts of modern enjoyment must at least be shown. 1 Phill. *Ev.* 276, 278. There does not, however, appear to be any strict rule of law which would authorise the judge in withdrawing the deed altogether from the consideration of the jury, the absence of proof of possession affecting merely the weight and not the admissibility of the instrument. Thus, in *Rogers v. Allen*, 1 Camp. 309, where, in order to prove a prescriptive right of fishery as appurtenant to a manor, ancient licenses to fish in the *locus in quo*, which appeared on the court rolls, and were granted by former lords in consideration of certain rents, were tendered in evidence, *Mr. Justice Heath*, after argument, held that they were admissible without any proof of the rents having been paid; but he added that, to give them any weight, it must be shown that in later times payments had been made under licenses of the same kind, or that the lords of the manor had exercised other acts of ownership over the fishery, which have been acquiesced in. So in the case of the *Duke of Bedford v. Lopes, Bart.* (cited in argument, 3 Q. B. 623), which was an action brought to try the title to the bed of a river; after proof of a grant from Henry 8, two counterparts of leases were produced from the duke's muniment-room comprehending the soil in question. No payment by a tenant was proved, nor any modern act of ownership; but Lord Denman admitted the instruments as coming from the right custody, observing that there was no circumstance in the case which threw suspicion on them, and that the absence of other kinds of proof was mere matter of observation. *See* further, *Clarkson v. Woodhouse*, 5 L. R. 413 n.: *per Lord Mansfield. Brett v. Beales*, M. & M. 418: *per Lord Tenterden. Doe v. Passingham*, 2 Car. & P. 444: *per Burrough, J. Rancliffe v. Parkyns*, 6 Dowl. 202: *per Lord Eldon. McKensie v. Frazer*, 9 Ves. 5. And the following American cases:—*Jackson v. Laroway*, 3 John's Cas. 283, 287. *Jackson v. Luguere*, 5 Cowen, 221, 225. *Jackson v. Lamb*, 7 id. 431. *Barr v. Gratz*, 4 Wheat. 213, 221. *Hewlett v. Cock*, 7 Wend. 371, 373, 374.

[2] An appointment is described as ancillary to the original deed containing the powers to appoint. 1 Steph. Com. 507. An administration is said to be ancillary when it is taken out in the county where the assets are locally situate, and is subordinate to the original administration. 1 Sto. *Eq. Jur.* 583.

[3] "And" is sometimes also relative, as well as copulative. Thus, R. devised 100 sheep and 10 bullocks, and 10*l.* quarterly; it was held that the second R. disjoined

ANIMALS. *See* also Bill of Sale; Carrier; Cattle; Distress; *Fieri facias*; Horse; Warranty.

I. Property in, p. 353.

II. Injuries by Animals, p. 353.

(A) *An Action will lie for keeping an Animal of* known *Mischievous Propensities*, p. 353.

(1) *Form of Declaration*, p. 354 n.

(B) *Although there has been no Negligence in the mode of keeping the Animal*, p. 354.

(C) *But the Knowledge of the Proprietor of its dangerous Propensity must be averred*, p. 355.

(D) *And that Fact must be proved*, p. 355.

(E) *Not Guilty puts in issue the Ferocity of the Animal and the* Scienter, p. 355.

(F) *Cattle affected with Glanders must not be taken to a Public Market*, p. 356.

III. Injuries to Animals, p. 356.

(A) *An Action lies for enticing Dogs into Traps set in the Grounds of the Defendant*, p. 356.

(B) *But not for setting Dogspears to protect Game*, p. 357.

(C) *A Plea justifying killing a Mastiff, that it attacked the Defendant's Dog, must allege that the Defendant could not otherwise separate them*, p. 357.

IV. Cruelty to Animals, p. 357.

(A) *Cruel Treatment of Cattle or Domestic Animals is Punishable*, p. 357.

(B) *So is the Keeping of a Place for, and the Baiting or Fighting of Animals*, p. 358.

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and severed the rent from the sheep and bullocks. *Sir Richard Pexhall's case*, 8 Rep. 85. Further, "and" is not always to be taken conjunctively. It is sometimes, in the fair and rational construction of a statute, to be read as if it were "or," and taken distributively and disjunctively. In *Creswick v. Rokesby*, 2 Bulst. 47; 2 Hawk. c. 25, s. 102 (see *Waterhouse v. Kean*, 4 B. & C. 200), *Dodderidge, J.*, said, "When the sense is the same they are all one, and the words conjunctive and disjunctive are to be taken *promiscue*." Thus, the conjunctive recited in a declaration instead of the disjunctive, where the recital answers the sense of the statute, is sufficient; for the statute, notwithstanding the variance, is truly recited. Nor, according to the case of *Holt v. Green*, will the use of the word "and" instead of "or" hurt, if the word "or" in the statute has always been construed "and." But if substituted improperly in a declaration it will be open to objection. *R. v. Marsack*, 6 T. R. 771. *R. v. Bland*, 5 id. 370. *See* Dwar. St. 681.

Where A. covenanted with B. to renew a lease for years of land, "to him and to his assigns" at such a time, it was held that this should be construed "to him or to his assigns;" so that, if he died before the time, the lease should be made to his assigns, that is, his executors, alone. Plowd. 284, 289.

In a power, where the words were *possession and remainder*, "and" was construed in the disjunctive, for otherwise no estate could be made in possession alone. O. Bridgm. 100; Platt on Leases, 451.

The cases upon the construction of this word, as used in wills, are numerous. To induce the Court to read "and" as "or," or *vice versâ*, there must, it seems, be shown some sort of necessity, something beyond mere probability that the testator's own words do not indicate his real intention. The change must be made for the purpose of correcting a probable mistake; or of avoiding an absolute absurdity; or of reconciling a contradiction or clear inconsistency; or of escaping from an uncertainty or ambiguity; or otherwise of giving an effect to an indisputable intention. Hayes & Jar. *Forms of Wills*, 273, 5th ed. *See* cases there cited, and 1 Jarm. *Wills*, 422–434; 1 Wms. *Exors.* 432; Smith, P. & R. P. 819.

V. May be the Subject of Demise, p. 358.
VI. Larceny of Animals, p. 358.

I. Property in.[1]

II. Injuries by,[2] and Remedy.

(A) *An Action will lie for keeping an Animal of* known *Mischievous Propensities.*

Smith v. Pelah, 2 Str. 1264.

An action will lie for keeping an animal of *known* mischievous propensities.[3]

Per Holt, C. J. "If a dog has once bit a man, and the owner, having notice thereof, keeps the dog, or lets him go about or lie at his door, an action will lie against him at the suit of a person who is bit, though it happened by such person's treading on the dog's toes, for it was occasioned by the owner not hanging the dog on the first notice, and the safety of the king's subjects ought not afterwards to be endangered. The *scienter* is the gist of this action."

For keeping a ram, *Jackson v. Smithson*, 15 Mee. & W. 563; a monkey, *May v. Burdett*, 9 Q. B. 101; and see *Charlwood v. Greig*, 3 C. & Kir. 46.

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[1] Those animals which are said to be *feræ naturæ* (*i. e.* of a wild and untamable disposition), which any man may seize upon, and keep for his own use and pleasure; these, so long as they remain in possession, every man has a right to enjoy without disturbance: but if once they escape from his custody, or he voluntarily abandon the use of them, they return to the common stock, and any man else has an equal right to seize and enjoy them afterwards. But such as are of a nature tame and domestic (as horses, kine, sheep, poultry, and the like), a man may have as absolute property; because these continue perpetually in his occupation, and will not stray from his house or person, unless by accident or fraudulent enticement, in either of which cases the owner does not lose his property.

A qualified property may subsist in animals *feræ naturæ, per industriam hominis*, by a man's reclaiming and making them tame by art, or by so confining them within his own immediate power that they cannot escape and use their natural liberty.

And such property may also subsist with relation to animals *feræ naturæ, ratione impotentiæ*. As when hawks, herons, or other birds, build in a person's trees, and have young ones there, he has a qualified property in those young till such time as they can fly or run away, and then his property in them expires. 2 Bl. Com. 389.

[2] The general rule is, that the owner of domestic or other animals not necessarily inclined to commit mischief, as dogs, horses, and oxen, is not liable for any injury committed by them to the person, or personal property, unless it can be shown that he previously had notice of the animal's mischievous propensity, or that the injury was attributable to some other neglect on his part; it being in general necessary, in an action for an injury committed by such animals, to allege and prove the *scienter*. *Mason v. Keeling*, 12 Mod. Rep. 333; Ld. Raym. 606. *Jenkins v. Turner*, 2 Salk. 662: Bac. Abr. Action, Case, F. But if the owner himself acted illegally, he may be liable even as a trespasser; as where a person in company with his dog trespassed in a close through which there was no footpath, and the dog without his concurrence killed the plaintiff's deer. 4 Burr. 2092; 2 Lev. 172. With respect to animals *mansuetæ naturæ*, as cows and sheep, as their propensity to rove is notorious, the owner is bound, at all events, to confine them on his own land; and if they escape and commit a trespass on the land of another, unless through the defect of fences, which the latter ought to repair, the owner is liable to an action of trespass, though he had no notice, in fact, of such propensity. 12 Mod. 235; Ld. Raym. 606; Vin. Abr. Fences, Trespass, B.; 2 Salk. 662. But for damages by animals, &c. *feræ naturæ*, escaping from the lands of one person to those of another, as by rabbits, pigeons, &c., an action cannot be supported, because the instant they escape from the land of the owner his property in them is determined. 5 Co. 104 b; Cro. Car. 387; 1 Burr. 259. *See* Game. A person cannot be liable for the act of cattle unless he were the general owner, or he actually put them into the place where the injury was committed (1 Saund. 27); and if a servant or a stranger, without the concurrence of the owner, chase or put his cattle into another's land, such owner is not liable: but the action must be against the servant or stranger, who, as it has been said, gains a special property in the cattle for the time. Bro. Abr. Trespass, pl. 435; 2 Roll. Abr. 553.

[3] A man is entitled to keep a ferocious dog for the protection of his premises, and to let it loose at night. In *Brock v. Copeland*, 1 Esp. 203, the defendant's foreman incautiously went into the yard of his master's house, and was thrown down and bitten by

(B) *Although there has been no Negligence in the mode of keeping the Animal.*

MAY AND WIFE v. BURDETT, 9 Q. B. 101.

Although there has been no negligence in the mode of keeping the animal.[1]

The declaration stated that the defendant wrongfully kept a monkey, well knowing that it was of a mischievous and ferocious nature, and used and accustomed to attack and bite mankind, and that it was dangerous to allow it to be at large; and that the monkey, whilst the defendant kept the same as aforesaid, did attack, bite, and injure the female plaintiff, whereby &c. It was objected on the part of the defendant that the declaration was bad, for not alleging negligence, or some default of the defendant, in not properly or securely keeping the animal; and it was said that, consistently with this declaration, the monkey might have been kept with due and proper caution, and the injury might have been entirely occasioned by the carelessness and want of caution of the plaintiff herself.

Lord Denman, C. J. "The conclusion to be drawn from an examination of all the authorities appears to us to be this — that a person keeping a mischievous animal with knowledge of its propensities, is bound to keep it secure at his peril, and that if it does mischief, negligence is presumed without express averment. The precedents, as well as the authorities, fully warrant this conclusion. The negligence is in keeping such an animal after notice. The case of *Smith v. Pelah*, 2 Str. 1264, and a passage in Hale's *Pleas of the Crown*, 430, put the liability on the true ground. It may be, that if the injury was solely occasioned by the wilfulness of the plaintiff after warning, that may be a ground of defence

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the watch-dog, a fierce animal, let loose at night, and it was held no action was maintainable. But a man has no right to put a ferocious dog in such a situation in the way of access to his house, that a person innocently coming there for a lawful purpose in the day-time may be injured by it. *Sarch v. Blackburn*, 4 Car. & P. 300; M. & M. 505. *Curtis v. Mills*, 5 Car. & P. 489. *Charlwood v. Greig*, 3 C. & Kir. 48. It is not material whether the defendant is the owner of the dog or not. It is enough for the maintenance of the action that he keeps the dog; and the harbouring of the animal by the defendant, or permitting him to frequent his premises, is a sufficient keeping of the dog to support the action, coupled with knowledge of his dangerous propensity. *McKone v. Wood*, 5 Car. & P. 1. The circumstance that there was a notice warning persons to beware of the dog will not exempt the owner, if the person bitten could not, or did not, read the notice. *Sarch v. Blackburn*, M. & M. 507. But no action lies if plaintiff contributed to the injury. 1 Hill, 134 n.

(1) *Form of Declaration.*

"That the defendant wrongfully kept a dog of a fierce and mischievous nature, well knowing that the said dog was of a fierce and mischievous nature; and the said dog, whilst the defendant so kept the same, attacked and bit the plaintiff, whereby the plaintiff was wounded, and so remained for a long time, and was prevented from carrying on his business, and incurred expense for medical attendance." B. & L. Pl. 215.

See, for forms of declaration for knowingly keeping a fierce dog, which injured the plaintiff's apprentice, *Hodsoll v. Stallebrass*, 11 Ad. & E. 301; for negligently driving an ox through the streets, which ran into the plaintiff's shop and broke his goods, *Milligan v. Wedge*, 12 id. 737; for knowingly driving a vicious and unmanageable horse, which ran against the plaintiff's carriage, *Martinez v. Gerber*, 3 Man. & G. 88. *See* also *Hartley v. Harriman*, 1 B. & A. 621. *Thomas v. Morgan*, 2 C., M. & R. 496. *Card v. Case*, 5 C. B. 622.

[1] In *Jackson v. Smithson*, 15 Mee. & W. 563, 15 L. J. Ex. 311, the declaration stated that the defendant wrongfully and injuriously kept a ram, well knowing that he was prone and accustomed to attack, butt, and injure mankind; and that the said ram, while the defendant so kept the same, attacked, butted, and threw down the plaintiff. The Court held the declaration sufficient on motion in arrest of judgment, although it contained no averment of negligence, *Alderson, B.*, saying that there was no distinction between the case of an animal which breaks through the tameness of its nature, and is fierce and known by the owner to be so, and one which is *feræ naturæ*.

In *Jones v. Perry*, 2 Esp. 482, a dog having been bit by another that was labouring under canine madness, the owner fastened him up; but a child coming near, and irritating him, the animal flew at and bit the child, in consequence of which the child was seized with hydrophobia and died; in an action for the expenses incurred,—

Lord Kenyon, C. J., held, that the father might maintain an action, it being the duty of the owner to have prevented the dog from doing mischief immediately he became acquainted with the fact of the dog labouring under so dangerous and fatal a malady.

by plea in confession and avoidance, but it is unnecessary to give any opinion as to this, for we think that the declaration is good upon the face of it, and shows a *primâ facie* liability in the defendant."[1]

(C) *But the Knowledge of the Proprietor of its dangerous Propensity must be averred.*

Bayntine v. Sharp, C. P. 1 Lutw. 90; S. P. Card v. Case, 5 C. B. 627; Scetchell v. Freeman, id. 534.

In case for keeping a mad bull, whereby the plaintiff was tossed, gored, and wounded, after verdict for the plaintiff the judgment was arrested, the Court being of opinion that the declaration was bad, because it did not show that the defendant knew the bull was mad.

But the knowledge of the proprietor of its dangerous propensity must be averred.[2]

(D) *And that Fact must be proved.*

Beck and Wife v. Dyson, 4 Camp. 198; S. P. Anon. 12 Mod. 555.

This was an action for keeping a savage and untractable dog, which had bitten the plaintiff's wife; it appeared that the animal had been in general fastened up; no evidence was adduced that the dog had been accustomed to bite mankind, but it was shown that defendant had promised compensation.

But *per Lord Ellenborough, C. J.* "The plaintiff must be called; for order to maintain this action, proof of defendant's knowledge is essenti Plaintiff nonsuited. *See* S. P. *Mason v. Keeling*, 12 Mod. 333; S. C. 1 Raym. 606.

And that fact must be proved.[3]

(E) *Not Guilty puts in issue the Ferocity of the Animal and the* Scienter.

Card v. Case, 5 C. B. 622.

The declaration stated that the defendant wrongfully kept a dog of a ferocious and mischievous description, well knowing, &c., and that while he so kept the dog it worried and bit the plaintiff's sheep. The defendant pleaded not guilty. At the trial it appeared that the defendant's dog had worried the plaintiff's sheep; but there was no evidence that the defendant knew the dog was accustomed to bite sheep, so the plaintiff was nonsuited. A rule to set aside the nonsuit and enter a verdict was discharged.

Not guilty puts in issue the ferocity of the animal and the *scienter*.[4]

Per Cur. The plea of not guilty puts in issue the keeping a savage dog, and the fact that the defendant knew its disposition; these two facts constitute the "wrongful act" alleged in the declaration, within the meaning of the rule of pleading, which gives to the general issue the effect of a denial only of the wrongful act complained of.

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[1] *See* also *Thomas v. Morgan*, 2 C., M. & R. 496; 4 Dowl. 223; *Hogan v. Sharp*, 7 Car. & P. 755; to the same effect.

[2] But where the animal which has done the mischief is *feræ naturæ*, notice of its ferocity need not be averred or proved. *Rex v. Huggins*, 2 Ld. Raym. 1583. *Jenkins v. Turner*, 1 id. 110.

[3] Proof that dogs had attacked men is not sufficient to support an averment in a declaration that they were used to bite and worry sheep. *Hartley v. Harriman*, 1 B. & A. 620; 2 Stark. 212; Holt, 617. But in the case of a boar, it has been held a sufficient averment after verdict that it was used to bite animals, where the complaint was that it had bitten the plaintiff's mare. *Jenkins v. Turner*, 1 Ld. Raym. 109; 3 Salk. 13.

And it seems that evidence of the dog having bitten another *after* the injury complained of will not support the averment, if there is no evidence of his having previously done so. *Judge v. Cox*, 1 Stark. 285. By the French Code Civil and Scotch law (*Orr v. Fleming*, 1 W. R. 339), a *scienter* is not necessary.

[4] Where the defendant's bull, which was being driven along the public streets, ran at a man with a red handkerchief round his neck and gored him, and the defendant after the accident was heard to say that the red handkerchief caused the mischief, as a bull would run at anything red, it was held that this was some evidence to go to the jury that the defendant knew that his bull was a dangerous animal. *Hudson v. Roberts*, 6 Ex. 699; 20 L. J. Ex. 299. And where an ungovernable horse is exercised in an improper place a *scienter* is not required. 2 Lev. 172; 1 Vent. 295.

(F) *And Persons are Prohibited from bringing Cattle affected with Glanders into a Public Market.*

Persons bringing animals affected with glanders into a public fair or market, or depasturing them in uninclosed land, &c. are subject to a penalty.[2]

By 16 & 17 Vic. c. 62, s. 1,[1] "any person bringing or attempting to bring for sale any horse, or other animal, into any market, fair, or other open or public place where animals are commonly exposed for sale, knowing such horse or other animal to be infected with or labouring under the disease called glanders, and any person turning out, keeping, or depasturing any horse or other animal infected with or labouring under any such disease, in or upon any forest, chase, wood, moor, marsh, heath, common, waste land, open field, road side, or other undivided or uninclosed land, shall, on conviction of any such offence, forfeit and pay any sum not exceeding 20*l.*; and the said act (11 & 12 Vic. c. 107) shall be read and construed as if this enactment were incorporated therein; and all the provisions of the said act with respect to the penalties or forfeitures thereby imposed, and the recovery and application thereof, shall be applicable accordingly."

III. Injuries to Animals.[3]

(A) *An Action lies for enticing Dogs into Traps set in the Grounds of the Defendant.*

Townsend v. Wathen, 9 East, 277.

An action lies for enticing dogs into traps set in the grounds of defendant.

Action for enticing the plaintiff's dogs upon the defendant's land into traps there set for the purpose of catching dogs, meat of an attractive scent being placed in the traps, and they being so near to the plaintiff's land that the scent could reach the plaintiff's dogs while in his own grounds. On rule to set aside the verdict for the plaintiff, it was objected that the dogs were trespassers.

Per Cur. It is true that the traps were set in the defendant's own ground; but machines of this dangerous description must not be set in a situation to invite a neighbour's dogs, and, as it were, to compel them by their instinct to come into the traps; and the traps in the present instance being proved to have been placed so near to the plaintiff's courtyard where his dogs were kept, they

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[1] This act, which by sect. 2 was to be in force for two years, was continued by the 19 & 20 Vic. c. 101, for a further period of two years; and by the 21 & 22 Vic. c. 62, is continued until the 1st August, 1863, and to the end of the then next session of parliament.

[2] In *Hill v. Balls* (2 H. & N. 299; 27 L. J. Ex. 45), the declaration stated that the defendant was possessed of a glandered horse, and knowing it had such disease, caused it to be sold by auction at a horse repository, and the plaintiff, believing it to be healthy, became the purchaser thereof at the sale, and paid therefor; that by reason of the diseased state of the horse it was utterly worthless, and the plaintiff necessarily paid a veterinary surgeon for examining the horse; and in consequence of the horse being put into a stable wherein another horse of the plaintiff then was, the last-mentioned horse became infected with the disease and died. The Court held that the declaration did not disclose any cause of action. It neither alleged a breach of warranty nor showed an illegal act within the above statute of the 16 & 17 Vic. c. 72, s. 1, for it did not state that the place where the horse was sold was "a market, fair, or other open or public place, where animals are commonly exposed for sale."

[3] Trespass lies for killing a mastiff. *Edwards v. Engleton*, Hob. 283. *Athill v. Corbet*, Cro. Jac. 463. So will trover lie. 1 Rol. Abr. 5, pl. 5. So trover will lie for a parrot or monkey, because they are merchandise and valuable. *Grymes v. Shack*, Cro. Jac. 262. Further, it seems that an action will lie for an injury to any reclaimed animal (Com. Dig. Actions in Trover, C), or for the wilful disturbance of a decoy (*Keeble v. Hickeringill*, 11 East, 574, n. a. *Carrington v. Taylor*, 2 Camp. 258; 11 East, 571); but not of a rookery. *Harman v. Mockett*, 4 D. & R. 518; 2 B & C. 934. Bees are property, and are the subject of larceny. 2 id. 944. In the case of a hawk, pheasant, hare, rabbit, fish, or other animals *feræ naturæ*, and not generally merchandisable, it should be shown in the pleadings that the same were reclaimed or dead, or at least that the plaintiff was possessed of them. So an action lies in some cases for taking animals *feræ naturæ*, and not reclaimed; as, if a hare or rabbit be killed on the land of another, he, having a local property *ratione soli* in such hare or rabbit, may support trespass for taking it, though the wrongdoer did not enter on the land. *Vide post*, Game.

might even scent the bait without committing any trespass on defendant's wood. This rule must be discharged.

(B) *But not for setting Dogspears to protect Game.*

JORDIN v. CRUMP, 8 Mee. & W. 782.

But not for setting dogspears to protect game.[1]

The question which arose on the pleadings in this case was, "whether a person passing with a dog through a wood, in which he knows dogspears are set, has any right of action against the owner of the wood for the death of or injury to his dog, who, by reason of his own natural instinct, against the will of his master, runs off the path against one of the dogspears, and is killed or injured?"

Per Cur. To set dogspears in this wood was a perfectly legal act on the part of the defendant, and we therefore think that our judgment must be in his favour.

(C) *A Plea justifying killing a Mastiff, that it attacked the Defendant's Dog, must allege that the Defendant could not otherwise separate them.*

WRIGHT v. RAMSCOTT, 1 Saund. 84; 1 Sid. 336.

A plea justifying killing a mastiff dog, that it attacked the defendant's dog, must allege that the defendant could not otherwise separate them.[2]

This was an action of trespass for stabbing a mastiff dog, the property of the plaintiff. The defendant pleaded that the plaintiff permitted his dog to go unmuzzled, and that on a certain day the dog of the plaintiff ran upon a dog belonging to one C. B. and bit the said dog; and that he, the said defendant, being servant to the said C. B., did kill the said mastiff, to prevent further mischief. On demurrer to this plea, it was argued that it was untenable, as the plea did not state that the defendant could not part or take off the mastiff from worrying the other dog, unless he killed the former. The Court, acquiescing in this argument, gave judgment for plaintiff. S. P. *Kellett v. Stannard*, 4 Irish Jur. 50.

IV. CRUELTY TO ANIMALS.

(A) *Cruel Treatment of Cattle or Domestic Animals is Punishable.*

Cruel treatment of cattle or domestic animals is punishable.[3]

By 5 & 6 Wm. 4, c. 59, s. 2, "if any person shall wantonly and cruelly beat, ill-treat, abuse, or torture any horse, mare, gelding, bull, ox, cow, heifer,

[1] Previously to the above decision, the Court of Common Pleas were divided in opinion as to the right to set dogspears, or other engines for destroying dogs, in the pursuit of game. *Dean v. Clayton*, 7 Taunt. 489; 2 Marsh, 577; 1 Moore, 203.

[2] The defendant may justify killing the plaintiff's mastiff, that it infested a warren and could not be restrained doing damage there. *Wadhurst v. Damme*, Cro. Jac. 45. And it is not necessary to allege that he could not otherwise prevent the dog from killing the conies, but it is sufficient to state that the dog was in the warren pursuing the conies there, and therefore he killed him. Cro. Jac. 44. So it is if a dog runs after deer in a park. *Barrington v. Turner*, 3 Leo. 28. *Protheroe v. Mathews*, 5 Car. & P. 581. But these cases apply only to manors and parks strictly so called; for it has been held that a gamekeeper could not justify killing a dog which was pursuing a hare in his lord's manor and close. *Vere v. Lord Cawdor*, 11 East, 568.

[3] The 13th section enacts, "that it shall be lawful for any such justice as aforesaid, in all cases in which no other mode of proceeding is specially provided or directed by this act, or in any case where any person shall not be conveyed before any justice by the authority of this act, upon information or complaint made by any person of any offence against the provisions of this act, within fourteen days next after the commission of any such offence, to summon the party accused to appear before such justice, or before any justice of the peace, at a time and place to be by him named, and either on the appearance of the party accused, or in default thereof, it shall be lawful for such justice, or any other justice, at the time and place to be appointed for such appearance, to proceed to examine into the matter, and upon due proof made thereof by voluntary confession of the party, or by oath of one or more credible witness or witnesses, to award, order, give judgment, or convict for the damage or injury, penalty or forfeiture, as the case may be."

If a constable be required by another person to take a third person into custody

steer, calf, mule, ass, sheep, lamb, dog, or any other cattle or domestic animal, or if any person who shall drive any cattle or other animal shall, by negligence or ill-usage in the driving thereof, be the means whereby any mischief, damage, or injury shall be done by any such cattle or other animal, upon conviction before one justice, he shall forfeit and pay (over and above the amount of the damage or injury, if any, done thereby, which damage or injury shall be ascertained and determined by such justice), such a sum of money, not exceeding 40*s.* nor less than 5*s.*, with costs, as to such justice shall seem meet, or, in default of payment, he shall be imprisoned for not more than fourteen days."

(B) *So is the Keeping of a Place for, and the Baiting or Fighting of Animals.*

So is the keeping of a place for, and the baiting or fighting of animals.[1]

12 & 13 Vic. c. 92, s. 3. "Every person who shall keep or use, or act in the management of any place for the purpose of fighting or baiting any bull, bear, badger, dog, cock, or other kind of animal, whether of domestic or wild nature, or shall permit or suffer any place to be so used, shall be liable in a penalty not exceeding 5*l.* for every day he shall so keep or use, or act in the management of any such place, or permit or suffer any place to be so used as aforesaid: Provided always, that every person who shall receive money for the admission of any other person to any place kept or used for any of the purposes aforesaid, shall be deemed to be the keeper thereof. And every person who shall in any manner encourage, aid, or assist at the fighting or baiting of any bull, bear, badger, dog, cock, or other animal as aforesaid, shall forfeit and pay a penalty not exceeding 5*l.* for every such offence." *See* Metropolitan Police Act, 2 & 3 Vic. c. 47, s. 47.

IV. May be the Subject of Demise.[2]

V. Larceny of Animals.[3]

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under the 13th section, for cruelty to a horse, *not committed in the officer's own view*, the officer, before taking the party into custody, should either inquire into all the particulars, or see the animal, so as to form a judgment as to what has occurred. *Hopkins v. Crowe*, 7 Car. & P. 373. For form of conviction, *see* Schedule to Act.

Under the Malicious Trespass Act, 7 & 8 Geo. 3, c. 30, s. 24, it has been held, that if a small dog run after and bark at a party, and he thereupon beat him with unreasonable violence, under colour of self-defence, and thereby materially injure the dog, he may be proceeded against summarily before a justice for such injury; and although he may have left the premises and gone a mile off, he may nevertheless be immediately pursued and apprehended without warrant, and such imprisonment thereupon will be lawful. 2 M. & M. 15.

[1] The first paragraph of the section makes it a substantive offence to keep or use a place for baiting animals: the second imposes the penalty on those aiding in fighting the animals as aforesaid; that is, in a place so used, as is mentioned before. It is, therefore, not an offence within the statute to assist in fighting cocks in a place other than one "kept or used for the purpose." *Clarke v. Hague*, 2 E. & E. 29 L. J. M. C. 105.

[2] Animals, as a flock of sheep, may be demised. The lessee is entitled to the use and profits of them during the term, but he cannot destroy, kill, sell, or give them away without, it seems, exposing himself to an action of trespass. The property of such animals as may die during the term belongs to the lessee, and hence the lessor has not such reversion as can be granted over, either during the demise or in the interval between its determination and the re-delivery of the sheep. He has only a possibility of property in case they outlive the term. The young ones belong absolutely to the lessee, as profits arising and severed from the principal. 1 Platt on Leases, 217.

[3] No larceny at common law can be committed of such animals in which there is no property, either absolute or qualified, as of beasts that are *feræ naturæ* and unreclaimed; such, for instance, as deer, hares, and conies, in a forest, chase, or warren, fish in an open river or pond, or wild fowls on rocks at their natural liberty. *Hammond v. Mockett*, 2 B. & C. 934; 4 D. & R. 518; 1 Hale, 511; Fost. 366. But if they are reclaimed or confined, and may serve for food, it is otherwise; or of deer so inclosed in a park that they may be taken at pleasure, fish in a tank or net, and pheasants or partridges in a mew, larceny may be committed. 1 Hale, 511; 1 Hawk. c. 33, s. 39. Swans, it is said, if lawfully marked, are the subjects of larceny at common law, although at large in a public river or pond. (Ib.) So all valuable domestic animals, as horses, and all animals *domitas naturæ*, which serve for food, as swine, sheep, poultry, and the like, and the product of any of them, as eggs;

ANIMUS revertendi.[1] *An intention of returning.* *See* Domicile.

ANIMUS furandi. *An intention of stealing.* Words descriptive of the felonious intent in larceny. *See* Larceny; Lost Property.

ANNATES. The primitive or first-fruits, being the first year's whole profits of a spiritual preferment, according to a rate or valor made in the time of Pope Innocent IV., by Walter bishop of Norwich, and which was afterwards advanced in value in the time of Pope Nicholas IV., under a taxation of the king's precept, begun in 1288 and finished in 1292, and which is still preserved in the Exchequer. (Num. xviii. 26.) Previous to the statute 2 & 3 Anne, c. 11, it formed part of the revenue of the Crown, but by that statute it was,

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milk from the cow while at pasture (Foster, 99); wool pulled from the sheep's back feloniously (*R. v. Martin*, 1 Leach, 171), and the flesh of such as are *feræ naturæ*, may be the subject of larceny. 1 Hale, 511. But as to all other animals which do not serve for food, such as dogs, ferrets, though tame and saleable (*R. v. Spearing*, R. & R. 250), and other creatures kept for whim and pleasure, stealing these does not amount to larceny at common law. 1 Hale, 512. But now to course, hunt, snare, or carry away, or kill or wound, or attempt to kill or wound, any deer kept or being in the inclosed part of any forest, chase, or purlieu, or in any enclosed land wherein deer are usually kept, is felony, punishable as simple larceny; and if committed in the uninclosed part of any forest, chase, or purlieu, the first offence is punishable upon summary conviction by fine, not exceeding 50*l.*; and the second, after a previous conviction, is felony, and punishable as simple larceny. 7 & 8 Geo. 4, c. 29, s. 26. Summary punishment may also be imposed by fine, not exceeding 20*l.*, upon any person who shall have in his possession or upon his premises, with his knowledge, any deer, or the hide, skin, or other part thereof, or any snare or engine for the taking of deer, without satisfactorily accounting for such possession (Id. s. 27); or who shall set or use any snare or engine whatsoever for the purpose of taking or killing deer in any part of any forest, chase, or purlieu, whether inclosed or not, or in any fence or bank dividing the same from any land adjoining, or in any enclosed land where deer are usually kept; or shall destroy any part of the fence of any land where deer are then kept. (Id. s. 28.) To take or kill hares or conies in the nighttime, in any warren or ground lawfully used for the breeding or keeping of the same, is a misdemeanour; and to take and kill them in any warren or ground in the daytime, or at any time to set any snare or engine for the taking of them, is punishable upon summary conviction by fine. (Id. s. 30.) Stealing any beast or bird ordinarily kept in a state of confinement, not being the subject of larceny at common law (Id. s. 31); knowingly being in possession thereof, or of the skin or plumage thereof (Id. s. 32); killing, wounding, or taking any dove or house-pigeon under such circumstances as shall not amount to larceny at common law (see *R. v. Brooke*, 4 Car. & P. 131; 7 & 8 Geo. 4, c. 29, s. 31), is punishable upon summary conviction by fine, imprisonment, and whipping, according to the nature of the offence. Stealing dogs is now a misdemeanour punishable summarily before justices for the first offence by penalty or imprisonment, and on indictment for the second offence by fine and imprisonment. 8 & 9 Vic. c. 47. To take or destroy any fish in any water which shall run through, or be in any land adjoining or belonging to the dwelling-house of any person being the owner of such water, and having a right of fishery therein, is a misdemeanour; and to take and destroy fish in any other water, being private property, or in which there shall be any private right of fishery, and to take and destroy fish by angling in the daytime in either description of water, is punishable upon summary conviction by fine, varying according to the nature of the offence (7 & 8 Geo. 4, c. 29, s. 34); and, lastly, to steal any oyster or oyster-brood from any oyster-bed, laying, or fishery, being the property of another, and sufficiently marked out and known as such, is larceny; and to use any dredge or any net, instrument, or engine whatsoever, within the limits of such oyster-fishery, for the purpose of taking oysters or oyster-brood, although none be taken, or to drag upon the soil of any such fishery with any net, instrument, or engine, is a misdemeanour. Id. s. 36.

[1] The question of *animus revertendi* arises in controversies as to domicile, and in cases under the poor laws, where the question concerns the *status* of irremovability of a pauper by reason of five years' unbroken residence within a particular parish. As in other questions of intent, the acts and declarations of the person afford the key to the solution of the difficulty. *See*, as to domicile, Phillimore's *Law of Domicile*, pp. 112, 113. As to question of settlement, *Reg. v. Taddlenstone*, 12 Q. B. 157. *Reg. v. Brighthelmstone*, 4 E. & B. 236. *Reg. v. Stapleton*, 1 id. 766. *Reg. v. Llanelly*, 17 Q. B. 40.

together with the tenths to which the Crown was entitled, vested in trustees, to be applied towards the augmentation of poor livings. *See* Queen Anne's Bounty.

ANNUITY.[1]

I. Grants and Devises of Annuities, p. 361.

(A) *Annuity charged on Land enures for the Term of the Grantor's Interest*, p. 362.

(B) *A Devise of an Annuity charged on Lands clear of all Taxes and Deductions is payable clear of Legacy Duty*, p. 363.

(C) *A Judgment cannot be given so as to be a* continuing *Charge upon a Living as a Security for the Annuity*, p. 363.

(D) *The same of a Warrant of Attorney expressly having that effect*, p. 363.

(E) *But not where it does not in Terms charge the Benefice*, p. 364.

(F) *The Pay of a Military Officer cannot legally be assigned as the Security for an Annuity*, p. 364.

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[1] An annuity is the grant of a certain sum of money, to be paid by the grantor or his representative, at the expiration of fixed consecutive periods, for a definite term, or for life, or in fee. Formerly, the term "annuity" referred to the nature of the security on which the grantee relied, and expressed a charge upon the person or personal estate of the grantor only, while a charge upon the real estate of the grantor was signified by the term of a rent. At the present an annuity is applied indiscriminately to every species of security, but a rent-charge still retains its ancient limited signification. When the rent was granted to issue out of certain land, with a power of distress, it was termed a rent-charge; but when that power was not given it was termed a rent-seck. The proper remedy for the latter was an assise (abolished by 3 & 4 Wm. 4, c. 27, s. 36); but as this was too tedious a remedy, and had, therefore, almost become obsolete, the statute 4 Geo. 2, c. 28, s. 5, enacted, that for all rents-seck there should be the like remedies by distress as were then allowed by law for rents reserved on leases. *See* Distress; Rents.

In former times it was doubted whether an annuity was not a mere chose in action, and therefore incapable of assignment (Co. Lit. 144 b. n. 1); but this objection has long been overruled. When limited to the heirs of the grantee it will, on his intestacy, descend, like real estate, to his heir, but it is still personal property (*Earl of Stafford v. Buckley*, 3 Ves. sen. 171. *Radburn v. Jarvis*, 3 Beav. 450), and will pass by his will under a bequest of all his personal estate. *Aubin v. Daly*, 4 B. & A. 59. When given to the grantee and the heirs of his body, the grantee does not acquire an estate tail; for this kind of inheritance is not a tenement within the meaning of the statute *de donis conditionalibus*. *Turner v. Turner*, 2 Amb. 776. The grantee has merely a fee simple conditional on his having issue, such as a grantee of lands would have had under a similar grant prior to the statute *de donis*, or as a copyholder would now take in manors where there is no custom to entail. When the grantee has issue, he may, therefore, alien the annuity in fee simple by a mere assignment; but should he die without issue the annuity will fail. Wms. *Pers. Pro.* 160. A personal annuity given to a man for ever will devolve on the executor, and not on the heirs of the grantee. *Taylor v. Martindale*, 12 Sim. 158.

A mere personal annuity is generally accompanied by a bond or warrant of attorney by way of collateral security, and sometimes by both; but where there is a warrant of attorney, and the deed contains a covenant for the payment of the annuity, the expense of a bond may be safely dispensed with, as a judgment may be effectually entered upon the warrant of attorney at any time, as well without the bond as with one. In case, however, a warrant of attorney is given, a bond affords a better security than a covenant, as the former entitles the grantee of the annuity to obtain judgment for the penalty in a single action, and to take out execution from time to time on the arrears; whereas, if he has only the grantor's covenant to rely on, he would be compelled to bring successive actions to recover the arrears as they accrued due. Another disadvantage in the case of covenant also is, that in case of the grantor's death, the annuitant would not, as against simple contract debtors, be entitled to have the assets reserved to answer future payments, as he clearly would be if the annuity had been secured by bond, which for such purposes will be treated as an actual subsisting debt. 2 Hughes, *Con. Pre.* 448, 2d ed.

II. Registration of Minute of Annuity, p. 364.

(A) *Memorandum or Minute of Annuities (other than those granted by Marriage Settlement or given by Will) must be Registered*, p. 364.

(B) *Enrolment of Memorial*, p. 365.

III. Registration in Registry Counties, p. 367.

IV. Summary Jurisdiction of Court over, p. 367.

(A) *Grounds of setting aside Annuity must be stated in the Rule* Nisi, p. 367.

(B) *Costs of Application*, p. 368.

V. Recovering back Consideration-Money, p. 368.

(A) *Recoverable if any of the Securities be set aside*, p. 368.

(B) *Unless a void Annuity be vacated while it is executory, the Grantee cannot, after the Death of the Annuitant, recover back the Consideration-Money*, p. 368.

VI. Rights of Principal and Surety, p. 369.

(A) *One of several Sureties cannot claim an Advantage from any Security which is given by his Co-surety, nor object if that Security be taken away*, p. 369.

(B) *Where Principal gives Surety a Bond of Indemnity, conditioned for Payment of the Annuity, it becomes forfeited upon the event of Annuity being in Arrear, although the Surety has not been called upon*, p. 369.

(C) *A Surety is not discharged by the Discharge of his Principal under the Insolvent Debtors' Act*, p. 370.

VII. Apportionment of Annuities, p. 370.

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IX. Remedies for, p. 372.

(A) *By Action*, p. 372.

(*a*) *If the Interest be several, one of several Covenantees may sue*, p. 372.

(*b*) *But if joint, all must be joined*, p. 372.

(*c*) *Notwithstanding the Annuity be payable in Moieties to Two Joint-Covenantees*, p. 373.

(*d*) *In Action on Bond, Plaintiff must assign Breaches*, p. 373.

(B) *By Distress*, p. 373.

(*a*) *Annuitant under Will must Distrain within Twenty Years*, p. 373.

(C) *In Case of Bankruptcy or Insolvency.* *See* Bankrupt.

I. Grants and Devisees of Annuities.[1]

[1] The following cases have been decided upon the construction of grants and devises of annuities. In *Barford v. Stuckey* (3 B. & C. 308; 5 D. & R. 118), the question was as to the construction of a deed granting an annuity to A., his executors and administrators, or children, or wife, for twenty-one years; and the Court held that the annuity was determined by the death of A., his children and wife, and did not go to his repesentatives, for the deed did not operate as a grant of an annuity for twenty-one years absolutely, but it was intended as a provision for A. and his family only, and was determinable upon their deaths. So an annuity devised in trust for the maintenance of a child during infancy, determines upon the death of the child be-

(A) *Annuity charged on Land enures for the Term of the Grantor's Interest.*

SAFFERY v. ELGOOD, 3 Nev. & M. 346; S. C. 1 Ad. & E. 191.

Where the grant of an annuity is charged on land, it will enure for the term the grantor is entitled to it.

In replevin. The defendants made cognizance of taking the goods by a distress for arrears of a rent-charge granted by a tenant for years, the annuity being for three lives.

On demurrer it was contended, that the grant of the rent-charge for lives by a tenant for years was void; this being granted by a tenant for years, and not for years determinable upon lives, is the grant of a greater estate than the termor had.

Sed per Cur. The grant is good for the term for which the termor could grant.

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fore he becomes of age. *Morrant v. Gough*, 7 B. & C. 206; 1 M. & R. 41.

If an annuity or rent-charge be granted to B. for the life of C., to hold to the use of C., the annuity may be paid either to B. or C. *Boscawen v. Cook*, 1 Mod. 223; 2 id. 138. If granted to husband and wife during their two lives, the annuity will divest on the death of either. *Slater v. Carew*, 1 Mod. 187. In *Acherley v. Vernon* (Willes, 153; Com. R. 513; Forts, 188) a testator gave a rent-charge to his sister, payable half-yearly, "in lieu and satisfaction of all claim she might have on his real or personal estate, and upon consideration that she released her right and claim thereto to his executors and trustees." The sister lived several years without executing any release. The Court held that her husband was not, after her death, entitled to arrears of the annuity. Upon the true construction of the will, the executing a release was a condition precedent; and even if it were a condition subsequent it ought to have been performed within a reasonable time, as at the end of six months, when the first payment of the annuity became due, but, at all events, before it became impossible: for it was a fallacy to say that it had become impossible by the act of God, since it was by reason of her own laches that the condition was not performed. In *Molyneux v. Scott* (1 Bl. 376), upon the construction of a devise of an annuity for life, with a direction that the annuitant should receive no wages after the testator's death, the Court held that it did not imply a condition that the annuitant should continue in service. An annuity is not redeemable unless there be a special provision to that effect in the deed. *Coverley v. Burrell*, 5 B. & A. 257. Smith, R. & P. P. 9.

If a testator dedicates the *corpus* of his property, or a portion of the *corpus* of his property, to the purpose of purchasing or providing an annuity of a certain amount, without indicating that such annuity is to be of less duration, the annuitant will be entitled to a perpetual annuity. *Kerr v. The Middlesex Hospital*, 2 De G., M. & G. 576. *Stokes v. Heron*, 2 Dr. & W. 89; 12 Clark & Fin. 161. And where a testator, after giving an annuity to a person for life, proceeds to limit it over to another person indefinitely, and in the words in which it is limited over, or some other words in the will, the annuity is spoken of as if, without reference to the benefit of such other person, it would have an existence beyond the life of the first taker, then the second taker has a perpetual annuity. *Stokes v. Heron*, 12 Clark & Fin. 161. *Yates v. Madox*, 2 Man. & G. 540. See *Hedges v. Harpur*, 6 W. R. 842.

If an annuity is charged upon a fund which fails during the life of the annuitant, the annuity will also fail, although expressly given for life. 2 Rop. Leg. by White, 1482. And wherever an annuity is granted for the performance of any duty or service, and the grantee refuses or neglects to perform it, the annuity becomes extinct. 2 Jarm. & Byth. 61; Co. Litt. 204 a.

When an annuity is directed by will to be purchased, without reference to any contingency, the annuitant takes an immediate vested interest in the price or value of it, so that he may elect to take the price or value instead of the annual payment; and so that his personal representatives will be entitled to it, though he happen to die immediately after the testator, and though the annuity is not to be purchased until some time subsequent to the testator's death, and though the money with which it was to be purchased is to be raised by a sale of real estate, after the death of a tenant for life who survived the annuitant. Smith's *R. & Pers. Pro.* 9, 2d ed.; 1 Ross. Leg. by White, 640; 1 Jarm. *Wills*, 326.

A covenant by the purchaser of an estate charged with an annuity to pay the annuity and to indemnify the vendor is an absolute covenant to pay, and entitles the covenantee to maintain an action for a breach on non-payment, notwithstanding he has not been called upon to pay the annuity. *Saward v. Anstey*, 2 Bing. 519; 10 Moore, 55.

An annuity granted to a woman by deed (*Beauchamp v. Reeve*, 15 L. J. Q. B. 41), in consideration of past cohabitation, is valid (*Nye v. Mosely*, 6 B. & C. 132. *Hall v. Palmer*, 3 Hare, 532); if in contemplation of future illicit cohabitation, it will be void on the ground of immorality of consideration. *Smyth v. Griffin*, 13 Sim. 245. *Friend v. Harrison*, 2 Car. & P. 584. *See* also, as to the construction of grants of annuities, *James v. Tallent*, 5 B. & A. 889; 1 D. & R. 548; *Barford v. Stuckley*, 1 Bing. 225.

(B) *A Devise of an Annuity charged on Lands clear of all Taxes and Deductions is payable clear of Legacy Duty.*[1]

Stow v. Davenport, 2 Nev. & M. 805; S. C. 5 B. & Adol. 359.

Devise to A. to take out of certain lands an annuity, clear of all taxes and deductions, is payable clear of legacy duty.

Lands were devised to the use, among others, that M. A. F. should take from and out of the same premises an annuity or yearly rent-charge of 500*l.* a-year, to be paid clear of all taxes and deductions, remainder to S. for life, subject to the annuity. The Court held that the annuity was to be paid clear of legacy duty, and was a charge upon the land; consequently that S., who had entered into possession under the devise to him, and had been compelled to pay the legacy duty on the annuity pursuant to 45 Geo. 3, c. 28, s. 5, could not recover it again from the annuitant. See *Horne v. Booth*, 4 Scott, N. R. 526.

(C) *A Judgment cannot be given so as to be a* continuing *Charge upon a Living as a Security for the Annuity.*[2]

Flight v. Salter, 1 B. & Adol. 673.

A judgment cannot be given so as to be a *continuing* charge upon a living as a security for the annuity.

The warrant of attorney recited the grant of an annuity, which was secured on the defendant's rectory, and a covenant that the plaintiff might, immediately on the execution of the deed, procure a sequestration of the living, and continue it during the continuance of the annuity, for the purpose of more effectually securing the same. It then authorised the judgment to be entered up, to secure the annuity at the time and in the manner aforesaid; and to the end and intent that a sequestration might be obtained or procured and continued by the grantee, pursuant to the covenant. The Court held that it was bad, being apparent on the face of the instrument that it was a continuing charge created on the living; and *Littledale, J.*, said: "A judgment given *bonâ fide*, without any intention to evade the statute, might, on failure of other property, have been available against the living; but this warrant of attorney having been given to the intent that a sequestration might issue, would, if it were held good, have the effect of contravening the statute. It must be set aside."[3]

(D) *Nor a Warrant of Attorney in Terms a Charge on a Benefice.*

Saltmarshee v. Hewett, 3 Nev. & M. 656; S. C. 1 Ad. & E. 812; S. P. Newland v. Watkin, 9 Bing. 113.

So is a warrant of attor-

By the defeasance of the warrant of attorney it was provided, that in case of

[1] The legacy duty for annuities for lives is fixed by tables given in the act, and is payable by four equal payments, to be made successively on completing each of the first four years' payments of the annuity. *See* stat. 36 Geo. 3, c. 52, s. 32, and *post*, Legacy Duty.

[2] Other parties, as well as the clergyman —for instance, creditors—may apply to set aside the sequestration. *Newland v. Watkin*, 9 Bing. 113; S. C. 9 B. & C. 344; S. C. 4 M. & R. 249.

[3] The sequestration will be set aside if for the entire amount, notwithstanding it does not appear on the face of the warrant of attorney that the annuity was to be a continuing charge on the benefice. *Kirlew v. Butts*, 2 B. & Adol. 736. *Doe d. Moore v. Ramsden*, 1 Nev. & M. 489. But if not a continuing charge, and the warrant of attorney is in the common form, execution for arrears merely will not be set aside. *Colebrooke v. Layton*, 1 id. 374. *Gibbons v. Cooper*, 2 B. & Adol. 734. *Newland v. Watkins*, 9 Bing. 113. *See* also *Johnson v. Brasier*, 3 Nev. & M. 654. *Britten v. Watt*, 3 B. & Adol. 915. And although, under the 13th Eliz. c. 20, an annuity or rent-charge by a rector, charged on his benefice, is void, yet that circumstance does not vacate a personal covenant (*Monys v. Leake*, 8 T. R. 41. *Faircloth v. Gurney*, 9 Bing. 622; 2 M. & S. 822); for the statute does not create any incapacity in the clergyman to grant an annuity; it only forbids his charging his benefice with it. A demise of glebe by an incumbent to secure an annuity is void. *Shaw v. Pritchard*, 10 B. & C. 241; 5 M. & R. 180. *Bowyer v. Pritchard*, 11 Price, 103. As to annuities granted by incumbents between 1803 and 1817, during which period the operation of the 13th Eliz. c. 20, was suspended, see *Doe d. Broughton v. Gulley*, 9 B & C. 344; *Doe d. Cotes v. Somerville*, 6 id. 126.

ney expressly given as a security upon a benefice under 13 Eliz.

any arrear of the annuity it should be lawful to sue out such executions as the party thought fit, and also to sequester the said rectory.

Per Cur. From the language of the defeasance we are of opinion that enough appears to show that the warrant of attorney was given to charge the benefice, and that it is therefore void by the statute 13 Eliz. It seems proper to add that the authorities upon the subject, with the exception of *Colebrook v. Layton*, 4 B. & Adol. 578, which is of a more recent date, namely, *Shaw v. Pritchard*, *ante*, p. 363; *Flight v. Salter*; *Gibbons v. Hooper*; and *Doe v. Carter*, were brought under the consideration of the Court of Common Pleas in *Newland v. Watkins*, *ante*, p. 363. There a rule had been obtained to set aside the plaintiff's warrant of attorney, judgment, and sequestration. The warrant of attorney is not set out, but the report states that it was given to enter up judgment for the arrears of the annuity, and expressly authorised him to issue sequestration.

The Court, having taken time to consider, made the rule absolute.

(E) *But if not in Terms a Charge on the Benefice it is good.*

Moore v. Ramsden, 3 Nev. & P. 180; S. C. 7 Ad. & E. 898.

But not where it does not in terms charge the benefice.

In 1813 the defendant charged his benefice, a rectory, for the payment of an annuity by a demise, for a term which in 1825, with other similar charges, were transferred to the plaintiff; and by the same deed he also demised the rectory and a vicarage for a term, with power to sequester, and a warrant of attorney was executed as a collateral security; but no power to sequester was therein given, either expressly or by reference of the deed of demise. The plaintiff afterwards brought ejectment, and obtained possession of the rectory, and subsequently entered up judgment on the warrant of attorney, and sequestered the vicarage.

The Court held, that the warrant of attorney not in terms charging the benefice was not void, and that the plaintiff was entitled to apply the proceeds to satisfy the accruing annuities, and keep alive the sequestration until the old arrears were paid. *See* 3 B. & Adol. 915.

(F) *The Pay of a Military Officer cannot be assigned as the Security for an Annuity.*

Barwick v. Reade, 1 H. Black. 627; S. P. Stuart v. Tucker, 2 W. Black. 1137.

The pay of a military officer cannot legally be assigned as the security for an annuity.

To secure the payment of an annuity, a lieutenant in the Marines had assigned his full pay in trust, to pay over the residue to himself. On a rule to show cause why the deed of assignment should not be vacated, the Court were clearly of opinion that it was contrary to the policy of the law, and derogatory to the honour and dignity of the Crown, that a stipend or reward given to one man for past or future services should be transferred to another, who perhaps could not perform them. *See* 4 T. R. 248; 2 Anst. 533; 1 T. & R. 207.

II. Registration of Minute of Annuity.

(A) *Memorandum or Minute of Annuities (other than those granted by Marriage Settlement or given by Will) must be Registered.*

Memorandum or minute of annuities (other than those granted by marriage settlement or

18 & 19 Vic. c. 15, s. 12, enacts, that "any annuity or rent-charge granted after the passing of this act, otherwise than by marriage settlement, for one or more life or lives, or for any term of years or greater estate, determinable on one or more life or lives, shall not affect any lands, tenements, or hereditaments, as to purchasers, mortgagees, or creditors, unless or until memorandum or minute containing the name and the usual or last-known place of abode, and

the title, trade, or profession of the person whose estate is intended to be affected thereby, and the date of the deed, bond, instrument, or assurance, whereby the annuity or rent-charge is granted, and the annual sum or sums to be paid, shall be left with the senior master of the Court of Common Pleas at Westminster, who shall forthwith enter the particulars aforesaid in a book, in alphabetical order, in the name of the person whose estate is intended to be affected by the annuity or rent-charge, together with the year and the day of the month when every such memorandum or minute is so left with him; and he shall be entitled for every such entry to the sum of 2*s.* 6*d.*, and all persons shall be at liberty to search the same book, together with the other books or registers in the office, on payment of the sum of 1*s.*"

(given by will) must be registered.[1]

By sect. 14, "the provisions of this act shall not extend to require the registry of annuities or rent-charges given by will."

(B) *Enrolment of Memorial.*[2]

[1] For form of plea that no memorial was enrolled pursuant to 53 Geo. 3, c. 141, *see* Bull. & L. Pl. 287.

[2] The 53 Geo. 3, c. 141, which required the enrolment within thirty days of a memorial of the grant of life annuities, was repealed by the 17 & 18 Vic. c. 90, s. 1, "An Act to Repeal the Laws relating to Usury and the Enrolment of Annuities." But by sect. 2 it is provided, that "nothing herein contained shall prejudice or affect the rights or remedies of any person, or diminish or alter the liabilities of any person, in respect of any act done previously to the passing of this act." As to the memorial, &c., of annuities granted previous to stat. 17 & 18 Vic. c. 90, the 2d section of the statute 53 Geo. 3, c. 141, enacts, "that within thirty days after the execution of every deed, bond, instrument, or other assurance, whereby any annuity or rent-charge shall, from and after the passing of this act, be granted for one or more life or lives, or for any term of years or greater estate, determinable on one or more life or lives, a memorial of the date of every such deed, bond, instrument, or other assurance, of the names of all the parties, and of all the witnesses thereto, and of the person or persons for whose life or lives such annuity or rent-charge shall be granted, and of the person or persons by whom the same is to be beneficially received, the pecuniary consideration or considerations for granting the same, and the annual sum or sums to be paid, shall be enrolled in the High Court of Chancery, in the form or to the effect prescribed by the statute, with such alterations therein as the nature and circumstances of any particular case may reasonably require."

The 10th section contains the following clause: "And be it further enacted, that this act shall not extend to Scotland or Ireland, nor to any annuity or rent-charge given by will or by marriage settlement, or for the advancement of a child, nor any annuity or rent-charge secured upon freehold or copyhold or customary lands, over and above any other annuity, and the interest of any principal sum charged or secured thereon, of which the grantor had notice at the time of the grant, whereof the grantor is seised in fee simple or fee tail in possession, or the fee simple whereof in possession the grantor is enabled to charge at the time of the grant, or secured by the actual transfer of stock in any of the public funds, the dividends whereof are of equal or greater annual value than the said annuity; nor to any voluntary annuity or rent-charge, granted without regard to pecuniary consideration or money's worth; nor to any annuity or rent-charge granted by any body corporate, or under any authority or trust created by act of parliament."

The act will be satisfied by a description of the instrument in popular language, although that be not according to its strict legal effect; and therefore, where an underlease was stated in the memorial as an assignment, it was held sufficient. *Butler v. Capel*, 2 B. & C. 251; S. C. 3 D. & R. 485.

Although the memorial must be enrolled within thirty days, yet enrolment may be before the deeds are executed. *Flight v. Buckeridge*, 3 Bing. 215; H. Moore, 28; affirmed in error, 6 B. & C. 49; 9 D. & R. 113.

And a statement of "an assignment of dividends and an annuity-deed to secure the same," is a sufficient description in the memorial of a deed reciting a contract to purchase an annuity, to be received out of the dividends of stock, and a covenant to pay the annuity, and to pay additional premium if the grantor went abroad. *Cave v. Lovelace*, 2 B. & Adol. 767.

So the words, "grant of an annuity," have been held to be a sufficient description in the memorial of a deed containing a release to the grantor of a former annuity. *Crowther v. Wentworth*, 6 B. & C. 366; 9 D. & R. 286. *Brown v. Lee*, 6 B. & C. 689; 9 D. & R. 700. It is not necessary to state in the memorial that the annuity was redeemable. *Yems v. Smith*, 3 B. & A. 206. *Appleby v. Smith*, 3 Anst. 865, *contra*; and see *Tringham v. Bethune*, 7 Taunt. 429. Neither need a covenant to pay the premiums of insurance on a policy assigned as a security be stated. *Faircloth v. Gurney*, 9 Bing. 622. *Johnson v. Tweed*, 1 Dowl. 459. The name of the person to whom a warrant of attorney is

given need not be stated. *Yems v. Smith*, 3 B. & A. 206. The accidental omission of the word "life" in the memorial does not vitiate the securities where the intent that there should be a memorial, in compliance with the statute, is clear, and the other requisites are complied with. *Flight v. Lord Lake*, 2 Bing. N. S. 72; 2 Scott, 126.

A re-grant of the same annuity is substantially a new transaction, and must be memorialised. *Hammond v. Foster*, 5 T. R. 635. But a memorial once enrolled need not, upon assignment, be enrolled again. *Dixon v. Birch*, 2 H. Black. 307. And an agreement to allow the grantor to redeem an annuity on terms different from the original contract, entered into after the original grant of the annuity and enrolment of the memorial, need not be memorialised. *Booth v. Druce*, 4 Taunt, 252. And if the warrant of attorney be memorialised, it is not essential that a judgment entered up thereon should be memorialised. *Richardson v. Tomkins*, 9 Bing. 51; 2 M. & Scott, 56. *See* also *O'Callaghan v. Ingilby*, 9 East, 135. *Henderson v. Glencairn*, 2 Taunt. 235. *Garrick v. Williams*, 3 id. 540. *Ex-parte Mackenzie*, 4 id. 323. *Sandilands v. Marsh*, 2 B. & A. 673.

An exception is contained in the stat. 53 Geo. 3, c. 141, of annuities or rent-charges secured upon lands of *equal or greater value*, &c. The statement in a covenant in the deed, that lands upon which the annuity was secured were of greater value than was sufficient to answer the annuity, is not conclusive, otherwise a party might evade the statute by a mere assertion in the deed. *Doe d. Chandler v. Ford*, 5 Nev. & M. 209; 3 Ad. & E. 649. The grantor of the annuity must be seised in fee simple or fee tail, or be enabled to charge the fee simple. *See* stat. *supra*. An annuity granted under a joint power, where the parties have the disposition of the fee, is within the exception. *Halsey v. Halsey*, 7 T. R. 194. If the annuity is secured on lands in fee *of equal annual value*, as well as on *leasehold* property, it need not be enrolled merely because the leasehold is included with the freehold in the same deed. *Ex-parte Michell*, 2 East, 137. And in analogy with the construction placed on the earlier statute, if the annuity be secured on lands which the grantor, who was seised in fee, had previously mortgaged, but which were of equal value, no memorial need be enrolled, there being no difference between legal and equitable estates in the construction of the statute. *Amhurst v. Skinner*, 12 East, 263. *Cumming v. Twysden*, 12 id. 272, n. a. A surety to an annuity-deed conveying his own freehold estate, of greater value than the annuity, in trust to secure the payment of the same, is a grantor within the exception of the act. *Darwin v. Lincoln*, 5 B. & A. 444.

As to the exception with regard to annuities secured by the actual transfer of stock in the public funds, of equal value (*see* statute, *supra*), it has been held that if A. entitled to dividends on stock grant an annuity payable thereout to B., who assigns it to C., there must be an actual transfer of the stock from B. to C. to bring the transaction within the exception. *Hudson v. Skinner*, 6 T. R. 596.

To make the consideration a pecuniary one, the advance of money must form part of the original contract. Accordingly where, after an advance by a mother to her sons to place them out in business, they granted her an annuity, the Court regarded the annuity as voluntary, and held that no enrolment was necessary. *Heck v. Keats*, 5 Moore, 629; in error, 4 B. & C. 69; 6 D. & R. 68. So a covenant to pay a wife an annuity as separate allowance need not be enrolled. *Carter v. Smith*, 6 Nev. & M. 480. Upon the ground that the statute applies only to cases of money considerations, an annuity in consideration of relinquishing a business (*Crespigny v. Wittenson*, 4 T. R. 790), or a school, need not be enrolled. *Hutton v. Lewis*, 5 T. R. 639; 4 Bing. 215. And where the consideration for the annuity was the assignment of a life interest, to which the grantee was entitled in certain veins of coal, the consideration not being pecuniary, no enrolment was necessary, being a *bonâ fide* sale of landed property. *James v. James*, 2 B. & B. 702; 5 Moore, 479. *Harrison v. Smitheringale*, 5 Moore, 481; 2 B. & B. 704. But where part of the consideration-money was retained by the grantee under the original agreement, in discharge of a debt due from a third party to him, and the memorial stated the consideration to be the entire sum, the securities were set aside. *Watts v. Millard*, 5 T. R. 598. If the consideration be promissory notes, the date and particulars of the notes must be stated. *Rumball v. Murray*, 3 id. 298. Where payment is made by a check, if cashed before the execution of the deed, it may be described in the memorial as money. *O'Callaghan v. Ingilby*, 9 East, 135. *Ex-parte Michell*, 2 id. 137. If part of the consideration is a prior debt, it must be so described. *Kirkman v. Price*, 1 H. Black. 309. *See* also, as to stating considerations, *Hodges v. Money*, 4 T. R. 500. *Saunder v. Hardinge*, 5 id. 9. *Cousins v. Thompson*, 6 id. 355. *Washburn v. Birch*, 5 id. 472. *Drake v. Rogers*, 1 H. Black. 209.

With reference to the Date.—The memorial must state the date of every instrument. *Downes v. Parkhurst*, 2 H. Black. 13. *Buckeridge v. Flight*, 6 B. & C. 53; 9 D. & R. 113. If there are several deeds as collateral securities for the same annuity, and the memorial contains the date of some, but omits any mention of, or reference to, the dates of the others, such of them only will be set aside as are open to this objection. *Ex-parte Chester*, 4 T. R. 694.

As to the Consideration.—It is indispensable that it should be set out with truth, and in what form paid. *Lewis v. Hooper*, 2 Ad. & E. 135; 4 Nev. & M. 318. *Nash v. Godmond*, 1 B. & Adol. 634. But describing the consideration as notes, when the deed states it to have been in notes and

III. Registration in Registry Counties.[1]

Cottle v. Warrington, 5 B. & Adol. 447.

A warrant of attorney had been given by the defendant, who was a beneficed clergyman in the North Riding of Yorkshire, to secure the payment of an annuity. It was urged, that the judgment entered up by the plaintiff, not being registered, was fraudulent and void, as against registered judgments of other creditors; but the Court overruled the objection, holding that it did not require registration, for that the payment may be enforced by sequestration. The benefice is not affected by the judgment.

A judgment entered up on a warrant of attorney, given by a beneficed clergyman in a registry county, need not be registered.

IV. Summary Jurisdiction of Courts over.[2]

(A) *Grounds of setting aside Annuity must be stated in the Rule* Nisi.

Reg. Gen. (Pr.) H. T. 1853, r. 169. "Where a rule to show cause is obtained to set aside an annuity, the several objections thereto intended to be insisted upon at the time of moving to make such rule absolute shall be stated in the rule to show cause."

Grounds of setting aside annuity must be stated in the rule *nisi*.

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sovereigns, is not a fatal variance. *Faircloth v. Gurney*, 9 Bing. 622; 2 M. & S. 822. *Wright v. Read*, 3 T. R. 554. A nominal consideration, expressed in the deed to have been paid to a surety, need not be mentioned in the memorial. *Few v. Backhouse*, 1 Per. & D. 34. It may be described as one payment, although paid at different times. *Symons v. Mortimer*, 5 T. R. 139. *Bonâ fide* deductions for the expense of the annuity-deeds may, it seems, be made without being noticed, if the transaction substantially amounts to a paying by the grantor of the charges at the time he received the money. *Monys v. Leake*, 8 T. R. 411.

As to the Names of the Witnesses in the Memorial.—The 7 Geo. 4, c. 75, after reciting that doubts were entertained as to whether it was not essential to the validity of memorials of annuities under 53 Geo. 3, c. 141, that the description of witnesses should be added to their names in the memorial, it is enacted, "that by the said act of the 53d year of the reign of his late majesty, no further or other description of the subscribing witness or witnesses to any deed, bond, instrument, or other assurance, whereby any annuity or rent-charge is or may be granted, is required in the memorial thereof, besides the names of all such witnesses; and so the said act shall be deemed, construed, and taken." The memorial must state the Christian names of the witnesses; a description by initials is insufficient; and on this objection securities have been set aside. *Doe v. Bromley*, 6 D. & R. 292. *Metcalf v. Bowes*, 5 B. & C. 258; 7 D. & R. 773. *Cheek v. Jeffries*, 2 B. & C. 1. *Metcalfe v. Strathmore*, 8 D. & R. 773. But where the application was made after the lapse of a long period of time, the Court refused to set aside a warrant of attorney on this objection. 4 id. 344. It is no objection that by mistake the names of the parties have been copied in the memorial among the names of the witnesses. *Hawkins v. Bennett*, 6 C. B. (N. S.) 386.

[1] Under the stat. 2 Anne, c. 4 (West Riding of County of York); 6 Anne, c. 35 (East Riding); 8 Geo. 2, c. 6 (North Riding); and 7 Anne, c. 20 (Middlesex), where a rent-charge is granted out of any lands, tenements, or hereditaments, situate in either of the counties of York and Middlesex, a memorial thereof must be registered, according to the form and at the places specified in those acts; otherwise such grant will be void against any subsequent purchaser or mortgagee of the lands charged. But as the real object of these acts was to afford notice that the lands were subject to the incumbrance, which is registered, it has been held in equity, that where the subsequent purchaser or mortgagee has had notice, express or implied, of any such incumbrance, though the same have not been registered, yet he shall not take advantage of these statutes, but shall be bound to admit the priority of the charge. See *Cheval v. Nicholls*, 2 E. C. A. 64.

[2] There must be a warrant of attorney or judgment to enable the courts of law to exercise their summary jurisdiction. *Crawford v. Caines*, 2 H. Black. 438. A judgment on an annuity-bond is sufficient for this purpose. *Buck v. Tyte*, 7 T. R. 495. And to give the Court jurisdiction where there is a warrant of attorney, it is not necessary that any proceedings should have been taken upon it. *Ex-parte Ansell*, 1 B. & P. 66, n. a; 4 T. R. 694.

A party outlawed in one Court cannot be heard in another to set aside an annuity. *Foukes v. Holbeach*, 4 Bing. 419; 1 M. & P. 126.

Where eleven years had elapsed since the granting of the annuity, the Court required that the affidavit should state that the parties were all alive. *Amstead v. Atkins*, 2 Chit. R. 32.

The Court had a summary jurisdiction under the 53 Geo. 3, c. 141, s. 6, to set aside

(B) *Costs of Application.*

COLEBROOK v. LAYTON, 1 Nev. & M. 384, S. P. KIRLEW v. BUTTS, 2 B. & Adol. 736 n.

An unsuccessful application to set aside the judgment to secure an annuity will be discharged with costs.

Rule under the Annuity Act, to set aside a judgment entered up on a warrant of attorney to secure an annuity.

Littledale, J. The rule must be discharged with costs. It is in the nature of an application to the Court on the ground of irregularity.

V. RECOVERING BACK CONSIDERATION-MONEY.

(A) *Recoverable if any of the Securities be set aside.*

HUGGINS v. COATES, 5 Q. B. 433.

If any of the securities for an annuity be set aside the consideration may be recovered back.

Money had and received to recover back consideration-money of annuity. It appeared that one of the securities was a warrant of attorney, on which judgment was entered up; but the warrant and judgment had been set aside on motion, but it did not appear on what grounds. The defendant's counsel contended that this action would not lie, as it did not appear on what ground the warrant of attorney was set aside, and it might be that the annuity was still a valid one.

Lord Denman, C. J. "The case of *Scurfield v. Gowland*, 6 East, 241, is an answer to this argument, where it was expressly held that the loss of one out of several securities makes a failure of the consideration for which the purchase-money of the annuity was paid, and entitles the plaintiff to maintain this action."

(B) *Not unless Annuity be Vacated while Executory.*

DAVIS v. BRYAN, 6 B. & C. 651; 9 D. & R. 726.

If a void annuity be not vacated while it is executory, the grantee cannot, after the death of the annuitant, recover back the consideration.

Action for money had and received by plaintiff as executor of W. Griffiths. It appeared that W. Griffiths had, in 1814, contracted and agreed to purchase of the defendant an annuity of 24*l.* for the life of W. Griffiths, for the price of 300*l.*, which was then paid by W. Griffiths to the defendant for the said annuity. No memorial of this instrument was enrolled, no other security for the said annuity was given by the said defendant, or applied for by W. Griffiths. The defendant was able to have given the freehold security, if it had been required. W. Griffiths died in the month of December, 1823; and from the time of the contract for the annuity to the time of his death the annuity was regularly paid to him, half-yearly, by the defendant, and frequently paid in advance. The defendant and W. Griffiths were on terms of great intimacy, and the defendant

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annuities contravening the provisions of that statute. The statute itself was repealed by the 17 & 18 Vic. c. 90. This jurisdiction can only now be exercised, therefore, with reference to annuities granted before the 17 & 18 Vic. Under the stat. of Geo. 3, if there has been a retention of part of the consideration-money stated in the deed and memorial by the grantee or his agent, not being in respect of the *bonâ fide* expense of executing the security, the securities will be set aside, notwithstanding the grantor's acquiescence in the retention; and the Court have interfered in such a case after the lapse of more than six years, and notwithstanding the death of the grantee. *Finley v. Gardner*, 6 B. & C. 165; 9 D. & R. 207. And after the lapse of six years the securities have been set aside, on the ground that the name of the person advancing the money was not truly stated, but the name of another person mentioned instead. *Williams v. Hockin*, 8 Taunt. 435. *Ex-parte Lewis*, 2 Ad. & E. 135. The annuity may be vacated for unreasonable charges, although the grantee was ignorant of the exaction; for it is the duty of a principal to keep a strict eye over his agent, and see how he is conducting himself. *Calton v. Porter*, 2 Bing. 370; 9 Moore, 703. *Gorton v. Champneys*, 1 Bing. 87; 8 Moore, 302. *Mence v. Hammond*, 6 Moore, 491. *Henry v. Taylor*, 3 Bing. 177; 10 Moore, 588. *Jones v. Silberschildt*, 4 Bing. 26; 12 Moore, 113.

often lent him money, the balance of which had been paid to the defendant, since W. Griffiths' death, by the plaintiff.

The question for the consideration of the Court was, whether plaintiff was entitled to recover from the defendant, in this action, money so paid by the testator to the defendant.

Per Cur. The contract was not void, though the securities might have been; but the contract, having been performed, rested no longer *in fieri*, and therefore the action cannot be maintained.[1]

VI. Rights of Principal and Surety.

(A) *One of several Sureties cannot claim an Advantage from any Security which is given by his Co-surety, nor object if that Security be taken away.*

Brown v. Lee, 6 B. & C. 689; 9 D. & R. 700.

One of several sureties cannot claim an advantage from any security which is given by his co-surety, nor object if that security be taken away.

B., one of the sureties, by arrangement with W., the assignee of an annuity, became entitled, after payment of a certain sum and interest, to receive the annual payments. *Held* that, as between the sureties, the annuities were to be deemed subsisting, and not to release the other co-sureties from liabilities to contribute in respect of payments which B. was compelled to make to the assignee; nor was the liability varied by the fact, that stock originally assigned as a further security for the annuity was ultimately to revest in B.

(B) *Where Principal gives Surety a Bond of Indemnity, conditioned for Payment of the Annuity, it becomes forfeited upon the event of the Annuity being in Arrear, although the Surety has not been called upon.*[2]

Penny v. Foy, 2 M. & R. 181; S. C. 8 B. & C. 11.

A., a principal, gives B., his surety, a bond, conditioned to pay C. an annuity, and indemnify B.: *Held*, that B. may sue A. on non-payment by A. to C., though B. has not been called on to pay.

An indemnity bond, given by the grantor of an annuity to his surety, was conditioned, that the defendant, the principal, should pay a named sum to A. B., and should also indemnify the surety, the plaintiff, against his being called upon by A. B.

In an action on the bond, it appeared that the defendant had made default in paying A. B.

Per Cur. The case of *Toussaint v. Martinnant*, 2 T. R. 100, shows, that where there is an indemnity bond, the surety must show that he is damnified; and that when he is, the bond becomes forfeited. But here the party engaged

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[1] The vendee of an annuity may recover back the purchase-money, if no sufficient title be shown. *Curtis v. Blow*, 2 B. & Adol. 426. Where an action is brought to recover back money paid for an annuity, the statute of limitations runs from the time of the application to set aside, and not from the original payment. *Cowper v. Godmond*, 9 Bing. 748. *Huggins v. Coates*, 5 Q. B. 432. *Churchill v. Bertrand*, 3 Q. B. 568; 3 M. & Scott, 219. See *Waters v. Mansell*, 3 Taunt. 56; 6 Esp. 98. It seems that in an action for recovering back the consideration-money, the defendant may set off payments of the annuity previously made. *Hicks v. Hicks*, 4 Esp. 196; S. C. 3 East, 16. But where the parties have agreed to rescind the annuity, and by the agreement it is provided that the consideration should be returned, but it is silent as to payments of the annuity previously made, the grantee will be entitled to receive back the whole of the consideration-money, without a deduction in respect of the payments. *Beauchamp v. Borrett*, Peake, N. P. 109. *Burdon v. Browning*, 1 Taunt. 519.

[2] Where the defendant purchased an estate charged with an annuity to M. S., and as part of the bargain he covenanted with the vendor to pay the annuity to the person who, for the time being, should be entitled thereto, and that he would at all times indemnify the vendor from all actions, claims, &c. on account of the annuity. The annuity was only charged on the lands, and was not a personal charge on the vendor; and the Court decided that the covenant to pay the annuity was absolute and independent, and not qualified by the covenant of indemnity, and that, therefore, the vendor might sue for the non-payment of the annuity to the party entitled, although he, the vendor, was not, and could not be damnified. *Saward v. Anstey*, 10 Moore, 55; S. C. 3 Bing. 519.

to pay the annuity, and the indemnity is only another of the conditions. He did not pay the annuity, and therefore the bond became forfeited. The surety was entitled to have the annuity paid; and he has a remedy upon this bond, which he has a right to put in suit, upon default being made in payment of the annuity. *See* 1 Stark. 329.

(C) *A Surety for an Annuity is not discharged by the Discharge of his Principal under the Insolvent Debtors' Act.*

Hocken v. Brown, E. T. 4 Bing. N. S. 400; S. C. 6 Dowl. P. C. 634; 6 Scott, 194; S. P. Abbott v. Bruere, 7 Scott, 753.

An action will lie for arrears paid by the surety against his principal, after his principal is discharged under the Insolvent Act.[1]

In this case the question was, whether a surety in a joint and separate warrant of attorney for the payment of an annuity is relieved from his responsibility to the grantee, by the discharge, under the Insolvent Debtors' Act, of his principal, the grantor.

Per Cur. The annuity creditor has a vested right to sue the surety upon the non-payment by the grantor. Here the grantor was insolvent, and unable to pay it; and it is said that the creditor is deprived of proceeding by action against the surety, because the insolvent had been discharged under the statute. But we should not come to this conclusion unless we are compelled by the most express words. The 51st section of the Insolvent Debtors' Act, 7 Geo. 4, c. 57,[2] which extends the discharge to any sum of money which shall be payable by an annuity, &c., concludes with these words:—"And such creditor or creditors shall be entitled, in respect of such value, to the benefit of all the provisions made for the creditors by this act, without prejudice, nevertheless, to the respective securities of such creditor or creditors, excepting as respects such prisoner's discharge under this act." Now, there is nothing in the clause which leads to the conclusion that the surety is discharged. The exception leads to the opposite inference, and therefore he may sue his principal.

VII. Apportionment of Annuities.

On death of annuitant or other determination of annuity, proportion to be paid to personal representative or assignee.

Stat. 4 & 5 Wm. 4, c. 22, after reciting the 11 Geo. 2, c. 19, s. 2, enacts, "that all rent-charges, and other rents, annuities, pensions, dividends, moduses, compositions, and all other payments of every description, in the united kingdom of Great Britain and Ireland, made payable, or coming due at fixed periods, under any instrument that shall be executed after the passing of this act (or being a will or testamentary instrument), that shall come into operation after the passing of this act, shall be apportioned, so and in such manner, that, on the death of any person interested in any such rents, annuities, pensions, dividends, moduses, compositions, or other payments as aforesaid, or in the estate, fund, office, or benefice from or in respect of which the same shall be issuing or derived, or on the determination, by any other means whatsoever, of the interest of any such person, he or she, and his or her executors, administrators, or assigns, shall be entitled to a proportion of such rents, annuities, pensions, dividends, moduses, compositions, and other payments, according to the time which shall have elapsed from the commencement or last period of payment thereof respectively, as the case may be, including the day of the death of such person, or of the determination of his or her interest, all just allowances and

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[1] On the same ground a surety may arrest his principal for arrears which accrued due, and were paid by him, after the principal had taken the benefit of the Insolvent Act. *Freeman v. Burgess*, 1 M. & P. 91; 4 Bing. 416. See *Cartwright v. Cooke*, 3 B. & Adol. 701. Where the grantor has become bankrupt, the value of the annuity must be ascertained by the commissioner before a surety can be sued (12 & 13 Vic. c. 106. *Bell v. Bitton*, 4 Bing. 615; 1 M. & P. 574), or execution issued against him on a warrant of attorney. *Hone v. Morgan*, 4 M. & R. 559. As to proceeding for an annuity under the bankruptcy of the annuity debtor, *see post*, Bankrupt.

[2] The words of the 1 & 2 Vic. c. 110, s. 86, are the same.

deductions in respect of charges, on such rents, annuities, pensions, dividends, moduses, compositions, and other payments being made; and that every such person, his or her heirs, executors, administrators, and assigns, shall have such and the same remedies, at law and in equity, for recovering such apportioned parts of the said rents, annuities, pensions, dividends, moduses, compositions, and other payments, when the entire portion of which such apportioned parts shall become due and payable, and not before, as he, she, or they would have had for recovering and obtaining such entire rents, annuities, pensions, dividends, moduses, compositions, and other payments, if entitled thereto; but so that persons liable to pay rents reserved by any lease or demise, and the lands, tenements, and hereditaments comprised therein, shall not be resorted to for such apportioned parts specifically as aforesaid, but the entire rents of which such portions shall form a part shall be received and recovered by the person or persons who, if this act had not passed, would have been entitled to such entire rents, and such portions shall be recoverable from such person or persons by the parties entitled to the same under this act, in any action or suit at law or in equity."[1] *See* 16 Q. B. 357; 20 L. J. Q. B. 305.

VIII. Stamp Duties on.[2]

Mestayer v. Biggs, 1 C., M. & R. 110; S. C. 2 Dowl. P. C. 695.

When the consideration is not a pecuniary one, the clause in the Stamp Act imposing an *ad valorem* duty does not apply.

The condition of a bond, after reciting that M. M., the obligee, had contracted with S. B. and the obligor, for the sale to him, S. B., of a messuage, &c., in consideration, amongst other things, of an annuity of 150*l.*, to be paid to her, M. M., during her life, by S. B., by four quarterly payments in the year; and further reciting, that, on the contract of the purchase of the messuage, it was agreed that, for better securing the payment of the said annuity, the said S. B. should execute that bond for the payment of the said annuity at the times, &c. This bond was stamped with a 1*l.* 15*s.* deed stamp.

The Court held, that the bond was properly stamped; and that the consideration not being pecuniary, it did not require any enrolment under the Annuity Act. *See* 14 Mee. & W. 495; S. C. 14 L. J. Ex. 345.

Massy v. Nanney, 3 Bing. N. S. 478; 4 Scott, 258.

Hence, marriage is not a pecuniary consideration requiring such *ad valorem* stamp.

Marriage-settlement deed, whereby a party, in consideration of the marriage, and a sum of money paid as a marriage portion by the father of the intended

[1] Previously to this act, no apportionment was made of annuities, or of the dividends of stock settled in trust for one person for life, with remainder to another, but the remainderman was entitled to the whole of the annuity or dividend which fell due next after the decease of the person entitled for life. *Pearley v. Smith*, 3 Atk. 260. *Warden v. Ashburner*, 2 De Gex & Sma. 365. *Sherrard v. Sherrard*, 3 Atk. 502. *See* also *Paton v. Sheppard*, 10 Sim. 186. If an annuity were given for the maintenance of an infant (*Hay v. Palmer*, 2 P. Wms. 501; 1 Swanst. 349 n.), or of a married woman living separate from her husband (*Howell v. Hanforth*, 2 W. Black. 1016), the necessity of the case was considered a ground for presuming that an apportionment was intended.

[2] By 55 Geo. 3, c. 184, sch., an *ad valorem* duty on the consideration-money expressed in the deed is imposed. If under 20*l.* the duty is 10*s.*; if under 50*l.*, 1*l.*; if under 150*l.*, 1*l.* 10*s.*, and so on. *See* Conveyance; Stamps.

In case of grants under the Great Seal, the Privy Seal, or under the sign manual of her Majesty, out of the Civil List, or out of any other fund not being part of the supplies of the year, or appropriated by Parliament, of any annuity or pension,—

	£	*s.*	*d.*
Not amounting to 100*l.* per annum	1	10	0
Amounting to 100*l.* and not amounting to 200*l.* per annum . .	4	0	0
„ 200*l.* „ 400*l.*	10	0	0
„ 400*l.* „ 600*l.*	20	0	0
„ 600*l.* „ 800*l.*	30	0	0
„ 800*l.* „ 1000*l.*	40	0	0
„ 1000*l.* or upwards .	50	0	0

But where any such grant of an annuity or pension shall be made in confirmation, or by way of renewal only of any former grant of the like amount and description, then only a duty of 1*l.* 10*s.* 55 Geo. 3, c. 184, sch.

Where the grant of an annuity or rent-charge forms the consideration of the conveyance of an estate, a common deed stamp would formerly have sufficed (see *James v.*

wife, covenanted to pay an annuity to trustees, to the use of the husband and wife during their joint lives.

In an action on the deed it was contended that it required an *ad valorem* stamp, within the 55 Geo. 3, c. 184, as upon the sale of an annuity.

Sed per Cur. The deed does not require an *ad valorem* stamp. The case of *Dean v. Diamond*, 4 B. & C. 243, is in point. There it was held, that a conveyance by father to son of a freehold estate, reciting that the father was minded and resolved to give and assure the same to his son, as well in consideration of the natural love and affection which he entertained for his son, as also in consideration of the provision which his son had that day made by his bond, or obligations in writing, of 6500*l.*, in augmentation of the portions of his sisters, did not amount to a sale to the son, and consequently that the conveyance did not require an *ad valorem* stamp under 48 Geo. 3, c 14, sched. part i. The transaction cannot be said to be a mere sale. The party was not to put the money in his pocket and carry it off. He was to do much more: he was bound to support his wife in a becoming manner, and in a station suitable to that which she held before.

IX. Remedies for.

(A) *By Action.*[1]

(*a*) *If the Interest be several, one of several Covenantees may sue.*

Withers v. Bercham, 3 B. & C. 254; S. C. 5 D. & R. 106.

If the interest in an annuity be several, one of several covenantees may sue alone.

Two persons had, by different deeds, two annuities granted to them. A third person, for a consideration, covenanted that if they were not paid their annuities by the grantor, he would pay unto them (naming them both), their executors or administrators, the said annuities.

The Court held that the representatives of one of the annuitants could sue alone on the covenant without joining the other in the action, observing that, in looking to the words of the deed it was joint, but from the whole of the instrument it is clear that the interest is several. Neither of the covenantees has any interest in the annuity granted to the other. This decision does not militate against other cases upon the subject.

(*b*) *But if joint, all must be joined.*

Petrie v. Bury, 3 B. & C. 353; S. C. 5 D. & R. 152.

But where there are several joint-covenantees, all who may sue must join in the action.

A man on his marriage covenanted with three persons that his executors should pay an annuity to them for the use of his wife. It was held, that one alone could not sue the executors, though he averred in the declarations that

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James, 2 B. & B. 702. *Tetley v. Tetley*, 4 Bing. 214); but now by stat. 16 & 17 Vic. c. 63, a conveyance of any kind or description whatsoever in England or Ireland, and charter, disposition, or contract containing the first original constitution of fue and ground annual rents in Scotland, not being a lease or rack for years, in consideration of any annual sum payable in perpetuity, or for any indefinite period, whether fee-farm or other rent, fue duty, ground, annual or otherwise,—

	£	s.	d.
Where the sum thereby reserved, secured, or made payable, shall not exceed 20*s.* . . .	0	2	6
And where the same shall exceed 20*s.*, and shall not exceed 12*l.*, then for every 20*s.* and fractional part of 20*s.* of such annual sum	0	2	6
And where the same shall exceed 12*l.*, and shall not exceed 24*l.*, then for every 40*s.* and fractional part of 40*s.* of such annual sum	0	5	0
And where the same shall exceed 24*l.* then for every 4*l.* and for every fractional part of 4*l.*, of such annual sum . . .	0	10	0

See also 17 Vic. c. 83, s. 16, as to stamp-duty, where consideration partly annuity.

[1] For form of declaration on an annuity-deed for arrears, *see* Bullen and Leake on Pl. 37. *Randall v. Rigby*, 4 Mee. & W. 130. *Humphreys v. Jenkinson*, 8 Ex. 684. A Bill in Equity will lie for arrears.

the others did not seal the deed; because, though they did not seal, still they might have sued, and it did not appear that they did not assent to it.

(*c*) *Notwithstanding the Annuity be payable in Moieties to Two Joint-Covenantees.*

LANE v. DRINKWATER, 1 C., M. & R. 599; S. C. 3 Dowl. P. C. 223.

A. and B., in consideration of 800*l.* paid to them by C. and D., severally and respectively granted, covenanted, and agreed to, and with C. and D., their heirs, &c., to pay to the said C. and D., their executors, &c., one annuity or yearly sum of 30*l.*, in the shares and proportions following: viz. the sum of 15*l.*, being one moiety of the said annuity or yearly sum, unto C., and the sum of 15*l.*, the remaining moiety thereof, to D., the said moieties to be respectively paid quarterly. The deed contained several provisions for securing the annuity, which were all given to C. and D. jointly, and a joint warrant of attorney to enter up a joint judgment; and a reversion of a close of land was granted to them jointly, and a joint power of attorney was given to them to sell stock. Lastly, the annuity was made redeemable by the payment to both of one entire sum. The Court held that the interest in the annuity was joint, therefore the covenant was joint, and that C. could not maintain an action alone.

And so where the covenant is to pay two persons one annuity in moieties.

(*d*) *In Action on Bond, Plaintiff must assign Breaches.*

WALCOT v. GOULDING, 8 T. R. 126.

In debt on bond for 5000*l.*, conditioned to pay an annuity of 250*l.* to the plaintiff. On demurrer to the plea the plaintiff had judgment, and took out execution for 204*l.* 10*s.*, without suggesting on the roll any breach of the condition; and though it was contended that the legislature did not mean that the statute should extend to a case like that, where the condition was simply for the payment of a certain and precise sum of money, and where there was nothing on which the jury could exercise their judgment, yet the Court set aside the execution, saying that it was established by the case of *Collins v. Collins*, (2 Burr. 820), that a bond conditioned for payment of the annuity was within the statute.

In an action upon a bond for securing payment of an annuity, it is necessary to suggest breaches on the record, under the 8 & 9 Wm. 3, c. 11, s. 8. *See* 15 & 16 Vic. c. 76, s. 96.

(B) *By Distress.*

JAMES v. SALTER, 4 Scott, 168; S. C. 3 Bing. N. S. 544; S. C. 5 Dowl. P. C. 496.

A testator devised an annuity or rent of 30*l.* to defendant, with power of entry and distress if the payment remained behind a certain time; payable, in the first instance, out of certain leasehold property then in his possession; and, if the leasehold proved inadequate, his freehold premises were rendered liable to the payment, with the same powers, &c. The defendant distrained upon the freehold; and, in replevin, the Court held, that a distress for the arrears of an annuity created by will must be made within twenty years next after the right of the party distraining first accrued, according to the 2d section of the 3 & 4 Wm. 4, c. 27, that section not being qualified or controlled by the 3d section; and the causes specified in the latter section being put merely as instances of doubt and difficulty, not excluding cases not mentioned in such enumeration from the operation of the 2d section. *See* 2 Q. B. 925; 2 Scott, N. R. 278; 15 Mee. & W. 153.

An annuitant under a will must, since the 3 & 4 Wm. 4, c. 27, sue or distrain within 20 years.

ANSWER in Chancery.

(A) *If put in as containing Admissions, Defendant may require the whole to be read.*[1]

[1] If an answer in Chancery is put in evidence to prove admissions contained in it, the rule at common law is, that the whole document must be read through; the jury

(B) *And he may also have the whole Bill read.*[1]

(C) *The rule in Equity differs.*[2]

(D) *Against whom Answer is Evidence.*[3]

need not give equal credit to every part of it, and will frequently lend a qualified faith to such portions as make in favour of the defendant. *Bermon v. Woodbridge*, 2 Dougl. 788: *per Lord Mansfield. Blount v. Burrow*, 4 Bro. C. C. 79. So stringent is this rule that where, on exceptions taken, a second answer had been put in, the defendant was allowed to insist upon having that also read, in order to explain what he had sworn in his first answer. *R. v. Carr*, 1 Sid. 418. *Lord Bath v. Battersea*, 5 Mod. 10. *Lynch v. Clerke*, 3 Salk. 154.

[1] A party against whom an answer in Chancery is produced may have the whole bill read as part of his adversary's case, on the ground that this is like the ordinary case of conversations, where the answers of a party cannot be given in evidence against him without also proving the question which drew forth the answers. *Pennell v. Meyer*, 2 M. & Rob. 98: *per Tindal, C. J.* 8 Car. & P. 470, S. C. The jury, however, will in such case be warned that the statements in the bill are not admissions of the facts contained therein, it being notorious that allegations not consistent with facts are frequently introduced into a bill for the sole purpose of eliciting truth from the opposite party (Id.); but this rule is seldom rigidly enforced, for as the statements in the bill can scarcely be considered in the light of admissions, to insist upon their being read would look like an attempt to prejudice the cause, and, therefore, in practice the reading of the interrogatory part of the bill is alone required, and that only when the answer would be ambiguous without referring to the question. *Pennell v. Meyer*, 2 M. & Rob. 98: *per Tindal, C. J.* 8 Car. and P. 470.

[2] With respect to answers and examinations in Chancery, the equity rule is far less comprehensive than that which is recognised at common law, and although if a party in equity admits in his examination or answer that he received a sum, and then adds in the same sentence that he immediately paid it away; or if he states in a still more general form that a person gave him 100*l.*, the charge and the discharge will be so blended together that the one will not be admissible without the other. *Ridgeway v. Darwin*, 7 Ves. 404: *per Lord Eldon. Thompson v. Lambe*, id. 588: *per id. Robinson v. Scotney*, 19 id. 584: *per Sir William Grant, M. R.;* Bull. N. P. 237. *See* also *Awdley v. Awdley*, 2 Vern. 194. *Hampton v. Spencer*, id. 288. Still, if he once admits the receipt of money as an independent fact, he cannot refer to other parts of his examination or answer, much less to affidavits sworn by him, or to schedules attached to his answer, for the purpose of showing that he has liquidated the amount so admitted to have been received by separate and independent payments. So if a plaintiff reads a passage in the answer as evidence of a particular fact, the defendant cannot read other parts, even though grammatically connected with such passage by conjunctive particles, unless they be really explanatory of its meaning (*Davis v. Spurling*, 1 Russ. & Mylne, 68); and if, in order to understand the sense of the passage on which the plaintiff relies, it is necessary to read on the part of the defendant other portions of the answer, still these portions will be evidence only so far as they are explanatory; and any new facts introduced therein, though so immediately connected with the parts admitted as to be incapable of subtraction, will be considered as not read. *Bartlett v. Gillard*, 3 Russ. 156: *per Lord Eldon.*

[3] In general, the answer of one defendant in Chancery cannot be read in evidence against his co-defendant, the reason being, that as there is no issue between them there can have been no opportunity for cross-examination. *Jones v. Turberville*, 2 Ves. 11. *Morse v. Royal*, 12 Ves. 355, 361, 362; Gresley, *Ev.* 24. *Leeds v. Marine Ins. Co. of Alexandria*, 2 Wheat. 380. *Field v. Holland*, 6 Cranch. 8. *Hill v. Adams*, 2 Atk. 39. *Chevel v. Jones*, 6 Mod. 268. And, moreover, if such a course were allowed, the plaintiff might make one of his friends a defendant, and thus gain a most unfair advantage. *Wych v. Meal*, 3 P. Wms. 311. But this rule does not apply to cases where the other defendant claims through the party whose answer is offered in evidence, nor to cases where they have a joint interest, either as partners or otherwise, in the transaction. *Petherick v. Turner*, cited 1 Taunt. 104. *Pritchard v. Draper*, 1 Russ. & Mylne, 191. *Hiliard v. Phaley*, 8 Mod. 100. *Field v. Holland*, 6 Cranch, 824. *Clark's Ex. v. Van Reimsdyk*, 9 id. 153, 156. Wherever the admission of any party would be good evidence against another in such case, his answer may *à fortiori* be read against the latter. *Van Reimsdyk v. Kane*, 1 Gall, 630.

The sworn admission of a married woman answering to a bill in Chancery jointly with her husband, cannot, after his death, be read against her, it being considered as the answer of the husband alone. *Hodgson v. Merest*, 9 Price, 563. *Elston v. Rood*, 2 Mylne & K. 678. Neither can the answer of the guardian of an infant defendant in Chancery be read against the infant in another suit (*Eccleston v. Speke, alias Petty*, 3 Mod. 258; 2 Vent. 72; Carth. 79; Comb. 156; S. C. *Hawkins v. Luscombe*, 2 Saund. 392, in n. a. Sto. *Eq. Pl.* s. 668; Gresley, *Ev.* 24, 323. *Mills v. Dennis*, 3 John's Ch. 367) though it may be used against the guardian himself, if he afterwards be sued in his private capacity, for it

ANTE Litem motam.[1] *Before Controversy arose.*

ANTENUPTIAL Settlements.[2] *See* Marriage.

ANTICIPATION. Married woman may be restrained from.[3]

ANY.[4]

APICES Juris non sunt Jura.[5] *Legal Quibbles are not Law.* 10 Rep. 126.

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is his own admission upon oath. *Beesly v. Magrath*, 2 Sch. & Lef. 34.

On the trial of an indictment for conspiracy, the answers in Chancery of the defendants made on oath by them in a suit instituted against them by the prosecutor have been received. *R. v. Goldshede*, 1 C. & Kir. 657: *per Lord Denman. R. v. Highfield: per Vaughan, B.*, cited 2 Russ. C. & M. 859.

[1] Applied as descriptive of the state of things necessary to render declarations admissible as evidence of reputation. This expression has caused some difference of opinion. It seems to mean, before any controversy has arisen on the subject to which the declarations relate, whether such dispute has or has not been made the subject of a lawsuit. Best, *Evid.* 613.

[2] Marriage is a valuable consideration. Every settlement therefore made by parties of full age previously to, and in consideration of marriage, in pursuance of written articles, stands on the footing of a purchase, and has equal validity. Wms. *Law of P.* 236.

[3] The general doctrine is, that property cannot be deprived of the power of alienation legally incident to it by private disposition. *See ante*, Alienation, p. 284. On this doctrine, equity has ingrafted one exception, by allowing married women to be restrained from aliening by way of anticipation property limited to their sole and separate use during their coverture.

Real property, whether in fee or for life, and personal property, may be given or settled to the separate use of a woman, though unmarried at the time when the gift or settlement takes effect, and the gift may be accompanied by a prohibition of alienation or anticipation. But a separate estate and a mere prohibition of alienation or anticipation are both suspended whilst and as often as a woman is discovert; for the separate estate, of course, only exists during coverture, and the prohibition of alienation or anticipation is exclusively annexed to the separate estate: because such prohibition, without a clause of cesser, is inoperative as against an unmarried woman, and even as against a married woman, if the gift is not for her separate use, just as it is void as against a man. So that a clause against anticipation, unaccompanied by a gift over on such anticipation, annexed to a gift to the separate use of a female for life, does not prevent her alienating her whole interest before she is married. The words "independent of her husband," mean no more than that equity will not permit the marital power of the husband to be used in contravention of the enjoyment of the property according to the terms of the gift. If there is no restraint on alienation, she has an inalienable estate; and though it is legally enjoyable independent of her husband in the sense above mentioned, yet it is virtually liable to be destroyed by the influence and control of the husband, in inducing the wife to exercise the power of alienation thus incident to her separate estate. But if the limitation of a separate estate is accompanied with a prohibition of alienation or anticipation, she has an inalienable estate during the coverture existing at the time when the gift was made; or if she was then discovert, during the coverture following the gift; and if the words are general and unrestricted to any particular coverture, during every subsequent coverture. *See* Wms. *R. & P. P.* 994, 2d ed.; 2 Sp. *Eq. Jur.* 511, 520; Sto. *Eq. Jur.* s. 1382 a. 1384; 1 Rop. Leg. by White, 794; 2 Jarm. *Wills*, 30, 2d ed.; 11 Jarm. & Byth, by Sweet, 473.

[4] "Any court of record" is construed to import the four courts at Westminster. 6 Rep. 19. "Any creditor" in a deed of composition is applied in a limited sense. *Wells v. Greenhill*, 5 B. & A. 869. "Any other matter or thing from the beginning of the world to the day of the date hereof," in a release, is restrained to the subject-matter on which the parties acted. Mason's A. R. 227. *See* Release.

[5] The object of this maxim is to disallow curious and nice exceptions. Co. Litt. 304; 1 Wing. *Max.* p. 19. See *Yonge v. Fisher*, 5 Scott, N. R. 893: *per Eyre, C. J. Jones v. Chune*, 1 B. & P. 364, cited *per Creswell, J. Wilson v. Nisbett*, 4 Scott, N. S. 778. *Newman v. Rowe*, 7 id. 545. A grant from the Crown under the Great Seal shall not, *propter apices juris*, be made void and of no effect. *Earl of Rutland's case*, 8 Rep. 112, cited argument *Rex v. Mayor of Dover*, 1 C., M. & R. 732.

However, in some cases the Court is bound to pronounce upon *apices juris*, though disappointing the expectations of parties suing; but the certainty of the law is of infinitely more importance than any consideration of individual inconvenience. *Per Lord Ellenborough, C. J., Bell v. Janson*, 1 M. & S. 204; and in *Robertson v. Hamilton*, 14 East, 532. In *Brackner v. Molyneux*, 4 Scott, N. R. 767, and in *Yonge v. Fisher*, 5 id. 896, an objection is described as being *inter extremos apices juris*: also *Lord Mansfield, C. J.*, 3 Burr. 1243.

APOLOGY.[1]

APOLOGY for Libel in Newspaper.[2]

APOTHECARY.

(A) *Cannot recover Charges, unless he prove that he has obtained a Certificate from the Examiners.*[3]

(B) *And he is liable to a Penalty if he practise without such Certificate.*[4]

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[1] Many causes of action and claims may with propriety be brought forward, principally if not entirely with a view to clear up character, or obtain explanation, or prevent the repetition of affront or small injury. In such cases opportunity for apology ought to be afforded to the other side, although in many instances it may be injudicious to demand it, and incur the risk of a contemptuous refusal; and care should be taken that the apology required should not be of too humiliating a character. Such a course defeats its own object, preventing at once the probability of the apology being offered, and, if rejected, operating materially at the trial to reduce the damages. If, after declaration, the action be agreed to be stayed on an apology and defendant's paying costs, the Court will compel the defendant to empower the plaintiff to sign judgment for want of plea, in order to recover those costs. *Yardrew v. Brook*, 2 Nev. & M. 835.

[2] The 6 & 7 Vic. c. 29, s. 2, enables the defendant in an action for a libel in a newspaper, or other periodical publication, to plead that it was inserted without malice or gross negligence, and that a full apology was inserted at the earliest opportunity in the newspaper, and to pay money into court by way of amends. The apology, to bring the case within the protection of the statute, must be not only in terms sufficient, but must appear at least as prominently as the libel in regard to position in the newspaper and size of type. *Lafone v. Smith*, 3 H. & N. 705; 28 L. J. Ex. 33. *See post*, Libel. An apology and payment into court cannot be pleaded along with not guilty to the same part of the declaration. *O'Brien v. Clement*, 15 Mee. & W. 435; 15 L. J. Ex. 435; 2 D. & L. 676.

[3] By stat. 55 Geo. 3, c. 194 (amended by 6 Geo. 4, c. 133), for the better regulation of apothecaries, it is enacted by ss. 20, 21, that no person shall practise as an apothecary or his assistant (except persons who were already in practice as such) unless he shall have obtained a certificate from certain examiners appointed by virtue of that act, under a penalty of 20*l.* for practising as an apothecary, and 5*l.* as an assistant; and he is rendered unable to recover any charges in a court of law without proving such certificate, or that he was in practice before the act. And he must give this proof notwithstanding the defendant has only pleaded *non assumpsit*. *Shearwood v. Hay*, 5 Ad. & E. 383. *Wagstaffe v. Sharpe*, 6 Nev. & M. 831; S. C. 3 Mee. & W. 521. See *Hood v. Hall*, 6 Jur. 1121. It is also enacted that no certificate shall be granted to any one to practise as an apothecary unless he has served five years as an apprentice, and produces testimonials of a sufficient medical education and of good moral conduct. But in an action to recover the amount of his bill, if the plaintiff prove a certificate from the society of Apothecaries, he need not also prove an apprenticeship served. *Sherwin v. Smith*, 1 Bing. 204.

By the 14 & 15 Vic. c. 99, s. 8, "every certificate of the qualification of an apothecary which shall purport to be under the common seal of the Apothecaries' Company, shall be received in evidence without proof of the seal or of the authenticity of the certificate, and shall be deemed sufficient proof that the person named therein has been, from the date of the certificate, duly qualified to practise as an apothecary in any part of England or Wales."

If there is no seal, the certificate may be proved by proving the handwriting of the examiners, or of some of them. *Hambley v. Abbott*, 3 B. & C. 218; 5 D. & R. 62.

Practising while under the service of another, though for the party's own benefit, is not a practising within the act. 1 Car. & P. 264. If in an action on an apothecary's bill the plaintiff fail to prove himself qualified within the act, he cannot recover even for the phials in which the medicines were supplied. 1 Car. & P. 574. In an action by a payee on a promissory note, expressed to be in consideration of the plaintiff's care and medical attendance bestowed on the maker, it was held that the plaintiff to recover must bring himself within the statute. 1 R. & M. 125. A general certificate of qualification to practise, without limitation as to time or place, is sufficient to enable an apothecary to sue for medicines, &c. furnished to patients in London (1 id. 306), although he has not paid the extra fee to the Apothecaries' Company necessary to entitle him to practise in London. *Young v. Gerger*, 6 C. B. 541; 6 D. & L. 337; 18 L. J. C. P. 40. In an action on a chemist's bill, it being suggested that the items were properly within the scope of an apothecary's profession, it was held that the proper question for the jury was whether the plaintiff had acted as an apothecary, and not whether he had charged as a chemist or apothecary. *Richmond v. Coles*, 1 Dowl. N. S. 560; 6 Jur. 238.

[4] By the 55 Geo. 3, c. 194, s. 20, it is enacted, that if any person, except such as be then actually practising as such, shall,

(C) *And in an Action for the Penalty, the Onus lies on the Defendant of proving that he had a Certificate.*[1]

(D) *Persons using the name of Pharmaceutical Chemists, who are not Members of the Society, are subject to a Penalty.*[2]

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after the 1st of August, 1815, act or practise as an apothecary in any part of England or Wales, without having obtained a certificate as therein described, every person so offending shall for every such offence forfeit the sum of 20*l*. It was held, with reference to the exemption of persons practising at the time of the passing of the act, that the inability of a person to make up the prescriptions of others is sufficient evidence for a jury to find that he did not practise as an apothecary, when his principal business was that of a farrier, although he occasionally administered medicine to the human species. *The Apothecaries' Company v. Warburton*, 3 B. & A. 40. But such inability is not alone sufficient where the party's whole practice was in attending human patients. 1 Wms. S. 209 b. It is not to be inferred from the decision of *The Apothecaries' Company v. Warburton*, that if a person compound medicines without being able to make up a physician's prescription, he is liable to penalties for practising as an apothecary. *Apothecaries' Company v. Allen*, 4 B. & Adol. 652. A person having a certificate from the College of Surgeons cannot charge for attendance as an apothecary, *e. g.* for attending a patient in a fever, unless he have also a certificate from the Apothecaries' Company. 4 Bing. 619. *Allison v. Haydon*, 4 Bing. 619; 1 M. & P. 588. A person authorised to practise as a physician by a diploma from a Scotch university is not thereby exempt from the penalty for practising as an apothecary in England (*Apothecaries' Comp. v. Collins*, 4 B. & Adol. 604; 1 Nev. & M. 401); nor can he lawfully practise as a physician there. *Collins v. Carnegie*, 1 Ad. & E. 695; 3 Nev. & M. 703.

By statute 3 Hen. 8, c. 11, persons are prohibited from practising as surgeons within seven miles of London without a license from the College of Surgeons, under a penalty of 5*l*. per month; but the statute contains no clause disabling persons who practised contrary to its provisions from maintaining actions for their trouble, which actions they may therefore bring. *Greenacre v. Le Clerc Bois Valon*, 2 Camp. 144; but see *Cope v. Rowlands*, 2 Mee. & W. 160; Com. Dig. Physicians, D.

The 20th section of the 55 Geo. 3, c. 94, contains a proviso that nothing in the statute shall affect the business of a chemist and druggist in "the buying, preparing, compounding, dispensing, and vending drugs, medicine," &c. *Apothecaries' Company v. Greenough*, 1 Q. B. 799; 1 Gale & D. 378.

The County Court has jurisdiction over an action for a penalty for practising as an apothecary without a certificate. *Apothecaries' Company v. Burt*, 5 Ex. 363; 1 Prac. Rep. 405; 19 L. J. Ex. 334.

[1] If an action for penalties be brought against a person for practising as an apothecary without a certificate under 55 Geo. 3, c. 194, on the ground that the defendant is peculiarly cognisant of the fact whether or not he has obtained a certificate, and, if he has obtained one, can have no difficulty in producing it, the law, which is founded on general convenience, will compel him to do so. *Apothecaries' Company v. Bentley*, R. & M. 159: *per Abbott, C. J.*

[2] By the 15 & 16 Vic. c. 56, provision is made for the examination and admission of chemists and druggists to be members of the Pharmaceutical Society. And by the 12th section it is enacted, that "from and after the passing of this act it shall not be lawful for any person, not being duly registered as a pharmaceutical chemist according to the provisions of this act, to assume or use the title of pharmaceutical chemist, or pharmaceutist, in any part of Great Britain, or to assume, use, or exhibit any name, title, or sign, implying that he is registered under this act, or that he is a member of the said society; and if any person, not being duly registered under this act, shall assume or use the title of pharmaceutical chemist, or pharmaceutist, or shall use, assume, or exhibit any name, title, or sign, implying that he is a person registered under this act, or that he is a member of the said society; every such person shall be liable to a penalty of 5*l*.: and such penalty may be recovered by the registrar to be appointed under this act, in the name and by the authority of the council of the said society, in manner following; (that is to say), in England or Wales, by plaint under the provisions of any act in force for the more easy recovery of small debts and demands."

Sect. 13 provides "that no action or other proceeding for any offence under this act shall be brought after the expiration of six months from the commission of such offence; and in every such action or proceeding the party who shall prevail shall recover his full costs of suit, or of such other proceedings."

Under this statute, persons who since the passing of the act have become members of the Pharmaceutical Society, according to its bye-laws and charter, are entitled to be put upon the register, although they have been admitted as members without being examined according to the provisions of the act. *Reg. v. Pharmaceutical Society*, 5 E. & B. 138; 24 L. J. Q. B. 177.

APPEAL of Death.[1]

APPEAL from Decision of Court on Rule to enter Verdict or Nonsuit, or for New Trial.

I. In what Cases and to what Court Appeal lies, p. 378.
(A) *To enter Verdict or Nonsuit on point reserved*, p. 378.
(*a*) *Party decided against may Appeal*, p. 378.
(B) *For New Trial on ground of Misdirection*, p. 379.
(*a*) *If there be a Dissentient Judge, or with leave, an Appeal lies*, p. 379.
II. Notice of Appeal and giving of Bail, p. 379.
(A) *Must be given within Four Days*, p. 379.
(B) *Operates as a Stay of Execution, provided Bail be given*, p. 379.
III. Form of Appeal, p. 379.
(A) *Is on a Case stated*, p. 379.
IV. Procedure in and Jurisdiction of Court of Appeal, p. 379.
(A) *Where Appeal is from Refusal of Rule* Nisi, *if the Rule is granted by the Court of Appeal, Cause is there shown*, p. 379.
(B) *Only one Counsel on each side is heard*, p. 380.
(C) *Stating a Case does not preclude Objection to Jurisdiction*, p. 380.
(D) *The Court of Appeal gives such Judgment as the Court below ought to have given*, p. 380.
(E) *And has Power to award Costs and order Restitution*, p. 380.
(F) *On Affirmance, Respondent has Costs*, p. 380.
(G) *On Reversal, there are no Costs of Appeal*, p. 381.

I. In what Cases and to what Court[2] Appeal lies.

(A) *To enter Verdict or Nonsuit.*

(*a*) *Party decided against may Appeal.*

If rule to enter a verdict or nonsuit be refused, or be discharged, or made absolute, an appeal lies.[3]

17 & 18 Vic. c. 125, s. 34. "In all cases of rules to enter a verdict or nonsuit upon a point reserved at the trial, if the rule to show cause be refused or granted, and then discharged or made absolute, the party decided against may appeal." *See* 4 W. R. 644; id. 645.

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[1] This proceeding was instituted against a supposed offender after trial and acquittal. By it punishment for crime was demanded on account of the particular injury suffered by an individual, rather than for the offence against the public. (1 Chit. *Crim. Law*, 452. *See* the celebrated case of *Ashford v. Thornton*, 1 B. & A. 405.) Abolished by 59 Geo. 3, c. 46.

[2] By sect. 36 of 17 & 18 Vic. c. 125, "the Court of Error, the Exchequer Chamber, and the House of Lords, shall be courts of appeal for the purpose of this act." The Court of Queen's Bench is the court of appeal from the Palatine Courts, the Court of Common Pleas at Lancaster, and Court of Pleas at Durham. *See* 15 & 16 Vic. c. 76, s. 233; 17 & 18 Vic. c. 125, s. 102; 23 & 24 Vic. c. 127, s. 42.

Where the Exchequer Chamber are equally divided, there is a sufficient affirmance of the judgment to entitle appellant to a further appeal to the House of Lords. *Hickman v. Cox*, 3 C. B. (N. S.) 523; in error, 568; and see *Sampson v. Haddinott*, 3 C. B. (N. S.) 596.

[3] The right of appeal given by this section applies to feigned issues under the Interpleader Act. *Withers v. Parker*, 4 H. & N. 810, in error; 6 Jur. N. S. 22; 28 L. J. 383. And it applies to a rule against the direction of the

(B) *For New Trial on ground of Misdirection.*

(*a*) *If there be a Dissentient Judge, or with leave, an Appeal lies.*

17 & 18 Vic. c. 125, s. 35. "In all cases of motion for a new trial, upon the ground that the Judge has not ruled according to law, if the rule to show cause be refused, or, if granted, be then discharged or made absolute, the party decided against may appeal, provided any one of the judges dissent from the rule being refused, or, when granted, being discharged or made absolute, as the case may be, or provided the Court, in its discretion, think fit that an appeal should be allowed: Provided that where the application for a new trial is upon matter of discretion only, as on the ground that the verdict was against the weight of evidence, or otherwise, no such appeal shall be allowed." On motions for new trial for misdirection, if there be a dissentient judge, or with leave, an appeal lies.

II. Notice of Appeal and giving of Bail.

(A) *Notice of Appeal must be given within Four Days.*

Sect. 37. "No appeal shall be allowed, unless notice thereof be given in writing to the opposite party, or his attorney, and to one of the masters of the Court, within four days after the decision complained of, or such further time as may be allowed by the Court or a Judge." Notice of appeal must be given within four days.[1]

(B) *It operates as a Stay of Execution, if Bail given.*

Sect. 38. "Notice of appeal shall be a stay of execution, provided bail to pay the sum recovered and costs, or to pay costs where the appellant was plaintiff below, be given, in like manner and to the same amount as bail in error, within eight days after the decision complained of, or before execution delivered to the sheriff." Which operates as a stay of execution, provided bail be given.

III. Form of Appeal.

(A) *Is on a Case stated.*

Sect. 39. "The appeal hereinbefore mentioned shall be upon a case, to be stated by the parties (and, in case of difference, to be settled by the Court or a Judge of the Court appealed from), in which case shall be set forth so much of the pleadings, evidence, and the ruling or judgment objected to, as may be necessary to raise the question for the decision of the Court of Appeal." The parties must state a case.[2]

IV. Procedure in and Jurisdiction of Court of Appeal.

(A) *Where Appeal is from Refusal of Rule* Nisi, *if the Rule is granted by the Court of Appeal, Cause is there shown.*

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under-sheriff in a cause tried before him. *Levi v. Green*, 28 L. J. Q. B. 319; 5 Jur. N. S. 1245. An appeal will not lie where the decision is on that part of a rule which seeks for a new trial on the ground that the verdict was against evidence. *Holden v. Mordach*, 27 L. J. Ex. 27. A suggestion of error, and an appeal against a rule to enter a verdict, may be brought at the same time and argued together. *Whalton v. Hardisty*, 5 Jur. N. S. 14.

[1] The Court has, however, power to extend the time. *Lord Ward v. Lumley*, 2 L. T. (N. S.) 429; 29 L. J. Ex. 312.

[2] *Form of Case stated on Appeal.*

In the Exchequer Chamber.

Between A. B. plaintiff,
and
C. D. defendant.

This is an appeal by the plaintiff under the provisions of the Common Law Procedure Act, 1854, against the decision of the Court of in making absolute a rule of that Court obtained by the defendant, to show cause why [*stating the substance of the rule.*]

The following is a statement of the case. [*State the facts agreed on, and that a rule* nisi *was afterwards obtained setting it forth.*] This rule the Court of afterwards, on made absolute; and the following is a copy of the rule absolute. [*Here copy the rule absolute.*] The appellant appeals from the said decision and rule, and due notice of appeal has been given, pursuant to the said act. The question for the Court of Appeal is, &c.

When appeal is from refusal of rule *nisi*, if the rule is granted by the Court of Appeal, cause is there shown.

Sect. 40. "When the appeal is from the refusal of the Court below to grant a rule to show cause, and the Court of Appeal grant such rule, such rule shall be argued and disposed of in the Court of Appeal."

(B) *Only one Counsel on each side will be heard.*

KINGSFORD v. MERRY, 1 H. & N. 503.

Only one counsel on each side will be heard.

The Court in the above case laid down, that if the Court grant a rule *nisi*, the opposite party must show cause in the first instance, and only one counsel on each side will be heard.

(C) *Stating a Case does not preclude Objection to Jurisdiction.*

KINGSFORD v. MERRY, 1 H. & N. 503.

By submitting to a statement of a case on appeal, a party is not precluded from objecting to the jurisdiction.

This was an appeal from the refusal of the Court below of a rule *nisi* to enter the verdict for the defendant. A case was stated.

It was objected before the Court of Error that no appeal would lie; on the other hand it was contended, that by consenting to the statement of a case the plaintiff had precluded himself from such an objection.

Per Cur. The parties can only come before the Court upon a case stated, and therefore the statement of the case does not preclude the objection that no appeal will lie.

(D) *The Court of Appeal gives such Judgment as the Court below ought to have given.*

The Court of Appeal gives such judgment as the Court below ought to have given.[1]

Sect 41. "The Court of Appeal shall give such judgment as ought to have been given in the Court below, and all such further proceedings may be taken thereupon as if the judgment had been given by the Court in which the record originated."

(E) *And has Power to award Costs and order Restitution.*

And has power to award costs and order restitution.

Sect. 42. "The Court of Appeal shall have power to adjudge payment of costs and to order restitution, and they shall have the same powers as the Court of Error in respect of awarding process, and otherwise."

(F) *On Affirmance, Respondent has Costs.*

BARKER v. WINDLE, 6 E. & B. 675.

If the decision of the Court

This was an appeal from the decision of the Court of Queen's Bench, re-

[1] *Form of Judgment of Court of Appeal in Exchequer Chamber*, on a disposal of the appeal in the plaintiff's favour, where judgment for him had been given in the court below, under the 41st and 42d sections of the Common Law Procedure Act, 1854, prescribed by Reg. Gen. M. V. 1854. [*Copy the case for the appeal as stated by the parties, and then proceed thus:*]—Afterwards on [*the day of giving judgment of Court of Appeal*] in the Court of Exchequer Chamber of our Lady the Queen, before the Justices of the Common Bench of our Lady the Queen and the Barons of her Exchequer [*or, if the appeal be from the Common Pleas, say,* "before the Justices of our Lady the Queen assigned to hold pleas in the Court of our Lady the Queen, before the Queen herself and the Barons of her Exchequer;" *or, if the appeal be from the Exchequer, say,* "before the Justices of our Lady the Queen assigned to hold pleas in the Court of our Lady the Queen, before the Queen herself and the Justices of the Common Bench of our said Lady the Queen,"] come the parties aforesaid, by their respective attornies aforesaid, and the said Court of Appeal decide that, &c. [*state the decision of the Court upon the questions raised by the case on appeal*]; and it is considered by the said Court of Appeal that the plaintiff do recover against the defendant £ for his costs, which the plaintiff hath sustained and expended in the said appeal, and that the plaintiff have execution thereof.

fusing a rule *nisi* to enter the verdict for the defendant. The Court of Appeal affirmed the decision.

Hannen, for the plaintiff, applied for costs.

Per Cur. We think you are entitled to the costs of the proceedings in both Courts.

below be affirmed, the respondent is entitled to the costs of the appeal as well as the costs below.

(G) *On Reversal, there are no Costs of Appeal.*

YOUNG v. MOELER, 6 E. & B. 681.

This was an appeal from the judgment of the Court of Queen's Bench, on a rule to set aside a verdict for the defendant and enter the verdict for the plaintiff, making such rule absolute. The Court reversed the decision, thereby in effect discharging the rule, and allowing the verdict to stand.

The Court said that would give the appellant the costs, as if the rule had been discharged below. As to the costs of the appeal, after time taken to consider, the Court said—"The general rule as to the costs of the appeal is to be, that where the judgment below is affirmed the respondent gets them, but the appellant does not get them upon a reversal of the judgment."

If the decision of the Court below be reversed on appeal, neither party is entitled to the costs of the appeal; but if the Court of Appeal delivering the judgment which the Court below ought to have given, entitles the appellant to final judgment, he will have such costs below as he would have had if the Court below had so decided.

APPEAL from Decision of Justices in Summary Proceedings.

I. WHEN IT LIES, AND HOW BROUGHT, p. 381.

(A) *Lies to Superior Courts of Common Law on Case stated*, p. 381.

(B) *Upon the Appellant entering into a Recognizance*, p. 382.

II. PROCEEDINGS IN AND JUDGMENT OF THE COURT OF APPEAL, p. 382.

(A) *Right to begin*, p. 383.

(*a*) *The Party affirming that there ought to be a Conviction, whether Appellant or Respondent, has the Right to begin*, p. 383.

(B) *The Court of Appeal hears and determines the Question of Law, and their Decision is final*, p. 383.

I. WHEN IT LIES, AND HOW BROUGHT.

(A) *Lies to Superior Courts of Common Law on Case stated.*

Lies to superior court of common law on case stated.

20 & 21 Vic. c. 43, s. 2, enacts, "after the hearing and determination by a justice or justices of the peace of any information or complaint, which he or they have power to determine in a summary way by any law now in force, or hereafter to be made, either party to the proceeding before the said justice or justices may, if dissatisfied with the said determination,[1] as being erroneous in point of law, apply in writing, within three days[2] after the same, to the said justice or justices, to state and sign a case, setting forth the facts and the grounds of such determination, for the opinion thereon of one of the superior courts of law, to be named by the party applying; and such party, hereinafter called the 'appellant,' shall, within three days after receiving such case, transmit the same to the court named in his application, first giving notice in writing of such appeal, with a copy of the case so stated and signed, to the other party to the proceeding in which the determination was given, hereinafter called the 'respondent.'"[3]

[1] The appeal lies against the decision of justices dismissing a complaint. *Davys v. Douglas*, 4 H. & N. 180.

[2] Sunday must be included in the computation, although it be the last day. *Peacock v. Regina*, 4 C. B. (N. S.) 264.

[3] Notice to the respondent, and the transmission to him of the case within the time specified, is a condition precedent to the right of appeal. *Woodhouse v. Woods*, 29 L. J. Q. B. 164. But if the appellant was unable to find the respondent within the three days, and gave notice to the attorney who represented him before the magistrates,

(B) *Upon the Appellant entering into a Recognizance.*

Upon the appellant entering into a recognizance.[1]

Sect. 3. "The appellant, at the time of making such application and before a case shall be stated and delivered to him by the justice or justices, shall in every instance enter into a recognizance before such justice or justices, or any one or more of them, or any justice exercising the same jurisdiction, with or without surety or sureties, and in such sum as to the justice or justices shall seem fit, conditioned to prosecute without delay such appeal, and to submit to the judgment of the superior court and pay such costs as may be awarded by the same; and the appellant shall at the same time, and before he shall be entitled to have the case delivered to him, pay to the clerk to the said justice or justices his fees for and in respect of the case and recognizances, and any other fees to which such clerk shall be entitled, which fees, except such as are already provided for by law, shall be according to the schedule to this act annexed, marked (A), until the same shall be ascertained, appointed, and regulated in the manner prescribed by the stat. 11 & 12 Vic. c. 43, s. 30; and the appellant, if then in custody, shall be liberated upon the recognizance being further conditioned for his appearance before the same justice or justices, or, if that is impracticable, before some other justice or justices exercising the same jurisdiction, who shall be then sitting, within ten days after the judgment of the superior court shall have been given, to abide such judgment, unless the determination appealed against be reversed."

I. Proceedings in[2] and Judgment of Court of Appeal.

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and, after the three days, gave notice to the respondent, who did not object, the Court heard the appellant, although the respondent did not appear. *Syred v. Carruthers*, E. B. & E. 469.

[1] The appellant may enter into the recognizance at any time during the three days allowed for applying for a case, and he need not enter into it simultaneously with making the application. *Chapman v. Robinson*, 28 L. J. Q. B. 69.

By sect. 13, provision is made for the proceedings on forfeiture of the recognizance. "In all cases where the conditions, or any of them, in the said recognizance mentioned, shall not have been complied with, the justice or justices who shall have taken the same, or any other justice or justices, shall certify upon the back of the recognizance in what respect the conditions thereof have not been observed, and transmit the same to the clerk of the peace of the county, riding, division, liberty, city, borough, or place within which such recognizance shall have been taken, to be proceeded upon in like manner as other recognizances for forfeiture at quarter sessions may now by law be enforced, and such certificate shall be deemed sufficient *primâ facie* evidence of the said recognizances having been forfeited: Provided that where any such recognizances shall have been taken in England before a magistrate of the police courts of the metropolis, or by any stipendiary magistrate, all sums of money in which any person or persons shall be therein bound may, if the said magistrate shall think fit, be levied upon such recognizances being forfeited, and on non-payment thereof, together with the costs of the proceedings to enforce such payment, in the same manner as a police magistrate of the metropolis is now empowered to recover any penalty, forfeiture, or sum of money by sect. 45 of an act 2 & 3 Vic. c. 71, intituled 'An Act for Regulating the Police Courts in the Metropolis,' and that all and every the provisions and enactments contained in the said sect. 45 shall extend to and be applicable to this act, in as ample a manner as if they had been herein re-enacted and made part of the same."

[2] By rules of Michaelmas Term, 1857, it was ordered—R. 1, "that in cases of appeal to a superior court, under the provisions of 20 & 21 Vic. c. 43, the 15th and 16th practice rules of Hilary Term, 1853, so far as the same are applicable, shall be observed."

And by r. 2, "that in cases where the appeal is to be heard before a judge at chambers, the appellant shall obtain an appointment for such hearing, and shall forthwith give notice thereof to the respondent, and shall, four clear days before the day appointed for the hearing, deliver at the judge's chambers a copy of the appeal." The general rules of practice referred to by the first of the above rules are those which require that special cases, &c. should be set down in the special paper four clear days before argument, and notice given forthwith to the opposite party: and that paper books shall be delivered to the judges. *See post*, Demurrers.

The Court of Appeal will not allow any point to be taken which was not taken before the magistrates. *Motteram v. Eastern Counties Railway Co.* 7 C. B. (N. S.) 58; 6 Jur. N. S. 583. *Parkiss v. Huxtable*, 28 L. J. Q. B. 360.

(A) *Right to begin.*

ELLIS v. KELLY, 30 L. J. M. C. 35.

The party affirming that there ought to be a conviction, whether appellant or respondent, has the right to begin.[1]

This was a case stated on appeal from the decision of magistrates, dismissing an information.

The counsel on each side claimed the right to begin, the appellant relying on the case of *Gardiner v. Whitford*, 4 C. B. (N. S.) 665; the respondent on *The Blackpool Local Board of Health v. Bennett*, 4 H. & N. 127; 28 L. J. M. C. 203.

Bramwell, B. The general rule is that the appellant shall begin. An exception exists in the case of an appeal against a conviction. There the respondent begins, because the burden of proof is on him; but in this case, the burden of proof is on the appellant, for he has to make out that an offence was committed. He ought, therefore, to begin. This is in accordance with the rule laid down by the Court of Queen's Bench in *Jones v. Taylor*, 28 L. J. M. C. 204, n., where, on appeal against the dismissal of a complaint, the question being raised as to the right to begin, *Lord Campbell* said, that in that Court the respondent began; but when it was pointed out by counsel that the *onus* of showing that the offence was committed lay upon the appellant, his lordship said, that in that event the appellant ought to begin.

The Court agreed that the rule was so, and the counsel for the appellant began.

(B) *The Court of Appeal hears and determines the Question of Law.*

The Court of Appeal hears and determines the question, and reverses or affirms, or amends the decision.[2] And their decision is final.[3]

Sect. 6. "The Court, to which a case is transmitted under this act, shall hear and determine the question or questions of law arising thereon, and shall thereupon reverse, affirm, or amend the determination in respect of which the case has been stated, or remit the matter to the justice or justices, with the opinion of the Court thereon; or may make such other order in relation to the matter, and may make such order as to costs, as to the Court may seem fit, and all such orders shall be final and conclusive on all parties: Provided always, that no justice or justices of the peace who shall state and deliver a case in pursuance of this act shall be liable to any costs in respect or by reason of such appeal against his or their determination."

APPEAL from Order of Judge at Chambers.

See Orders at Chambers.

APPEAL from Order giving Relief in Ejectment against Forfeiture under the Common Law Procedure Act, 1860.

See Ejectment.

APPEAL from Revising Barrister.

I. PROCEEDINGS BELOW, p. 384.

(*a*) *Persons aggrieved by Decision on point of Law may Appeal*, p. 384.

[1] *See* also *Leech v. The North Staffordshire Railway Co.* 29 L. J. M. C. 150.

[2] The Court, for the opinion of which a case is stated, has power, if they think fit, to cause the case to be sent back for amendment. In that event, judgment is delivered after the case has been returned amended. 20 & 21 Vic. c. 43, s. 7.

The proper time for an application to send back the case for amendment is at the hearing: the Court will not, unless under special circumstances, entertain an application for that purpose earlier. *Christie v. The Guardians of St. Luke*, 8 E. & B. 992; but see *Yorkshire Tire and Axle Company v. Rotherham Local Board of Health*, 4 C. B. (N. S.) 362.

[3] Although the respondent does not appear, the appellant is not entitled to judgment unless he can satisfy the Court that the decision ought to be reversed. *Syred v. Carruthers*, 27 L. J. Q. B. 403.

(*b*) *Giving Notice in Writing to the Revising Barrister, stating the Decision objected to*, p. 384.
(*c*) *Who, if he thinks fit to allow the Appeal, states a Case*, p. 384.
(*d*) *Which he reads to the Appellant in open Court and Signs*, p. 385.
(*e*) *On the Appellant adding a Written Declaration that he Appeals*, p. 385.
(*f*) *And the Barrister indorses on the Case the Name of the County, and other Particulars*, p. 385.
(*g*) *And delivers Case to the Appellant*, p. 385.
(*h*) *And a Copy to the Respondent, if required*, p. 385.
(*i*) *Appeals may be Consolidated*, p. 385.

II. Proceedings in Court of Appeal, p. 385.
(*a*) *The Appeal is heard and determined according to the ordinary Rules and Practice of the Court*, p. 385.
(*b*) *If the Respondent does not appear, the Appellant must show he gave Ten Days' Notice*, p. 386.
(*c*) *Judgment of Court*, p. 387.
(*d*) *Jurisdiction over Costs*, p. 387.

I. Proceedings below.

(*a*) Persons aggrieved by decision on point of law may appeal.[1]

(*b*) Giving notice in writing to the revising barrister, stating the decision objected to.

(*c*) Who, if he thinks fit to allow the appeal, states a case.[2]

6 & 7 Vict. c. 18, s. 42. "It shall be lawful for any person who, under the provisions hereinbefore contained, shall have made any claim to have his name inserted in any list, or made any objection to any other person as not entitled to have his name in any list, or whose name shall have been expunged from any list, and who in any such case shall have been aggrieved by or dissatisfied with any decision of any revising barrister material to the result of such case, either himself or by some person on his behalf, to give the revising barrister in court, before the rising of the said Court, a notice in writing that he is desirous to appeal, and in such notice shall shortly state the decision against which he desires to appeal; and the said barrister thereupon, if he thinks it reasonable and proper that such appeal should be entertained, shall state in writing the facts which, according to his judgment, shall have been established by the evidence in the case, and which shall be material to the matter in question, and shall also state in writing his decision upon the whole case, and also his decision upon the point of law in question appealed against; and such statement shall be made, as nearly as conveniently may be, in like manner as is now usual in stating any special case for the opinion of the Court of Queen's Bench upon any decision of any court of

[1] By sect. 65, no appeal or notice of appeal shall be received or allowed upon "any question of fact only, or upon the admissibility or effect of any evidence or admission adduced or made in any case to establish any matter of fact only;" and, by sect. 46, no appeal is to be allowed in respect of any order for payment of costs.

[2] The barrister must state facts, and not the evidence of facts. *Pitts v. Smedley*, 7 Man. & G. 166, n. a. His decision as to the materiality or otherwise of the facts necessary for deciding the question is conclusive. *Hinton v. Hinton*, id. See *Webb v. Aston*, 5 Man. & G. 14.

Alterations cannot be made in a case when it is once before the Court, even by consent. The case must be remitted to the barrister, to be amended according to the provisions of the act. *Webb v. Overseers of Aston*, 5 Man. & G. 14; B. & Arn. 5. *Pitts v. Smedley*, 7 Man. & G. 85; B. & Arn. 344. *Hinton v. Town-clerk of Wenlock*, 7 Man. & G. 166; B. & Arn. 257. Or if the barrister be in court, it may be handed to him, for him to make the alterations instanter. *Whithorn v. Thomas*, 7 Man. & G. 4; B. & Arn. 259. When a case is remitted, the master returns it to the appellant's attorney, with a note of the facts to be supplied by the barrister if proved. He forwards it to the barrister, who returns it to the attorney, who again forwards it to the master. *Cogan v. Luckett*, 2 C. B. 182; B. & Arn. 716. *Webb v. Overseers of Aston*, 5 Man. & G. 14; B. & Arn. 5.

quarter sessions; and the said barrister shall read the said statement to the appellant in open court, and shall then and there sign the same; and the said appellant, or some one on his behalf, shall at the end of the said statement make a declaration in writing under his hand to the following effect; that is to say, 'I appeal from this decision;' and the said barrister shall then indorse upon every such statement the name of the county and polling-district, or city and borough, and of the parish or township to which the same shall relate, and also the christian name and surname and place of abode of the appellant, and of the respondent in the said appeal, and shall sign and date such indorsement. And the said barrister shall deliver such statement, with such indorsement thereon, to the said appellant, to be by him transmitted to her Majesty's Court of Common Pleas at Westminster, in the manner hereinafter mentioned; and the said barrister shall also deliver a copy of such statement, with the said indorsement thereon, to the respondent in the said appeal who shall require the same."

(*d*) Which he reads to the appellant in open court and signs.[1]

(*e*) And the appellant adds a written declaration that he appeals.

(*f*) And on which the barrister indorses the name of the county, &c.

(*g*) And delivers case to appellant.

(*h*) And a copy to the respondent if required.[2]

(*i*) *Appeals may be Consolidated.*[3]

II. Proceedings in Court of Appeal.

(*a*) *The Appeal is heard and determined according to the ordinary Rules and Practice of the Court.*

6 & 7 Vic. c. 18, s. 60, enacts that "all appeals and matters of appeal from or in respect of any decision of any revising barrister, entertained in manner hereinbefore mentioned, shall be prosecuted, heard, and determined in and by her Majesty's Court of Common Pleas at Westminster, according to the ordinary rules and practice of that Court with respect to special cases, so far as the same may be applicable, and not inconsistent with the provisions of

The appeal is heard and determined according to ordinary rules and practice of the court.[4]

[1] Notice of appeal having been given from the decision of a revising barrister, and approved and signed by the attornies of the respective parties, the revising barrister shortly afterwards died, and the case, approved and signed by the two attornies, was found amongst his papers, but was not signed by him. The Court of Common Pleas held that, under this section of the statute they had no jurisdiction to hear the appeal. *Nettleton, app.; Burrell, resp.* 8 Scott, N. R. 738, 740; 7 Man. & G. 35; B. & Arn. 297; cited *per Maule, J., Pring, app.; Estcourt, resp.* 4 C. B. 72. See *Wankly v. Woollett*, 4 C. B. 86. *Burton v. Blake*, 11 id. 47; 28 L. J. C. P. 254.

But *Burton v. Brooks*, 11 C. B. 41, the Court heard the appeal argued on a case not signed, upon the respondent's counsel consenting that it should be remitted to the barrister for signature, and that it should be considered as signed. *Anley v. Topsham*, 5 Man. & G. 1; but see *Prior v. Waring*, 5 C. B. 63: *per Maule, J.* And in *Agnew v. Fowler*, 1 Ir. L. R. (N. S.) 462, it was held that the Court had no jurisdiction to hear an appeal which was signed after the expiration of the statutable period for holding the Court of Revision. Nor has the Court any general jurisdiction to interfere with the lists in cases in which no appeal lies. 6 C. B. (N. S.) 334; 28 L. J. C. P. 256.

[2] The party in whose favour the barrister decides is to be the respondent; but if there be no such party, or if he or some one for him in open court, and by writing, declines to support the appeal, the barrister may name any one interested in the matter, if he consent, or the overseers, or in borough cases, the town-clerk, without their consent, to be respondent. Sect. 43.

[3] If the validity of any number of claims or objections depend upon the same point or points of law, and the parties or any of them aggrieved by the decision have given notice of appeal, the barrister may, by sect. 44, declare in a written and signed statement that such appeals ought to be consolidated, and he may name any person interested and consenting to be the appellant or respondent respectively on behalf of himself and the others: both appellant and respondent, or some one on their behalf, in such case must sign declarations according to the form prescribed by the 44th section. Under these declarations the names, and, where necessary, the particulars of the qualification of every party intended to be joined in the consolidated appeal, must be written. Any person interested, however, may proceed separately, subject to the payment of costs to, without receiving costs from, his opponent, unless the Court shall otherwise order. Sec. 45. In consolidated, as in single appeals, the barrister may name the overseers or the town-clerk to be respondent. Sect. 44. To admit of consolidation, the state of facts in each of the cases must be substantially the same. *Prior v. Waring*, 5 C. B. 56; 17 L. J. C. P. 73.

[4] Therefore paper books must be delivered to the judges, as in special cases. *Allen v. Waterhouse*, B. & Arn. 8. *Cooper v. Coates*, 5 Man. & G. 98. *Palmer v. Allen*, 5 C. B. 3.

this act, or in such manner and form, and subject to such rules and regulations, as the said Court from time to time, by any rule or order made for regulating the practice and proceedings in such appeals, shall order and direct."

(b) If the Respondent does not appear, the Appellant must show he gave Ten Days' Notice.

If the respondent does not appear, appellant must show he gave ten days' notice.

6 & 7 Vic. c. 18, s. 64. "No appeal shall be heard by the said Court in any case where the said respondent shall not appear, unless the said appellant shall prove that due notice of his intention to prosecute such appeal was given or sent to the said respondent ten days at least before the day appointed for the hearing of such appeal.[1] Provided always, that if it shall appear to the said Court that there has not been reasonable time to give or send such notice, in any case it shall be lawful for the said Court to postpone the hearing of the appeal in such case as to the said Court shall seem meet."[2]

If this be omitted, unless there be some reasonable excuse inducing the Court to order a delivery *nunc pro tunc* (*Colville v. Lewis*, 2 C. B. 69; B. & Arn. 517), the Court will strike out the appeal. *Sheddon v. Butt*, 11 C. B. 27. *See* 4 C. B. 70, 1; 16 L. J. C. P. 63.

By the 62d section the case must be transmitted to the masters of the Court of Common Pleas within the first four days of the Michaelmas Term next after the decision. It must be accompanied by a notice, signed by the appellant, of his intention to prosecute the appeal; and a similar notice must be given to the respondent. Signature by an agent will not do. *Petheridge v. Ash*, 4 C. B. 74. *See* 5 Man. & G. 3; 13 L. J. C. P. 13.

Sect. 64 also provides that the appeal shall not be heard unless such notice has been given to the masters. And accordingly, where neither the case nor the notice had been transmitted to the masters within the four days, the Court refused to allow the appeal to be entered after that day, although the respondent consented. *Anley v. Topsham*, 5 Man. & G. 1; B. & Arn. 1. So where the statement was sent and the notice was not, notwithstanding the omission was accidental, the appeal was not allowed to be entered. *Simpson v. Wilkinson*, 5 Man. & G. 2 n; B. & Arn. 3 n. And the Court refused to hear the appeal in a case where the master had declined to enter the appeal on the ground that the statement transmitted was defective, in respect that it was not indorsed (*Wanklyn v. Wollett*, 4 C. B. 86; but see *Pring v. Estcourt*, id. 70); and in another instance, where the notice was defective in not being signed by the appellant (*Petheridge v. Ash*, id. 74).

The appellant begins (*Webb v. Overseers of Aston*, 5 Man. & G. 14; B. & Arn. 6); and only one counsel is heard on each side. *Gadsby v. Warburton*, 7 Man. & G. 13; B. & Arn. 272. If the respondent does not appear, the Court will not reverse the decision of the barrister without hearing the appellant. *Cooper v. Town-clerk of Cambridge*, 7 Man. & G. 97. *Pownall v. Hood*, 11 C. B. 1: but see *Powell v. Caswell*, 8 id. 15. However, if the respondent's counsel give up the case it may reverse the decision without hearing any argument. *Jarvis v. Peele*, 11 id. 15. The appellant cannot raise points not taken before the barrister. *Simpson v. Wilkinson*, 7 Man. & G. 50; B. & Arn. 322. If the appellant does not appear the decision is usually affirmed with costs. *White v. Pring*, 8 C. B. 13: but see *Boge v. Perkins*, 7 Man. & G. 156; B. & Arn. 414.

[1] This may be shown by affidavit. See *Colville v. Lewis*, 2 C. B. 60; B. & Arn. 517. The ten days are reckoned exclusive of the day of service and the day appointed for hearing. *Norton v. Town-clerk of Salisbury*, 4 C. B. 32. Where the want of an affidavit of notice did not appear till after the case was first heard, the Court suspended their judgment till the giving of notice should be shown. *Colville v. Town-clerk of Rochester*, 2 C. B. 62; B. & Arn. 517. It is no excuse for not giving the notice that the appellant's attorney died (*Pring v. Estcourt*, 4 C. B. 73); or that the parties agreed to waive the notice (*Newton v. Overseers of Moberly*, 2 id. 205); or to consider the notice as given. *Aldworth v. Dore*, 5 id. 89. The respondent, however, by appearance waives all objections to the absence of notice, or to the form of a defective notice, where such has been given. *Rawlins v. Overseers of West Derby*, 2 id. 72; and see *Palmer v. Allen*, 5 id. 7. To have that effect, there must be an actual appearance, and not a constructive appearance merely. *Grover v. Bontems*, 4 id. 70.

[2] If by the respondent's conduct the appellant has been induced to omit or delay the giving of notice, the Court will exercise the power of postponing the hearing. *Burton v. Blake*, 11 C. B. 47; 6 C. B. 51; 18 L. J. C. P. 257. And so, it seems, it will where the delay has been occasioned by a difficulty in obtaining the indorsement of the barrister, where due diligence has been used. *Pring v. Estcourt*, 4 C. B. 70. But it is no ground that the Court has appointed an unusually early day for hearing appeals, if there has in fact been sufficient time. *Adey v. Hill*, 4 id. 38; 16 L. J. C. P. 63; 4 C. B. 32. Where, however, the statement was signed on October 30th, and the appeal was entered on the 11th of November, the Court postponed the hearing, on the ground that there had not been reasonable time for giving notice. *Palmer v. Allen*,

(*c*) *Judgment of Court.*[1]
(*d*) *Jurisdiction over Costs.*

6 & 7 Vic. c. 18, s. 70, enacts, "it shall be lawful for the said Court to make such order respecting the payment of the costs of any appeal, or of any part of such costs, as to the said Court shall seem meet: Provided always, that it shall not be lawful for the said Court, in any case, to make any order for costs against or in favour of any respondent or person named as respondent as aforesaid, unless he shall appear before the said Court in support of the decision of the revising barrister in question." The Court has power to allow costs.[2]

APPEAL to Judicial Committee of Privy Council. *See* Privy Council.

APPEALS, Criminal.

(A) *To the Court, for Crown Cases reserved upon Questions of Law reserved at the Trial*, p. 387; *and, Court, how Constituted*, p. 388 n.
(B) *Costs of, how allowed*, p. 389.

(A) *Question of Law may be reserved.*

11 & 12 Vic. c. 78, s. 1. "When any person shall have been *convicted* (3 C. & Kir. 353; 19 L. J. M. C. 147) of any treason, felony, or misdemeanour, before any court of oyer and terminer, or gaol delivery, or court of quarter sessions,[3] the judge or commissioner, or justices of the peace before whom the case shall have been tried, may in his or their discretion reserve any question of law which shall have arisen in the trial for the consideration of the Justices of either Bench and Barons of the Exchequer, and thereupon shall have authority to respite execution of the judgment on such conviction, or postpone the judgment until such question Judge or court of quarter sessions may reserve question of law for the opinion of the Court for the consideration of crown cases reserved.[4]

5 C. B. 5; 18 L. J. C. P. 257. Where a postponement is required on this ground, it should be shown by affidavit that there has not been reasonable time to give notice. *Aldworth v. Dore*, 5 C. B. 87. As to waiver of notice of consent, 2 id. 205.

[1] By sect. 67, if the judgment of the Court reverse the decision of the barrister, notice of such judgment or order of Court is directed to be forthwith given to the sheriff in counties, or returning officer in boroughs, having the custody of the register. This notice is in writing, under the hands of one of the masters of the court, and specifies exactly every alteration or correction to be made in the register in pursuance of the judgment or order. See *Peele v. Hinton*, 1 B. & Arn. 14; 5 Man. & G. 9.

[2] If the decision is affirmed, the respondent generally, but not universally, is allowed his costs. *Passingham v. Pitty*, 17 C. B. 315; 25 L. J. C. P. 5. *De Bornville v. Arnold*, 1 C. B. (N. S.) 22. But in some instances the Court have refused to order the successful respondent his costs, on the ground that the point was doubtful, and the case a proper one for argument. *Simpson v. Wilkinson*, 7 Man. & G. 50; B. & Arn. 323. *Webb v. Overseers of Aston*, 5 Man. & G. 32. *Walker v. Payne*, B. & Arn. 544. Unless there be, however, that degree of doubt about the case, the Court will allow the respondent, who successfully supports a decision in his favour, the costs of opposing the appeal. *Hannaford v. Whiteway*, 1 C. B. (N. S.) 62. *Clark v. Overseers of Bury St. Edmunds*, 1 id. 33. *Allen v. House*, 7 Man. & G. 157; B. & Arn. 419. *Bage v. Perkins*, 7 Man. & G. 156; 8 Scott, N. R. 983. *Gale v. Chubb*, 4 C. B. 41. In case the decision is reversed, the appellant, however, is not entitled to costs. In that event no costs are given to either side. *Burton v. Overseers of Aston*, 8 C. B. 13. *Barclay v. Parrott*, 1 C. B. (N. S.) 52.

[3] These words include the recorder of a borough. *Reg. v. Masters*, 1 Den. C. C. 332; 2 Car. & K. 930.

[4] The Judge or Sessions has authority to receive, and the Court to entertain, not only questions of law which arise on the evidence, but also questions of law which arise in arrest of judgment (*Reg. v. Masters*, 1 Den. C. C. 398); or as to the sufficiency of the indictment (*Reg. v. Webb*, 1 id. 338. *Reg. v. Craddock*, 2 id. 31; 18 L. J. M. C. 137); but not questions which arise on demurrer, since that would take away the right of a prisoner to review the decision of the Court of Queen's Bench in the Exchequer Chamber, and ultimately before the House of Lords. *Reg. v. Tadsman*, 1 Den. C. C. 565; 19 L. J. C. M. 147, R. T. T.; 13 Vic.; 19 L. J. xv. Neither can it entertain questions of mere practice. *Reg. v. Stubbs*, 19 Jur. 1115.

The manner of stating the question, and the powers and procedure of the Court of Appeal, are provided for by sect. 2, which enacts, "that the judge or commissioner, or court of quarter sessions, shall there-

shall have been considered and decided, as he or they may think fit; and in either case the Court in its discretion shall commit the person convicted to prison, or shall take a recognizance of bail, with one or two sufficient sureties,

upon state, in a case signed in the manner now usual, the question or questions of law which shall have been so reserved, with the special circumstances upon which the same shall have arisen, and such case shall be transmitted to the said justices and barons, and the said justices and barons shall thereupon have full power and authority to hear and finally determine the said question or questions, and thereupon to reverse, affirm, or amend any judgment which shall have been given on the indictment or inquisition on the trial whereof such question or questions have arisen, or to avoid such judgment, and to order an entry to be made on the record that in the judgment of the said justices and barons the party convicted ought not to have been convicted, or to arrest the judgment, or order judgment to be given thereon at some other session of oyer and terminer, or gaol delivery, or other sessions of the peace, if no judgment shall have been before that time given, as they shall be advised, or to make such other order as justice may require; and such judgment and order (if any) of the said justices and barons shall be certified under the hand of the presiding Chief Justice or Chief Baron, to the clerk of assize or his deputy, or to the clerk of the peace or his deputy, as the case may be, who shall enter the same on the original record in proper form; and a certificate of such entry under the hand of the clerk of assize or his deputy, or the clerk of the peace or his deputy, as the case may be, in the form, as near as may be, or to the effect mentioned in the schedule mentioned in the act, with the necessary alterations to adapt it to the circumstances of the case, shall be transmitted or delivered by him to the sheriff or gaoler in whose custody the person convicted shall be; and the said certificate shall be a sufficient warrant to such sheriff or gaoler, and all other persons, for the execution of the judgment, as the same shall be so certified to have been affirmed or amended, and execution shall be thereupon executed on such judgment, and for discharge of the person convicted from further imprisonment, if the judgment shall be reversed, avoided, or arrested; and in that case such sheriff or gaoler shall forthwith discharge him, and also the next court of oyer and terminer, or gaol delivery, or sessions of the peace, shall vacate the recognizance of bail (if any), and if the court of oyer and terminer, and gaol delivery, or court of quarter sessions, shall be directed to give judgment, the said court shall proceed to give judgment at the next session."

Court, how Constituted.

By sect. 3, "the jurisdiction and authorities by this act given to the justices of either Bench and the Barons of the Exchequer, shall and may be exercised by the said justices and barons, or five of them at the least, of whom the Lord Chief Justice of the Court of Queen's Bench, the Lord Chief Justice of the Court of Common Pleas, and the Lord Chief Baron of the Court of Exchequer, or one at least of such chiefs, shall be part, being met in the Exchequer Chamber or other convenient place; and the judgment or judgments of the said justices and barons shall be delivered in open court, after hearing counsel, or the parties, in case the prosecutor or the person convicted shall think fit that the case shall be argued, in like manner as the judgments of the superior courts of common law of Westminster or Dublin, as the case may be, are now delivered."

Sect. 4 empowers the Court of Appeal, "if they think fit, to cause the case or certificate to be sent back for amendment, and thereupon the same shall be amended accordingly, and judgment shall be delivered after it shall have been amended." See *Reg. v. Hey*, 1 Den. C. C. 602. *Reg. v. Perkins*, 2 id. 459. Where the assizes are holden before two judges, if the one reserving the point dies, the other may state and sign the case. 23 L. J. M. C. 127.

The following orders for the hearing of these appeals were promulgated on the 1st June, 1850 (19 L. J. xv.):—

"It is ordered, that when any case shall be transmitted by a court of oyer and terminer, or gaol delivery, or court of quarter sessions, for the consideration of this Court, the original case, signed by the judge or commissioner, or chairman of sessions, reserving the questions of law, and seventeen copies of such case, one for each judge and one for each party, shall be delivered to the clerk of this court at the Exchequer Chamber, Westminster, at least four days before the day appointed for the sitting of the said Court.

"That every case transmitted for the consideration of this Court briefly state the question or questions of law reserved, and such facts only as raise the question or questions submitted; if the question turn upon the indictment, or upon any count thereof, then the case must set forth the indictment or the particular count.

"That no case be heard upon any demurrer to the pleadings.

"That every case state whether judgment on the conviction was passed or postponed, or the execution of the judgment respited, and whether the person convicted be in prison or has been discharged on recognizance of bail to appear and receive judgment, or to render himself in execution.

"That when any case is intended to be argued by counsel, or by the parties, notice thereof be given to the clerk of this court, at least two days previously to the sitting of the said Court.

"That with every case delivered to the Judges of this Court (except such case as

and in such sum as the Court shall think fit, conditioned to appear at such time or times as the Court shall direct, and receive judgment, or to render himself in execution, as the case may be.

(B) *Costs of, how allowed.*[1]

APPEALS from County Courts. *See* County Courts.

APPEALS to Quarter Sessions. *See* Quarter Sessions.

APPEARANCE in County Court. *See* County Court. At Sessions, *see* Sessions.

APPEARANCE in the Superior Courts.[2] *See* also Ejectment; Infant; Outlawry; Replevin.

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shall be reserved by such Judges), the fee payable to the clerks of the said Judges shall not exceed the fee payable on 'demurrer and other paper-books,' as contained in the table of fees allowed and sanctioned by the Judges pursuant to the stat. 1 Vic. c. 30."

Counsel, in arguing the case, must confine themselves to the facts as they appear on the case reserved for the opinion of the Court. *Reg. v. Smith*, 1 Den. C. C. 512. *Reg. v. Blakemore*, 2 id. 410; 18 L. J. M. C. 137. The Court will hear counsel for the prisoner or for the prosecution, although no counsel appear on the other side. *Reg. v. Martin*, 1 id. 398. *Reg. v. Garner*, 1 id. 329. Where no counsel appear, the presiding Lord Chief Justice or Chief Baron reads the case, and then judgment is pronounced upon the question.

Form of Certifying the Judgment of the Court of Appeal to the Court below, prescribed by the stat. 11 & 12 *Vic. c.* 78.

Whereas at the sessions of the peace for the county of held on before and other their fellows [*or*, "at the session of oyer and terminer, and gaol delivery, held for the county of on before, among others, Sir A. B. Knight, one of the justices of the Court of and [*here name the quorum commissioners*], justices of oyer and terminer, and gaol delivery"], A. B., late of labourer, having been found guilty of felony, and judgment thereupon given, that [*state the substance*] the court before whom he was tried reserved a certain question of law for the consideration of the Justices of either Bench and the Barons of the Exchequer, and execution was thereupon respited in the meantime.

This is to certify, that the said justices and barons having met in the Exchequer Chamber at Westminster [*or* "Dublin," *as the case may be*], on the day of it was considered by the said justices and barons there that the judgment aforesaid should be annulled, and an entry made on the record that the said A. B. ought not, in the judgment of the said justices and barons, to have been convicted of the felony aforesaid; and you are, therefore, hereby required forthwith to discharge the said A. B. from your custody.

To the gaoler of and the sheriff of and all others whom it may concern.

(Signed) E. F.

By the 6th section it is felony to "forge or alter, utter, dispose of, or put off, knowing the same to be forged or altered, any certificate of, or copy certified by, a chief justice, or any certificate of, or copy certified by, a clerk of assize or his deputy, or the clerk of the peace or his deputy, as the case may be, with intent to cause any person to be discharged from custody, or otherwise prevent the due course of justice."

[1] The costs of arguing a case upon a point reserved for the opinion of the Court for the consideration of crown cases reserved, can be allowed upon the order alone of the Judge who tried the case. This power he exercises under the stat. 7 Geo. 4, c. 64, s. 22. *Reg. v. Cluderoy*, 3 C. C. R. 205.

The Court of Criminal Appeal has no authority to order that the prosecutor shall have those costs, the statute by which that Court is constituted (11 & 12 Vic. c. 78) being silent upon the subject. *Reg. v. Lewis*, 7 Cox, *Crim. Cas.* 406. The Judge, who reserves the case at the same time that he orders the other costs of the prosecution, may make the order for the allowance of the prosecutor's costs in the court above. *Reg. v. Hornsen*, 4 id. 452. Or he may make the order for such costs after that Court has delivered its judgment. *Reg. v. Wooley*, 4 id. 452. These costs must be taxed by the officer of the court below. *Dolan's case*, 1 Dears. Cr. C. 436.

The Court of Criminal Appeal intimated in a recent case that they considered it to be convenient that the officer of that court should certify the proper amount of costs to be allowed in that court, saying, that although that certificate would not be binding upon the officer of the court below, it would, no doubt, be universally accepted and adopted by them. It was in contemplation to frame a rule for the regulation of the practice in this respect, but no such rule has yet been promulgated; at the same time it is understood that the practice is in accordance with the intimation in that case. *Reg. v. Lewis*, 7 Cox, *Crim. Cas.* 406.

[2] The coming into court of either of the

I. Within what Time must be Entered,[1] p. 390.

(A) *If Appearance is not entered within Eight Days after Service of Writ, Plaintiff may sign Judgment*, p. 390.

(B) *But Defendant may enter Appearance at any time before Judgment is Signed*, p. 391.

II. How Entered, p. 391.

(A) *By delivering Memorandum in Writing to Officer of Court*, p. 392.

III. Effect of, p. 392.

(A) *Waives Irregularity in Writ or Service*, p. 392.

IV. Judgment by Default of. *See* Judgment by Default.

I. Within what Time must be Entered.

(A) *If Appearance is not entered within Eight Days after service of Writ, Plaintiff may sign Judgment.*

If an appearance is not entered within eight days after service of writ the plaintiff may sign judgment.[2]

By 15 & 16 Vic. c. 76, s. 27,[3] "in case of non-appearance by the defendant, where the writ of summons is indorsed in the special form hereinbefore provided, it shall and may be lawful for the plaintiff on filing an affidavit of personal service of the writ of summons or a judge's order, for leave to proceed under the provisions of this act, and a copy of the writ of summons, at once to sign final judgment in the form contained in the schedule (A) to this act annexed, marked No. 5 (on which judgment no proceeding in error shall lie), for

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parties to an action. By the defendant, the prescribed mode of complying with the exigency of the plaintiff's process.

[1] As a general rule, it is not competent to the defendant to take any step in the action until he has entered an appearance. Before appearance, however, he may obtain an order for particulars of the plaintiff's demand. Reg. Gen. H. T. 1853, r. 20. He may also, it would seem, obtain an order to stay proceedings on payment of debt and costs; and if the order is resisted on the ground that sufficient is not offered, the Judge may, if the action be for a debt, indorse the summons, showing plaintiff's refusal to take the amount, and thus subject him to the loss of future costs if he afterwards take such amount in satisfaction. Chit. Arch. by Prentice, 198, 10th ed. He may also, before appearance, obtain an order to compel the plaintiff's attorney to state the plaintiff's residence. 15 & 16 Vic. c. 76, s. 7. *Ante*, 54.

[2] When the defendant is within the jurisdiction, the appearance must be entered within eight days after the service of the writ, inclusive of the day of such service. See *Pearce v. Swaine*, 7 Mee. & W. 553; 9 Dowl. 724. *Bromage v. Ray*, 9 Dowl. 589.

The rule of Court excluding Sunday from the computation of legal time when it is the last day for doing an act, does not apply to the above section; and, therefore, if Sunday is the last of the eight days after which execution may issue, such execution may issue on the Monday following. *Rowbray v. Morgan*, 9 Ex. 730.

The time for appearance to writs against defendants out of the jurisdiction is regulated according to the distance from England of the place of defendant's residence, such time being mentioned in the body of the writ. 15 & 16 Vic. c. 76, s. 18. If the defendant enter an appearance within the eight days, the plaintiff may declare immediately, and is not obliged to wait until such time has expired. *Morris v. Smith*, 4 Dowl. 198; 1 Gale, 187.

[3] By the 28th section, "in case of such non-appearance, where the writ of summons is not indorsed in the special form hereinbefore provided, it shall and may be lawful for the plaintiff, on filing an affidavit of personal service of the writ of summons, or a judge's order for leave to proceed under the provisions of this act, and a copy of the writ of summons, to file a declaration indorsed with a notice to plead in eight days, and to sign judgment in default, at the expiration of the time to plead so indorsed as aforesaid; and in the event of no plea being delivered where the cause of action mentioned in the declaration is for any of the claims which might have been inserted in the special indorsement on the writ of summons hereinbefore provided, and the amount claimed is indorsed on the writ of summons, the judgment shall be final, and execution may issue for an amount not exceeding the amount indorsed on the writ of summons, with interest at the rate specified, if any, and the sum fixed by the masters for costs as hereinbefore mentioned, unless the plaintiff claim more, in which case the costs shall be taxed in the ordinary way: Provided always, that in such case the plaintiff shall not be entitled to more costs

any sum not exceeding the sum indorsed on the writ, together with interest at the rate specified, if any, to the date of the judgment, and a sum for costs to be fixed by the masters of the said superior courts, or any three of them, subject to the approval of the judges thereof, or any eight of them, of whom the Lord Chief Justices and the Lord Chief Baron shall be three, unless the plaintiff claim more than such fixed sum, in which case the costs shall be taxed in the ordinary way; and the plaintiff may, upon such judgment, issue execution on the expiration of eight days from the last day for appearance, and not before: Provided always, that it shall be lawful for the Court or a judge, either before or after final judgment, to let in the defendant to defend upon an application supported by satisfactory affidavits, accounting for the non-appearance, and disclosing a defence upon the merits." See *Whiley v. Whiley*, 4 C. B. 653; 27 L. J. C. P. 305.

(B) *But the Defendant may enter an Appearance at any time before Judgment is Signed.*

But the defendant may enter an appearance at any time before judgment is signed.

15 & 16 Vic. c. 76, s. 29. "The defendant may appear at any time before judgment, and if he appear after the time specified, either in the writ of summons or in any rule or order to proceed as if personal service had been effected, he shall, after notice of such appearance to the plaintiff or his attorney, as the case may be, be in the same position as to pleadings and other proceedings in the action as if he had appeared in time: Provided always, that a defendant appearing after the time appointed by the writ, shall not be entitled to any further time for pleading, or any other proceeding, than if he had appeared within such appointed time."

II. How Entered.[1]

15 & 16 Vic. c. 76, s. 31. "The mode of appearance to a writ of summons is by delivering a memorandum in writing, in the form prescribed by the statute,

than if he had made such special indorsement, and signed judgment upon non-appearance."

By the 32d section, "all such proceedings as are mentioned in any writ or notice issued under this act shall and may be had and taken in default of a defendant's appearance."

By the 33d section, "in any action brought against two or more defendants, where the writ of summons is indorsed in the special form hereinbefore provided, if one or more of such defendants only shall appear, and another or others of them shall not appear, it shall and may be lawful for the plaintiff to sign judgment against such defendant or defendants only as shall not have appeared, and before the declaration against the other defendant or defendants to issue execution thereupon, in which case he shall be taken to have abandoned his action against the defendant or defendants who shall have appeared; or the plaintiff may, before issuing such execution, declare against such defendant or defendants as shall have appeared, stating, by way of suggestion, the judgment obtained against the other defendant or defendants who shall not have appeared, in which case the judgment so obtained against the defendant or defendants who shall not have appeared shall operate and take effect in like manner as a judgment by default obtained before the commencement of this act against one or more of the several defendants in an action of debt before the commencement of this act." That is, he must still prove the joint liability of all the defendants at the trial, in order to be entitled to a verdict against any. (See *Stuart v. Rogers*, 4 Mee. & W. 649. *Boyler v. Webster*, 21 L. J. Q. B. 202), unless the misjoinder of defendants be amended at the trial. *See* C. L. P. Act, 1852, s. 37.

[1] The following is the form prescribed by the 31st section:—

A. plaintiff, against C. D., or, against C. D. and another, or, against C. D. and others. } The Deft. C. D. appears in person. E. F., attorney for C. D., appears for him.

[*If the defendant appears in person here give his address.*]

Entered the day of 18 .

If the defendant has been sued by a wrong name, he should appear by his right name, and state that he was sued as in the writ; *e. g.* "the defendant C. D., sued as A. D. appears in person."

By the 15 & 16 Vic. c. 76, s. 26, "so much of 2 Wm. 4, c. 39, as relates to the entering an appearance by the defendant for the plaintiff in any action in any of the said superior courts, shall be repealed, except so far as may be necessary to support proceedings heretofore taken, and no appearance need be entered by the plaintiff for the defendant." Care should be taken to adhere to the above

or to the like effect, to the proper officer or person in that behalf, dated on the day of the delivery thereof."

III. Effect of Appearance.

(A) *Waives Irregularity in the Process.*

Forbes v. Smith, 24 L. J. Ex. 167.

Appearance waives irregularity in the process.[1]

A writ of summons having been served upon the defendant in France, he appeared by attorney, and the declaration having been delivered, he obtained an order to inspect, and inspected the promissory notes on which the action was brought. He then applied to the Court to set aside the writ and all subsequent proceedings, on the ground of the writ having been served beyond the jurisdiction of the Court, and of the action having been brought for the breach of a contract made beyond the jurisdiction of the Court.

Per Cur. The writ is regular. If the defendant had not appeared the plaintiff could have done nothing. The defendant has voluntarily appeared; and after having so done, he is not entitled to set aside the writ.

APPENDANT. *See* Appurtenant; Common.

APPOINTMENT, Deed of, under a Power. *See* Power; and Sugd. on Powers; Watk. *Conv.;* Wms. *Real Property;* Stor. *Eq. Jur.;* Jarm. on Wills; Spence's *Equit. Jur.*

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form. Before the Common Law Procedure Act, an appearance entered which essentially departed from the proper form was held to be properly treated as a nullity. *Warren v. Love*, 7 Dowl. 602. *Codrington v. Curlewis*, 9 id. 968. If irregular, the plaintiff may get it set aside, or he may compel the defendant to amend it, or enter a fresh appearance. *Bates v. Bolton*, 4 Dowl. 160, 667; 2 C., M. & R. 365; 1 T. & G. 148. But such an application must be made within a reasonable time after the irregularity came to the plaintiff's notice. See *Strange v. Freeman*, 5 Dowl. 407. *Esdaile v. Davies*, 6 id. 465. *Alsager v. Crisp*, 9 id. 353. *Belcher v. Goodered*, 4 D. & L. 814; 4 C. B. 472. *Hawkins v. Hassell*, 12 Mee. & W. 776. If the plaintiff, after an appearance, proceed as if no appearance had been entered, such proceedings are not null, but only irregular; and the irregularity may be waived either by the defendant not applying within a reasonable time after notice to set aside the proceedings, or by any other act of waiver. *Alsager v. Crisp*, 9 Dowl. 353. *Strange v. Freeman*, 5 id. 407. *Maple v. Woodgate*, 1 B. & C. 79.

An appearance by more than one attorney is an irregularity (*Williams v. Williams*, 10 Mee. & W. 178); and if entered by attorney without authority from client, it will be set aside even after execution issued. 16 L. J. Ex. 204. Plaintiff's remedy is by summary application against the attorney, or by action against him. 13 Mee. & W. 702.

By Reg. Gen. (Pr.) H. T. 1853, r. 2, "if two or more defendants in the same action shall appear by the same attorney, and at the same time, the names of all the defendants so appearing shall be inserted in one appearance."

By Reg. Gen. (Pr.) H. T. 1853, r. 3, "an attorney not entering an appearance in pursuance of his undertaking shall be liable to an attachment."

By 15 & 16 Vic. c. 76, s. 30, "every appearance by the defendant in person shall give an address, at which it shall be sufficient to leave all pleadings and other proceedings not requiring personal service; and if such address be not given, the appearance shall not be received; and if an address so given shall be illusory or fictitious, the appearance shall be irregular, and may be set aside by the Court or a judge, and the plaintiff may be permitted to proceed by sticking up the proceedings in the master's office without further service." *See* also Reg. Gen. (Pr.) H. T. 1853, r. 166.

No appearance can be entered *nunc pro tunc*, for the statute requires it to be dated on the day on which it is delivered to the officer; hence a declaration delivered before appearance, without either an affidavit of personal service or a judge's order to proceed without, is a nullity, and a judgment thereon is utterly void. *Roberts v. Spurr*, 3 Dowl. 351. *Watson v. Dow*, 5 id. 548.

It seems that one of several partners has no implied authority to enter an appearance for the others. See *Hambridge v. De la Crouée*, 3 C. B. 742; 4 D. & L. 466; 16 L. J. C. P. 85. As to appearance to actions of ejectment, *see post*, Ejectment.

[1] *Humble v. Bland*, 6 T. R. 255. *Anon.* 1 Chit. 129 n. See *Holt v. Eades*. 6 Scott, N. R. 699. *Chalkley v. Carter*, 4 Dowl. 480. *Davis v. Skerlock*, 7 Dowl. 530. Where the writ was improperly indorsed, partly for unliquidated damages, the defendant by appearing thereto was held to be precluded from taking the objection. *Rodney v. Lucas*, 24 L. T. 262.

APPOINTMENT, Official, Presumption of. A person's acting in a public capacity is *primâ facie* evidence that he has been duly appointed.[1]

R. v. Winifred, 1 Leach, C. C. 515.

A person's acting in a public capacity is *primâ facie* evidence that he has been duly appointed.

On an indictment for the murder of a constable in the execution of his office, the only evidence that the deceased was a constable was the circumstance that, on raising him from the ground after he had been wounded, the constable's staff was found lying under his arm, and it was proved by several of the witnesses that he was generally known as constable of the parish.

On the conference of the judges on this case, they were all of opinion that these circumstances were sufficient evidence and notification of his being constable, although there was no proof of his appointment, or of his having been sworn into the office.

APPORTIONMENT. Entire Contract not subject to.[2] *See* Work and Labour.

[1] The principle, applicable as well to criminal as civil cases, that a person acting in a public capacity is *primâ facie* evidence of his having been duly authorised so to do; and that, even although the office be one, the appointment to which must have been in writing, it is not, at least in the first instance, necessary to produce the document, or account for its nonproduction (1 Phil. *Evid.* 449, 10th ed.; Ph. & Am. *Evid.* 452. *M'Gahey v. Alston*, 2 Mee. & W. 206), has been held to apply to justices of the peace (*Berryman v. Wise*, 4 T. R. 366), churchwardens and overseers (*Doe d. Bowley v. Barnes*, 8 Q. B. 1037), masters in chancery (*Marshall v. Lamb*, 5 Q. B 115), surrogates (*R. v. Verelst*, 3 Camp. 432), commissioners for taking affidavits (*R. v. James*, 1 Show. 397. *R. v. Howard*, 1 M. & Rob. 187), attornies (*Pearce v. Whale*, 5 B. & C. 38), under-sheriffs (*Doe d. James v. Brawn*, 5 B. & A. 243), replevin clerks (*Faulkner v. Johnson*, 11 Mee. & W. 581), peace officers and constables (*R. v. Gordon*, *supra*. *Berryman v. Wise*, *supra*), persons in the employment of the Post Office (*R. v. Rees*, 6 Car. & P. 606), vestry clerks (*M'Gahey v. Alston*, 2 Mee. & W. 206), attested soldiers under the Mutiny Act (*Wotton v. Gavin*, 16 Q. B. 48), &c.; and has been expressly extended by statute to revenue officers. 26 Geo. 3, c. 77, s. 12, and c. 82, s. 6; 11 Geo. 1, c. 30, s. 32; 7 & 8 Geo. 4, c. 53, s. 17; 16 & 17 Vic. c. 107, s. 307.

This principle avails to cases even where persons are indicted for offences committed by them in their character of public officers; as, where a person employed by the Post Office is indicted for stealing or embezzling a letter, his formal appointment need not be proved, but it is sufficient to show he acted in the capacity charged. *R. v. Rees*, 6 Car. & P. 606. *R. v. Barrett*, id. 124. *Clay's case*, 2 East, P. C. 580. *R. v. Goodwin*, 1 Lewin, C. C. 100.

The presumption is not restricted to appointments of a strictly public nature. It has been held to apply to constables and watchmen appointed by commissioners under a local act (*Butler v. Ford*, 1 C. & M. 662), and to trustees empowered by act of parliament to raise money for building a church. *R. v. Murphy*, 8 Car. & P. 310. But it does not, at least in general, hold in the case of private individuals, or agents supposed to be acting by their authority. Thus, it does not apply to a tithe-collector acting under the authority of a private person. *Short v. Lee*, 2 J. & W. 468. *See* 1 N. R. 196; 2 Esp. 526.

The presumption of the due appointment of public officers seems to rest on three grounds: 1st. A principle of public policy. 2d. In some degree on the hypothesis that, in many cases not to make it, would be to presume the party acting guilty of a breach of the law. 3d. That in the case of public appointments there is a facility of disproof of the regularity of the appointment, which cannot exist in the case of the agents of private individuals. Best on *Evid.* 459.

[2] An entire contract cannot in general be apportioned. See *Chanter v. Leese*, 4 Mee. & W. 295, 311; and in general, 3 Vin. Abr. Apportionment, 2 Pothier, by Evans, 44; 9 B. & C. 92. So that if a party undertake to complete a certain act, which is entire or indivisible, before his claim to remuneration is to accrue, he cannot recover for a partial performance, although the completion of the act was prevented by inevitable accident. 1 H. Black. 275 n.; 8 T. R. 375; 4 Ad. & E. 605.

Thus, where a sailor was to be paid a certain sum if he proceeded and continued, and did his duty on a voyage, and he died before the voyage was completed, it was held that his executor had no claim to any part of his wages. *Cutter v. Powell*, 6 T. R. 320; 1 Smith, L. C. 1. *Appleby v. Dods*, 8 East, 300. *Hulle v. Heigham*, 2 id. 145. But *see* 13 & 14 Vic. c. 93, s. 53, and *Jesse v. Roy*, 1 C., M. & R. 316, 340. So if there be a covenant in a charter-party to pay freight on the goods being delivered at A., no claim to freight arises *pro ratâ itineris*, although the goods be carried to B., where the ship is wrecked, and the defendant there accepts the goods. *Cook v. Jennings*, 7 T. R. 381. So if a landlord accepts the surrender of a tenancy in the middle of a quarter, without any new agreement as to an apportionment of the quarter's rent, he cannot recover any part of it. *Grimman v. Legge*, 8 B. & C. 324; 2 M. & R. 240.

APPORTIONMENT of Annuity. *See* Annuity, p. 360.

APPORTIONMENT of Conditions. An entire condition cannot be apportioned, except by act of law; never by act of the parties. 5 Rep. 546; 4 id. 524; 2 B. & A. 105. Therefore a condition once dispensed with, in whole or in part, is dispensed with for ever, and to the whole of the property. Thus, if a lease be made for years, on condition that the lessee or his assigns shall not alien without the license of the lessor, and the lessor licenses the lessee alone to alien, or licenses him to alien a part of the land, or licenses him to alien all the land for a time; or if the lease is to three, on such a condition the lessor licenses one of them to alien; in all these cases the condition is gone for ever. *Dumpor's case*, 4 Rep. 119; 1 Smith, L. C. 15; 1 Pres. Shep. Touchst. 159. The neglect of the lessor to avail himself of the forfeiture by entry, and his subsequent acceptance of rent, have not this effect, but amount simply to a confirmation of the first alienation. Burton, s. 853; Wms. R. & P. P. 67. Smith, R. & P. P. 619, 620; 4 Taunt. 735. *See* Conditions.

APPORTIONMENT of Rent. *See* Rent.

APPORTIONMENT of Rights of Common. *See* Common.

APPRAISEMENT. *See* Valuation.

APPREHENSION of Offenders. *See* Arrest; Constable; Trespass; Warrant.

APPRENTICE.

I. Of the Contract[1] of Apprenticeship, p. 397.

(A) *An Indenture in Contravention of Statute is void*, p. 397.

(B) *Execution of Instrument*, p. 398.

(C) *Of the Stamp*, p. 398.

(*a*) *The Sum paid is the Criterion of Amount of*, p. 399.

(*b*) *Stat.* 8 *Anne*, *c.* 9, *does not apply to Indentures in which no Consideration is expressed*, p. 399.

(*c*) *And no Stamp is necessary upon the Binding of a Parish Apprentice, or where the Premium is paid by a Public Charity*, p. 400.

And so when a tenant is evicted by his landlord from part of premises, let at an entire rent, such eviction will afford a complete defence to an action for the use and occupation of those premises (*Smith v. Raleigh*, 3 Car. & P. 513); but not to an action on the covenant to repair. See *Morrison v. Chadwick*, 18 L. J. C. P. 189. *Newton v. Allen*, 1 Q. B. 518. Although a partial remuneration for the part performance of an entire contract cannot in general be recovered, yet a claim may sometimes arise upon a *quantum meruit*, by reason of the party who is to make the payment accepting and retaining the benefit of the partial performance after the time for completing the contract has elapsed. See *per Cur. Chanter v. Leese*, 4 Mee. & W. 295, 311. Thus, if the tenant after a partial eviction continue in possession of the residue of the premises, he will be liable for the rent of that portion. *Stokes v. Cooper*, 3 Camp. 514 n.

[1] The contract of apprenticeship is, as its name denotes, from *apprendre*, a bargain for instruction (see *Rex v. Crediton*, 2 B. & Adol. 493. *Rex v. Igtham*, 4 Ad. & E. 937), to be bestowed by one person upon another, who in return agrees to give up his whole time and services to his instructor, and frequently also to bestow upon him a pecuniary consideration. It is one of those contracts by which a person, under age, is permitted by law to bind himself upon that general ground adverted to by *Lord Mansfield* in *Drury v. Drury* (5 Bro. C. C. 570), namely, that if an agreement be for the benefit of an infant, it shall bind him (*Rex v. St. Petrox*, 4 T. R. 196. *Rex v. St. Mary's*, 1 Bott, 705. *Rex v. Arundell*, 5 M. & S. 257. See *Maddon v. White*, 2 T. R. 159. *Rex v. Weddington*, 1 Bott, 636). But no action can be sustained against an infant apprentice, except by the custom of London. *Barton v. Palmer*, 2 Bulst. 192.

Instructing and learning are essential elements in the contract; hence, where L. agreed on behalf of his son that he should serve M. in his business of a wheelwright,

(*d*) *An Assignment of an Apprentice requires a Stamp*, p. 401.
(*e*) *But not of a Parish Apprentice*, p. 401.
(*f*) *Nor where the Fund is supplied by a Public Charity*, p. 401.
(*g*) *Where a Stamp is necessary, it need not be affixed within Two Months, as required by* 9 *Anne, c.* 9, p. 401.

II. Rights and Obligations of Master, p. 402.

(A) *He is bound to Instruct, &c. his Apprentice*, p. 402.
(*a*) *But if an Apprentice run away, and by his Misconduct disqualifies himself from serving his Master, no Action lies against the Master for not taking him back*, p. 402.
(B) *He is entitled to his Apprentice's Earnings*, p. 403.
(C) *In case of Misconduct of Apprentice, he may Sue those who covenanted for his good Behaviour in that particular*, p. 403.
(D) *He cannot, unless there was an express Promise, recover for Board of proposed Apprentice taken on Trial*, p. 403.
(E) *He may maintain an Action for Enticing Away his Apprentice*, p. 404.
(F) *Or for a Personal Injury inflicted on the Apprentice, occasioning Loss of Service*, p. 405.
(G) *He is bound to provide for his Apprentice sufficient Food, Clothing, and Lodging, and may be indicted for Neglect of this Obligation*, p. 405.

III. Rights and Obligations of Apprentice, p. 405.

(A) *The Obligation of the Apprentice to serve is discharged by the Master abandoning the Trade which the Apprentice was to learn*, p. 405.

IV. Assignment of Apprentice, p. 406; and *see* Parish Apprentices, p. 414.

V. Dissolution of Apprenticeship, p. 406.

(A) *By Death of Master*, p. 406.
(*a*) *An Apprentice is not bound after the Death of his Master to serve his Executor or Administrator*, p. 406.
(B) *By coming of Age of Apprentice*, p. 408.
(*a*) *If of full Age, the Apprentice may elect to avoid the Agreement*, p. 408.

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from the date of the agreement until a certain specified time, M. paying at the expiration of that said term, 5*l.* to the son; and L. to find his son clothes, washing, and all other necessaries, and M. meat, drink, and lodging, the Court held it was not a contract of apprenticeship, since it contained no provision for learning or teaching. *Rex v. Billingham*, 5 Ad. & E. 676. *See* 5 Nev. & M. 540.

The relation which it creates is one of very ancient origin, and the reciprocal rights and duties which it involves greatly resemble those of parent and child, for the master is entitled to the whole produce of the labour of his apprentice (see *Anon.* 12 Mod. 415. *Puckington v. Chepton Beauchamp*, Str. 582. *Barber v. Dennis*, 1 Salk. 98. *Foster v. Stewart*, 3 M. & S. 191. *Sed vide Carson v. Watts*, 3 Dougl. 350), and may, in case of disobedience by the latter to his lawful commands, or upon the detection of any immorality in his behaviour, administer to him, if an infant, reasonable corporal chastisement, such as a father may inflict upon his child, or a schoolmaster upon his pupil. 3 Bl. Com. 428. *Penn v. Ward*, 5 Tyr. 979; 2 C., M. & R. 338. The master cannot delegate this power. 9 Co. 76.

Any person capable of executing a deed may take an apprentice; even a person under age may do so. *Rex v. St. Petrox*, 4 T. R. 196. But a married woman cannot take one; because her deed is altogether void, and not merely voidable. *Rex v. Guildford*, 2 Chit. Rep. 284. It is not necessary, however, to the legality of an indenture of apprenticeship that the master should exercise any trade, art, or mystery. Where a girl was bound apprentice to a common day-labourer, to learn "the art and mystery of a housewife," the Court held the indenture not invalid on that ground. *Rex v. St. Margaret's, Lincoln*, Burr. 728.

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I. Of the Contract of Apprenticeship.[1]

(A) *Indenture in Contravention of Statute is void.*

Regina v. Inhabitants of Barmston, 3 Nev. & P. 167.

An infant, by an indenture of apprenticeship, put himself an apprentice to his father, to learn the trade of a tailor. The indenture first bore date 12th December, 1813; but the parties, for the fraudulent purpose of enabling the minor to exercise the trade of a tailor, and have the full benefit of the 5 Eliz.

An indenture of apprenticeship fraudulently antedated to evade 5 Eliz. c. 4, was void.[2]

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[1] The common form of the indenture is not *inter partes*. It begins, "This indenture witnesseth, that D. binds himself," &c., and ends with a clause that for the true performance of the indenture each party binds himself to the other, &c. This clause constitutes a covenant, and binds the parties executing the deed according to their relative positions; and if the father of the apprentice execute the deed, he is liable thereon for any misconduct of the apprentice in violation of its provisions, although it be not expressed in terms in the prior part of the instrument, that the father thereby covenants with the master, &c. *Branch v. Ervington*, 2 Dougl. 518. *Cuming v. Hill*, 3 B. & A. 59. The common indenture often runs, that the master covenants (not stating with whom) to instruct the apprentice, &c., and it seems that in such case the latter alone (if a party to the deed) should be the plaintiff in an action against the master for a breach of his covenant, although the father be also a covenanting party.

The stat. 5 Eliz. c. 4, created many regulations and restrictions respecting the mode of binding and the qualifications of apprentices, which being found extremely inconvenient in practice, it was by 54 Geo. 3, c. 96, enacted, that any person may take or become an apprentice, though not according to the provisions of that act, provided that the statute shall not prejudice the customs or bye-laws of any corporation or company. *See* 5 & 6 Wm. 4, c. 76, s. 14; the Municipal Corporation Act.

The contract of binding must also, by the statute of Elizabeth, have been by deed indented. See *Smith v. Birch*, 1 Bott, 628. *Castor v. Aickles*, Salk. 68. And though 54 Geo. 3, c. 96, has now dispensed with the formality, still, even under it, a writing is required, and a mere parol binding would not constitute an apprenticeship. Therefore, in order to gain a settlement, the instrument of apprenticeship must be by deed (*see* 3 Wm. & Mary, c. 11, s. 8), though it need not be indented (31 Geo. 2, c. 11, s. 4; 4 T. R. 770). No parol binding would be sufficient. *See* 4 T. R. 769; 2 Mylne & K. 27; 8 B. & C. 88. And if verbal for more than a year it would be unavailing, as falling within the 4th section of the Statute of Frauds, 29 Car. 2, c. 3.

The binding is usually effected by deed. See *Rex v. Harrington*, 6 Nev. & M. 165. By the custom of some towns, indentures of apprenticeship should be enrolled. *See* Com. Dig. London, N. 2. *Barber v. Dennis*, 6 Moore, 69. *Rex v. Marshall*, 2 T. R. 2. *Rex v. Mayor of Cambridge*, 2 Chit. 144. The deed contains covenants by the master and apprentice for the faithful discharge of their respective duties towards each other. These covenants, whether entered into by the infant and master, or by the master and some other person, are independent, and the performance of neither side is a condition precedent to that of the other. *Winstone v. Linn*, 1 B. & C. 460. *Hughes v. Humphries*, 6 id. 680; and 32 L. T. 282; 28 L. J. Ex. 153.

It is necessary, for the purposes of settlement, that the master and apprentice should be named as parties to the deed, and that the former stipulate to instruct, and the latter to learn (*Chesterfield's case*, 2 Salk. 479. *Rex v. Inhabitants of Cromford*, 8 East, 25; and 5 Nev. & M. 540) and if there be no stipulation to serve, there will be no apprenticeship: indeed, the contract may be invalid for all purposes. And in *Lees v. Whitcomb* (5 Bing. 34; 2 M. & P. 86) it was held that a written promise by a party "to remain with the plaintiff for two years for the purpose of learning his business," was invalid for want of mutuality, it not appearing from the memorandum that the plaintiff was bound to retain or teach the defendant during any part of that period. See *Sykes v. Dixon*, 1 Per. & D. 463.

If from the whole contract it appear that the parties contemplated the relation of master and servant, although it contain terms of a contract of apprenticeship, it will not be a perfect contract of apprenticeship, so as to confer a settlement by apprenticeship. *R. v. Tipton*, 9 B. & C. 888. *R. v. Inhabitants of Billinghay*, 5 Ad. & E. 676. On the other hand, where the parties appear from the instrument to have contemplated above all other things a contract of master and apprentice, the contract must be deemed to be one of apprenticeship. See *R. v. St. Margaret's*, 6 B. & C. 97. *R. v. Combe*, 8 id. 82. *R. v. Tipton*, 9 id. 888. *R. v. Edingdale*, 10 id. 739. *R. v. Nether Knutsford*, 1 B. & Adol. 726. *R. v. Crediton*, 2 id. 493. *R. v. Newton*, 3 Nev. & M. 306; 1 Ad. & E. 238. *See* further, *post*, Poor (Settlement). The mere fact that the contract speaks about the servant being "taught" or "instructed" in his work, will not make it a contract of apprenticeship, if in other respects it is essentially a contract of hiring. *Reg. v. Northowram*, 2 New Sess. Cas. 437; 10 Jur. 1003.

[2] And where it was prohibited by statute to bind a child under eight years of age as a

c. 4, then in full force, after five years' apprenticeship, caused the indenture, before execution, to be antedated two years.

The Court held, that if the indenture was fraudulently antedated to contravene the 43 Eliz. it was void.

(B) *Execution of Instrument.*

R. v. Inhabitants of Longnor, 4 B. & Adol. 647; 1 Nev. & M. 576.

An indenture signed with the names of the apprentice and his father by another at their request, and in their presence, and afterwards acted upon, held sufficient.[1]

An indenture having been prepared for binding a boy apprentice, the apprentice and his father being unable to write, desired a third person to write their names opposite two of the seals, and he did so. The indenture was not read to them. The apprentice immediately afterwards took the indenture to the master and left it with him, and afterwards stated that when he did so he considered himself bound; and he went into service under the indenture. It was held that the indenture was sufficiently executed and delivered.

(C) *Of the Stamp.*[2]

chimneysweep, and a child of five years was, notwithstanding, bound, the Court held the indenture void altogether, and not merely voidable. *Rex v. Hipswell*, 8 B. & C. 466. *Rex v. Gravesend*, 3 B. & Adol. 240.

[1] In order to bind a party so as to proceed against him for a breach of the instrument of apprenticeship, he must have executed the same, and not delivered merely as an escrow. 29 L. J. Ex. 369. And before the 54 Geo. 3, c. 96, for the purposes of *trade*, to make a valid apprenticeship the apprentice himself, whether an infant or an adult, must have executed the indenture. See *R. v. Cromford*, 8 East, 25. *R. v. Chesterfield*, 1 Bott, 527. *R. v. Ripon*, 9 East, 295. But this is no longer necessary for that purpose, though it is to gain a settlement. *R. v. Arnesby*, 3 B. & A. 584. The execution of the indenture, or a counterpart by the master, was never necessary, either for the purposes of trade or settlement. *R. v. Fleet*, Cald. 31; 2 Bott, 371. *R. v. St. Peter's-on-the-Hill*, id. 367. But it is necessary in order to sue him for a breach thereof. *See* 29 L. J. Ex. 369.

[2] By stat. 55 Geo. 3, c. 184, the following stamp duties are payable upon indentures of apprenticeship:—

				£	s.	d.
If the sum of money, or the value of any other matter or thing which shall be paid, given, assigned, or conveyed, or be secured to be paid, given, assigned, or conveyed, to or for the use or benefit of the master or mistress, with or in respect of such apprentice, clerk, or servant, or both the money and value of such other matter or thing, shall not amount to			£ 30	1	0	0
If the same shall amount to £ 30	and not amount to		50	2	0	0
,, 50	,,		100	3	0	0
,, 100	,,		200	6	0	0
,, 200	,,		300	12	0	0
,, 300	,,		400	20	0	0
,, 400	,,		500	25	0	0
,, 500	,,		600	30	0	0
,, 600	,,		800	40	0	0
,, 800	,,		1000	50	0	0
,, 1000	or upwards		——	60	0	0

The exemptions are "of indentures or other instruments placing out poor children apprentices, by or at the sole charge of any parish or township, or by or at the sole charge of any public charity, or pursuant to 32 Geo. 3, for the further regulation of parish apprentices."

In cases where *no premium* is given, the stamp is regulated by the 16 & 17 Vic. c. 59, sched. which imposes a stamp duty of 2*s.* 6*d.* upon any "indenture or other instrument or writing containing the covenants, articles, and agreements for or relating to the service of *any apprentice*, clerk, or servant, who shall be put or placed to or with any master or mistress, or to or with any new master or mistress, either by assignment, transfer, or turn-over, or upon the death, absence, or incapacity of the former master or mistress, or otherwise, to learn any profession, trade, or employment whatsoever (except articles of clerkship or apprenticeship to any attorney, solicitor, or other person, in order to admission in any court, or in any office in any court, or any writing whatever, except as aforesaid), whereby any such assignment, transfer, or turn-over may be effectually ascertained; where no sum of money or other matter or thing shall be paid, given, assigned, or conveyed, or be secured to be paid, given, assigned, or conveyed, to or for the use or benefit of the master or mistress, with or in respect of any apprentice, clerk, or servant."

An indenture improperly stamped may be re-stamped. *Mann v. Lent*, 10 B. & C. 877; M. & M. 240. *Rex v. Preston*, 5 B. & Adol. 1029; 3 Nev. & M. 31.

(*a*) *The Sum paid is the Criterion of Amount of.*

KING v. LOW, 3 Car. & P. 620.

In an action on an indenture of apprenticeship, it appeared that the premium agreed for was 20*l.*, but 19*l.* 19*s.* only was paid, and that sum was inserted in the indenture, and the stamp according to the latter sum.

Lord Tenterden, C. J., held that it was sufficient, within the 8 Anne, c. 9, being the sum actually paid.

In fixing the amount of stamp, the sum paid, and not that agreed to be paid, is the criterion.[1]

(*b*) *Stat.* 8 *Anne, c.* 9, *does not apply to Indentures in which no Consideration is expressed.*

SMITH v. AGETT, 8 Dowl. 411.

An apprentice deed in which no consideration was expressed had been received in evidence, though stamped more than one year after the execution. It was objected that 8 Anne, c. 9, limiting the stamping to particular times, had not been complied with.

The Court held it might be received in evidence. No consideration being stated, it was not within that act, and the 55 Geo. 3, c. 184, imposes no limitation as to time.

Stat. 8 Anne, c. 9, does not apply to indentures in which no consideration is expressed.[2]

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[1] In *Rex v. Bourton-upon-Dunsmore* (4 M. & R. 631) a sum was paid to the master upon the execution of an indenture of apprenticeship, but it was agreed by the mother of the apprentice that something more should be given, and only the sum actually paid at the time was inserted in the indenture as the consideration. The mother afterwards paid the master a further sum; but neither her husband nor the apprentice knew the fact of the agreement, or that of the payment of the additional sum. The stamp affixed would have been sufficient if the additional sum had been mentioned. The Court held, that, under these circumstances, the indenture was not void for want of the insertion of the true consideration. There was no binding agreement for more; it was all voluntary, and there was no fraud upon the stamp act, for the stamp would have been the same on the larger sum. *See* 7 T. R. 121; 27 L. J. C. B. 271.

So, where in addition to the sum mentioned as the consideration in the indenture, the uncle of the apprentice agreed to pay a sum of 150*l.* for the board of the apprentice, the indenture was held to have truly stated the consideration. *Hawkes v. Clutterbuck*, 2 C. & Kir. 811.

[2] The 8 Anne, c. 9, as to the time of stamping the indenture, is not repealed by the 55 Geo. 3, c. 184. *Rex v. Church Hulme*, 5 B. & Adol. 1029 n. *Rex v. Chipping Norton*, 5 B. & A. 412. As many of the provisions in the 8 Anne, c. 9, are still in force, it has been thought proper to subjoin a note containing the principal enactments. (See *Gye v. Felton*, 4 Taunt. 786. *Stewart v. Lawton*, 1 Bing. 374.)

By sect. 35, the full sum received or contracted for is to be inserted in words at length in the indenture, or writing containing the covenants, &c., or the master or mistress shall forfeit double the sum; and the instrument shall bear date upon the day of the execution.

By sect. 36, indentures signed in London, Westminster, or within the bills of mortality, shall be stamped within one month after date.

By sect. 37, every indenture entered into elsewhere in Great Britain shall be either stamped within two months, or brought within that time to some collector or officer appointed for the management of these duties, who shall indorse a receipt for the duty paid.

By sect. 38, where the indorsement is made within fifty miles from the bills of mortality, the indenture shall be stamped within three, and if at a greater distance, within six months.

By sect. 39, all such indentures or writings, wherein shall not be truly inserted the full sum received with, or in relation to, such apprentice, or whereupon the duties payable by this act shall not be duly paid or lawfully tendered, or which shall not be stamped, or lawfully tendered to be stamped, within the respective times herein for that purpose limited, shall be void.

By sect. 45, where anything, not being money, shall directly or indirectly be given, assigned, conveyed, delivered, contracted for, or secured to or for the use or benefit of any master or mistress, with or in respect of any such apprentice, for whom a duty is chargeable by this act, the duties hereby granted and last mentioned shall be answered and paid for the full value or values of such things; and the same duties for the said values shall be secured and answered in the same manner, and under the like penalties and incapacities, as are before in this act provided for securing the said rates, upon money given or paid, or agreed to be given or paid.

The indenture must be properly stamped,

(c) *And no Stamp is necessary on the Binding of a Parish Apprentice, or where the Premium is paid by a Public Charity.*[1]

The 55 Geo. 3, c. 184, exemps from stamp duty "indentures and all other instruments for placing out poor children apprentices, by or at the sole charge of any parish or township, or by or at the sole charge of any public charity, or pursuant to the 32 Geo. 3, for the further regulation of parish apprentices. And all assignments of such poor apprentices, provided there shall be no such valuable consideration as aforesaid given to the new master or mistress,

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according to the premium or consideration given, and the particular kind of stamp; and if the sum so paid or contracted for be not truly inserted in words at length, the indenture is void (8 Anne, c. 9, s. 35; 3 T. R. 353; 5 B. & A. 412; 1 Bott, 545). If an indenture bind an apprentice to two masters in different trades, to serve part of seven years with one and the rest of the term with the other, one stamp suffices (8 B. & C. 247).

[1] A voluntary yearly contribution of divers inhabitants of a parish for the purpose of putting out apprentices brought up at a charity school in the parish, is a charity within the meaning of the 8 Anne, and exempt from the stamp duty. *The King v. the Inhabitants of St. Matthew, Bethnal Green*, Burr. 574. And it has been held unnecessary, in order to render an indenture of apprenticeship valid, that the trustees of certain charitable funds, by whom the pauper was bound, should be parties to the indenture. *The King v. the Inhabitants of Quarnton*, 2 M. & S. 331. Where the fact of a payment of a premium out of a charitable fund was depended upon so as to justify the want of a stamp upon an indenture of apprenticeship, the Court held that the indenture of apprenticeship was no proof of the facts recited in it, and that the declaration of the parish officers could not be admitted to prove out of what funds it was paid, more especially as they themselves might have been called. *The King v. The Inhabitants of Skeffington*, 3 B. & A. 382.

Where the father of a child apprenticed by a charitable society gave the master, in addition to a premium of 20*l.*, paid by the society, four I. O. U's. for 5*l.* each, payable respectively after the interval of a year, and the deed stated the consideration to be 20*l.*, it was held that the master might, notwithstanding, recover upon the I. O. U's., although the deed was void by virtue of the stat. of Anne. *Westlake v. Adams*, 5 C. B. (N. S.) 218; 27 L. J. C. B. 271; 4 Jur. 1021.

In *Rex v. Aylesbury*, 3 B. & Adol. 569, it was held that no stamp was required. There a pauper was bound apprentice by the trustees of a public charity. The master covenanted to find him meat, drink, apparel, washing, &c. Before the execution of the indenture, the father of the pauper, who was not a party to it, agreed with the master to find the pauper clothing and washing during the term, and he did so. It did not appear that the trustees were privy to this engagement.

The Court were clearly of opinion, that if the friends of an apprentice covenant to maintain him, and to provide him with clothes, this is not such a benefit as renders the indenture liable to stamp duty; and did not think the circumstance of the master covenanting made any difference. Where the premium is paid by parish officers, although it be not parish binding, yet the indenture is exempt from the duty under 8 & 9 Anne. *Rex v. St. Petrox, in Dartmouth*, 4 T. R. 196. And it is unnecessary in an indenture relating to a parish apprentice to set out the premium in words at length. *Rex v. The Inhabitants of Oadby*, 1 B. & A. 477.

In *Rex v. Halesworth*, 3 B. & Adol. 717, certain lands were devised, half of the rents to be applied for the relief of widows, and the other half in binding out apprentices; and accounts were kept of the funds by churchwardens distinct from the poor rates: other lands were also devised to the churchwardens and overseers, to be applied in educating poor boys, and also apprenticing a certain number, to be chosen by the churchwardens, overseers, and principal inhabitants.

The Court held, that neither of the funds was to be deemed "public parochial funds" within the 56 Geo. 3, c. 139, s. 11, avoiding the indentures for want of the approval of justices.

But in *Rex v. Amersham*, 6 Nev. & M. 12, 4 Ad. & E. 508, it appeared that the trustees of a public charity bound out an apprentice to one R. for the consideration of 10*l.*, to be paid by them to R., and a receipt was indorsed in the indenture for the 10*l.*, the full consideration-money within mentioned. The apprentice's grandfather had previously agreed with R. to pay a premium of 25*l.* if she would take his granddaughter as an apprentice. After the execution of the above indenture, the apprentice's grandfather paid to R. 15*l.* to make up the amount which he had agreed to pay. The trustees were entirely ignorant of this contract. On the question whether the indenture was void by the stat. 8 Anne, c. 9, s. 39, the full sum received, &c. not being inserted in the indenture,—

The Court said that *Rex v. Baildon*, 3 B. & Adol. 427, decided that such an indenture, under similar circumstances to the present, was void, and they should adhere to that decision.

other than what may have been or shall be given by any parish or township, or by any public charity."

(*d*) *An Assignment of an Apprentice requires a Stamp.*

Morris v. Cox, 9 Dowl. 661; 3 Scott, N. R. 216.

The assignment requires a stamp.[1]

By indenture of apprenticeship the apprentice agreed to serve for five and a-half years, but at the end of two years he was transferred to a new master, to serve him as apprentice for the remainder of the term of five and a-half years, with a stipulation that for certain considerations his new master should provide for him during one year longer than the original term, and the assignment had only a stamp of 1*l.* affixed to it; it was held that this was sufficient, and that the deed of transfer did not require an additional stamp for the new term of one year.

(*e*) *Parish Money paid as a Premium on the Assignment of a Parish Apprentice does not render a Stamp necessary under* 55 *Geo.* 3, *c.* 184.

Rex v. Llangunnor, 2 B. & Adol. 616.

Parish money paid as a premium on the assignment of a parish apprentice does not render a stamp necessary under 55 Geo. 3. c. 184.

An unstamped assignment of a parish apprentice stated that D. E., the new master, in consideration of 3*l.* 10*s.* paid him by H., the old master, agreed to accept the apprentice, &c.

The Court held that parol evidence was admissible to show that the money paid on the assignment of the apprentice was parish money, and therefore that the instrument did not require a stamp. *See* sched. to act, Part I.

(*f*) *Nor where the Fund is supplied by a Public Charity.*

Rex v. Fakenham, 2 Ad. & E. 528; 4 Nev. & M. 553.

Nor where the fund is supplied by a public charity.

The master received a premium from trustees under a charitable bequest, and after service of above three years, at the request of the apprentice, agreed verbally that he should serve the remainder of his time with the master of a different trade, and pay a sum, as part of the premium paid on the binding; which was done without the knowledge of the trustees. On the question, whether the indenture of assignment required a stamp, or whether it came within the exemption as to indentures, or assignments thereof, by or at the sole charge of any public charity,—

The Court held the assignment void for want of a stamp. The assignment was a new arrangement entirely. It was impossible to say here that it was any act in which the trustees concurred, or that money of the charity was at all concerned. *See* 55 Geo. 3, c. 184, sched. Part I.

(*g*) *And where a Stamp is necessary it need not be affixed within Two Months, as directed by* 9 *Anne, c.* 9.

Rex v. Inhabitants of Ide, 2 B. & Adol. 866.

And where a stamp is necessary it need not be affixed within two months, as directed by 9 Anne, c. 9.

The assignment of a parish apprentice was executed by B. and L., and two justices; and at the time of the production of it in court, on the hearing of an appeal, it bore a 20*s.* stamp, which had been affixed on payment of the penalty a short time before, and more than two months after the date and making of it. B. paid L. 5*l.* as the consideration of this transfer of the apprentice to him,

[1] *See* also *R. v. St. Paul's, Bedford,* 6 T. R. 452. Where no money or other matter forms a consideration for the assignment, the indenture ought to have a half-crown stamp (16 & 17 Vic. c. 61, sch.); and if a new consideration be paid, then like duty in proportion to amount as on original indenture.

but this was not set out in the assignment, nor was any mention made of it therein.

The Court held, an assignment of a parish apprentice is not subject to the regulations imposed by the stat. 9 Anne, c. 9, and need not therefore be stamped within two months, nor need the consideration paid for such assignment be set forth in it.

II. Rights and Obligations of Master.

(A) *He is bound to Instruct, &c. his Apprentice.*

(*a*) *But if an Apprentice run away, and by his Misconduct disqualify himself from serving his Master, no Action lies against the Master for not taking him back.*[1]

Hughes v. Humphreys, 6 B. & C. 680; 9 D. & R. 715.

If an apprentice run away, and by his misconduct disqualify himself for serving his master, no action lies against the master for not taking him back.

To an action of covenant by a father for not receiving and clothing his son, an apprentice.

Plea. That after the indenture defendant did receive, &c. until the apprentice ran away and never returned.

Replication. That after the apprentice so ran away, to wit, on a certain day, the defendants refused to receive him back, then or at any other time, and thereby discharged him from their service and employ.

Rejoinder. That before such refusal the party enlisted as a soldier, and was during the whole time incapacitated from serving defendants as such

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[1] By the custom of London, a freeman may turn away an apprentice for gaming. 2 Vern. 291. If an apprentice marries without the privity of his master, that will not justify him in turning him away, but he must take his remedy on the covenant (id. 492); nor can he turn him away on account of his having been absent for a short time, or other breach of covenant (*Winstone v. Linn*, 1 B. & C. 460; 2 D. & R. 465; *see* 28 L. J. Ex. 153); nor on account of his being sick or so lame as to be unable to work. *R. v. Inhabitants of Hales Owen*, 1 Str. 99.

Where a tradesman took an apprentice, with whom he received a premium, and covenanted to instruct and maintain him, in an action on that covenant the master pleaded that the apprentice refused to obey his orders, and left his house, saying that he would not return again. To which it was replied, that, afterwards, the apprentice returned and offered to obey his commands, but the master refused to receive him. *Held*, that, if the apprentice had, under these circumstances, stopped away an unreasonable time (which ought to have been stated in a rejoinder), the master would have been justified in not receiving him; but that he was not at liberty to turn him away, or refuse to admit his apprentice into his house, for misconduct and absenting himself for a few days, but should have sued on his covenant. *Winstone v. Linn*, 1 B. & C. 460; S. C. 2 D. & R. 465. *See* 32 L. T. 282.

In *Wright v. Gihon*, 3 Car. & P. 583, an apprentice having received permission to be absent, stayed away, on one occasion, three or four days, and on another a week, beyond the time allowed; but after this, on the application of his friends, the plaintiff received him back. In an action against the surety, *Best, C. J.*, held that the master's conduct, afterwards, amounted to a condonation of the offence, by taking him back. But, still, that must be specially pleaded.

In a case where the apprentice ran away, after a short time, and enlisted as a soldier, and the master on his return refused to take him back, the Court held they could not compel any return of premium. *Cuff v. Brown*, 5 Price, 297. It was decided otherwise, however, with respect to an attorney's clerk, the Court considering that they had a more extensive authority over their own officers. *Ex-parte Prankerd*, 3 B. & A. 257. *Ex-parte Bayley*, 9 B. & C. 691.

In *Mercer v. Whall* (5 Q. B. 447; 14 L. J. Q. B. 267; 9 Jur. 576), the defendant, an attorney, pleaded in justification of the dismissal of an articled clerk that he conspired with another attorney to induce the defendant's clients to leave him, and in pursuance thereof disclosed the defendant's professional secrets, and calumniated him to his clients. In *Wise v. Wilson* (1 C. & Kir. 662), the action was against a surgeon for breach of contract in not instructing a "pupil and assistant," with whom a premium had been paid. The defendant justified a dismissal on the ground of misconduct. *Lord Denman, C. J.*, distinguished the case from that of an apprenticeship, saying it was a mixed relation of apprentice and servant, and that the master was justified if, by the misconduct of the plaintiff's son in being frequently intoxicated, and employing the shop-boy to compound the medicines which he ought himself to have compounded, real danger was occasioned to the surgeon's practice.

apprentice, and that plaintiff never requested defendant to receive back the apprentice when he was able to return to the service.

Surrejoinder. That a little time after such enlisting, to wit, &c. defendants refused then or ever to take back the apprentice into their service, and thereby discharged him.

The Court held that the surrejoinder was bad, and the plea a good bar to the action, as the plea was not avoided by the subsequent pleadings of the plaintiff; besides, the apprentice had, by his conduct, done that which disqualified him from serving his master.

(B) *He is entitled to his Apprentice's Earnings.*

BARBER v. DENNIS, 6 Mod. 69; 1 Salk. 68.

The master is entitled to the earnings of the apprentice.

A waterman's widow took an apprentice, who went to sea and earned ten tickets, which came into the defendant's possession. The widow brought trover for the tickets, and had judgment; for what an apprentice gains is for the use and benefit of his master, and it is not material whether he be legally an apprentice or not, for it is sufficient if he be so in fact.[1]

(C) *In case of Misconduct of Apprentice, he may Sue those who covenanted for his good Behaviour in that particular.*

WHITLEY v. LOFTUS, 8 Mod. 190.

The master may maintain an action against any adult person who has covenanted for the good behaviour of the infant in the deed of apprenticeship.[2]

In an action against the father of an apprentice for breach of covenant in the indenture of apprenticeship, that the apprentice should faithfully account for all the goods of his master which should come to his hands, it was on behalf of the defendant objected that the action ought not to be brought against the father, for he did not covenant that his son should truly account, &c., he only covenanted for himself separately to pay the money, which he should give to the plaintiff for taking his son apprentice; and the clause at the end of the indenture was in the singular number, namely, that each of them (the father and son) binds himself for the true performance thereof, so that the father cannot properly be said to bind himself for his son, but only for himself.

The Court was of opinion that the very end of binding the father was to answer the wrong which might be done by the son to his master; therefore the father must be bound for his son's true performance of the articles: and they said it was a joint-covenant.

(D) *The Master cannot, unless there was an express Promise, recover for Board of proposed Apprentice taken on Trial.*

EARRATT v. BURGHART, 3 Car. & P. 381.

There is no implied promise by the parent to pay for the board

In an action for board and lodging, it appeared that the defendant's son went to reside with the plaintiff, with a view to his taking him as an apprentice, and continued there for three months, behaving well; and after that, for six months longer, behaving so ill that he was at length dismissed by the plaintiff;

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[1] *See* Co. Litt. 117, note a.; 1 Ves. 83. *Hill v. Allen*, id. *Lightly v. Clouston*, 1 Taunt. 112. *Foster v. Stewart*, 3 M. & S. 191.

[2] *Elwes v. Vaughan*, 1 Lutw. 386. *Branch v. Ewington*, Dougl. 518. Every slight absence is not a breach of the covenant against absenting. Thus, in an action against a surety for the good conduct of an apprentice, on a covenant that the apprentice should not absent himself during business hours, it is no breach that the apprentice was later of returning on a Sunday evening than the time stipulated for in his indenture. *Wright v. Gibbon*, 3 Car. & P. 583. The liability of the surety continues, though the infant should, on coming of age, elect to avoid the deed. *Cuming v. Hill*, 3 B. & A. 59.

For form of declaration on indentures of apprenticeship, *see* Bull. & L. Pl. 38, 39; 2 Chit. Pl. 370. *Hughes v. Humphreys*, 6 B. & C. 680.

and lodging of an apprentice during the time he resides with the master on trial.[1]

and to a demand made by the plaintiff for his board and lodging, the defendant promised to call on the plaintiff, without denying the claim.

Lord Tenterden, C. J., directed the jury that they should not allow for the first month, that being the usual period for boys to go on liking, nor for the three months he behaved well; and with respect to the remaining part of the time according as they thought there was any contract, express or implied, for any part of the board and lodging.

(E) *He may maintain an Action for Enticing Away his Apprentice.*

Cox v. Muncey, 6 C. B. (N. S.) 375.

He may maintain an action for enticing away an apprentice, but there must be a valid contract of apprenticeship.[2]

This was an action for enticing away an apprentice. It appeared at the trial that the indenture of apprenticeship was vitiated by reason of the consideration or premium not being truly stated as required by the stat. 8 Anne, c. 9, s. 35, the 36th section of which renders such contracts void. It having been proved that the apprentice was enticed away by the defendant, a verdict was entered for the plaintiff.

On motion to enter the verdict for the defendant,—

Cockburn, C. J. "We all are strongly of opinion that the count for

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[1] In *Wilkins v. Wells*, 2 Car. & P. 231, *Garrow, B.*, ruled that there was no contract on the part of the father to pay for the board and lodging of his son; during several months he was maintained by the plaintiff, to whom he had been sent on trial for a month, but had been retained beyond that time, and then dismissed by the plaintiff without cause. So where the defendant had placed his son with a chemist to learn the business, and with the intention of his being apprenticed, but no indentures were executed, and the son served the chemist for five years, and was instructed in the business; the Court held that, in the absence of any agreement to pay for his board and lodging, the master could recover nothing in respect thereof from the father. *Attwaters v. Courtney*, Car. & M. 51.

[2] An action lies by the master for enticing away his servant or apprentice, but not an indictment. *R. v. Daniel*, 6 Mod. 182. *Reevely v. Mainwaring*, 3 Burr. 1306. *Gunter v. Astor*, 4 Moore, 12. *See* also *Reg. v. Daniel*, 1 Salk. 380; 2 Ld. Raym. 1116. *Lumley v. Gye*, 2 E. & B. 224. An action lies for harbouring a servant or apprentice, without any evidence of the defendant's having enticed him away, for the very act of giving the servant employment is affording him the means of keeping out of his former service. See *Ashcroft v. Bertles*, 6 T. R. 652. The plaintiff, however, must show that the defendant harboured the servant or apprentice after regular notice of the service or apprenticeship, and a requisition to the defendant to deliver him up or not to harbour him any longer. See *R. v. Edwards*, 7 T. R. 745. *Fawcett v. Beavres*, 2 Lev. 63; Peake, N. P. 55. *Dinsmore v. Greenbank*, Willes, 582. There must be some damage *per quod servitium amisit* proved. *Ex-parte Lansdowne*, 5 East, 39. *Bird v. Randall*, Burr. 1352. The measure of damage is the loss consequent upon causing the apprentice to leave the plaintiff's employment. *Gunter v. Astor*, 4 Moore, 12.

Notice of Demand of absent Apprentice before Suit.

The following form of notice is suggested (1 Ch. Gen. Pr. 449):—

J. T., an absent apprentice (or servant).

Take notice, that J. T., now in your service or employ, or harboured by you, is my apprentice for an unexpired term of years (*or* "is my servant to complete certain work still unfinished"), and is now unlawfully absent from my service without my consent, and that if you or any person shall, after this notice, harbour, or retain, or employ, or cause to be employed or retained, the said J. T., or neglect to cause him immediately to return to my house and premises, situate at there to perform his duty as such apprentice (*or* "servant"), I shall immediately cause legal proceedings to be instituted against you and all others so offending for such misconduct. And I further give notice that I shall attend at your house, situate at between the hours of eleven and twelve of the forenoon of the day of instant, there again to demand and to receive and take away my said apprentice (*or* "servant").

Dated, &c.

To Mr. A. B., and all others.

The master is not entitled to a *habeas corpus* for his apprentice. To induce the Court to grant the writ, it must appear that the apprentice is detained against his will (*Rex v. Reynolds*, 6 T. R. 497. *Rex v. Edwards*, 7 id. 745), though it should seem that the Chief Justice may, at the instance of the master, issue his warrant to bring up his impressed apprentice without any assent on the part of the latter. *Rex v. Edwards*, 7 T. R. 745. If it should appear by the return that the apprentice was legally committed for running away, he will be remanded. *Ex-parte Gill*, 7 East, 376.

enticing away the apprentice cannot be maintained. The language of the stat. 8 Anne, c. 9, is clear and peremptory. There is no valid contract of apprenticeship. But we incline to think, if the action had been brought on the footing of the youth being the *servant* of the plaintiff, the defendant would have been liable, there being evidence of enticement. We are, therefore, much disposed to allow the declaration to be amended, and to send the cause down again, unless the parties will agree to a *stet processus*."

(F) *Or for a Personal Injury inflicted on the Apprentice, occasioning Loss of Service.*

HODSOLL v. STALLEBRASS, 11 Ad. & E. 301; 3 Per. & D. 200; 8 Dowl. 482.

In an action by the master for an injury to the apprentice causing loss of service, prospective damages are recoverable.

In an action for permanently injuring the hand of an apprentice, whereby loss of service accrued, the master may recover for the prospective damage, and is not limited to the loss up to the time of the commencement of the action; for the damage alone is not the cause of action, but the illegal act and damage together; and the master could not bring a fresh action as often as fresh damage resulted.

(G) *He is bound to provide for his Apprentice sufficient Food, Clothing, and Lodging, &c.*

And the master is liable to indictment for neglect to supply necessary food, clothing, or lodging, or for an unlawful assault.[1]

By the 14 & 15 Vic. c. 11, s. 1, "where the master or mistress of any person shall be legally liable to provide for such person as an apprentice, or as a servant, necessary food, clothing, or lodging, and shall wilfully and without lawful excuse refuse or neglect to provide the same, or where the master or mistress of any such person shall unlawfully or maliciously assault such person, whereby the life of such person shall be endangered, or the health of such person shall have been or shall be likely to be permanently injured, such master or mistress shall be guilty of a misdemeanour, and being convicted thereof shall be liable to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any period not exceeding five years."

III. RIGHTS AND OBLIGATIONS OF APPRENTICE.[2]

(A) *The Obligation of the Apprentice to serve is discharged by the Master abandoning the Trade which the Apprentice was to learn.*

ELLEN v. TOPP, 6 Ex. 424; 20 L. J. Ex. 241; 15 Jur. 451.

The obligation of the apprentice to serve is discharged by

This was an action on an indenture of apprenticeship by the master against the father of the apprentice for non-fulfilment of the contract, and the breach assigned was, that the apprentice did not, and would not, faithfully serve the

[1] The guardians or overseers may be required by the certificate of the justices before whom the complaint is made to conduct the prosecution. Sect. 6. The costs of the prosecution may be allowed in like manner as costs of prosecutions under 7 Geo. 4, c. 64, and may be ordered by the Court of Queen's Bench, in case the indictment has been removed into that court. 14 & 15 Vic. c. 11, s. 2. Independently of the above statute, an indictment at common law might be maintained against the master for not providing sufficient food for an apprentice or servant of tender years, and under his dominion and control, whereby the infant became sick. *R. v. Ridley*, 2 Camp. 650. *R. v. Friend*, R. & R. C. C. 20.

[2] The apprentice has a right to sue his master in case of non-observance of any of the covenants contained in the deed. On the other hand, he is not liable to any action for the non-performance of any stipulations in the indenture whilst he continues an infant (*Gilbert v. Fletcher*, Cro. Car. 179), nor afterwards, if he disaffirms the contract on coming of age, unless by the custom of London. 1 Burns, J. 191, 29th ed. *See* a form of declaration by an apprentice against his master, to whom he had been assigned, for not instructing him, &c. *Morris v. Cox*, 2 Man. & G. 659. As to whether the law would imply a covenant to employ the apprentice, see *Aspdin v. Austin*, 5 Q. B. 671. *Dun v. Sayles*, id. 685.

the master abandoning the trade which the apprentice was to learn.[1]

plaintiff, according to the tenor and effect, true intent and meaning, of the said indenture; but on the contrary thereof, the said Richard Topp, during the said term of five years in the said indenture mentioned, did unlawfully absent himself from the service of the plaintiff, and hath from thence hitherto remained and continued absent from the service of the plaintiff, contrary to the tenor and effect of the said indenture. On the part of the defendant there was a plea craving oyer of the indenture, from which it appeared that the master was to teach the apprentice, and the apprentice was to become his apprentice in the business of an auctioneer, appraiser, and cornfactor. The defendant pleaded that the master had discontinued one of those occupations, and had ceased to carry on the business of a cornfactor. To this plea there was a replication, that the alteration was made by the consent of the parties, but without setting out any deed. To that replication there was a demurrer.

Pollock, C. B. The question that we have now to consider is, whether the plea is a good plea or not. On the part of the plaintiff, it was not contended that the replication could be supported. It is obviously bad. Such a parol consent could not entitle the plaintiff to maintain an action of covenant in this form, which is founded altogether on a deed under seal. The question, therefore, resolves itself into the only matter really argued before us, which was, whether the plea was good. Service with a man, "after the manner of an apprentice," imports, according to the meaning of those words, as ordinarily understood, that the party served should be carrying on the trade which the apprentice is to learn, otherwise, the one is to teach and the other to learn the trade, not as between master and servant, but as instructor and pupil. When, therefore, the one party ceases to carry on the trade, he, by his act, makes it impossible for the other to serve him after the manner of an apprentice, and he cannot be heard to complain that the other party has not done that which he wilfully made it impossible for him to do. To this particular covenant to serve, the relative duty to teach seems to us to be directly in the nature of a condition precedent, and we are not able to distinguish between the three trades of an auctioneer, appraiser, and cornfactor, so as to say that one is a more substantial part of the contract than the other.

Judgment for the defendant.

IV. Assignment of Apprentice.[2] (As to Stamp, *see* p. 401.)

And though by the consent of all parties the services of the apprentice may be transferred, yet in the generality of cases this operates as an agreement between the master and the transferee, that the apprentice shall, with his own consent, perform his contract to the former by doing service to the latter. *See Caister v. Eccles*, 1 Ld. Raym. 683; 1 Bott, 580.

By the custom of London, indeed, an assignment, properly so called, of an apprentice, may be made by one freeman to another (Com. Dig. London, Keble, 255), so as to transfer the benefit of the covenants to the assignee.

V. Dissolution of Apprenticeship.[3]

(A) *By Death of Master.*

(a) An Apprentice is not bound after the Death of his Master to serve his Executor or Administrator.

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[1] As to effect of dissolution of partnership, see *Lloyd v. Blackburn*, 9 Mee. & W. 363; 1 Dowl. N. S. 647.

[2] A master cannot assign his apprentice without the consent of the latter. *Coventry v. Woodhall*, Hob. 134. *Baxter v. Burfield*, 2 Str. 1266. An award that an apprentice shall be assigned, was in one case held void. *Horne v. Blake*, cited 2 id. 1267.

[3] May be by death; by consent; by misconduct; by coming of age; by award of justices; by bankruptcy or insolvency. It seems that a parish apprentice under age is capable of assenting to the cancellation of his indentures. *Rex v. Guinear*, 3 Nev. & M. 297; 1 Ad. & E. 152; *post*, Settlement.

BAXTER v. BURFIELD, 1 Bott, P. L. pl. 696, 6th ed.; S. C. 2 Str. 1266.

Debt upon bond for performance of indenture of apprenticeship.

The apprentice is not bound after the death of his master to serve his executor or administrator.

Plea. Condition performed. Breach assigned, that the defendant being put apprentice to plaintiff's husband, who lies dead, he refused to serve his executrix. The plaintiff was alleged to carry on the same business of a mariner by herself and servants.

Demurrer and Joinder. This having been twice argued, *Lee, C. J.*, delivered the opinion of the Court, that the executrix could not maintain this action, for, "First, it appears by the words of the covenant, that it was only to serve with the master, and no mention of executors or administrators. Secondly, from the nature of the covenant; for covenant between master and apprentice implies that he shall only serve the master, for he is the only person he is bound to, and so it is determined in the case of *Coventry v. Wood*, Hob. 134. And though it is said that a master has an interest in his apprentice, yet it is not such a one as a person has in lands and chattels, which is transferable, but is an interest coupled with a personal trust, annexed to the person of the master, which cannot be assigned, and is gone by his death; like the case of a guardian. See *Bedell v. Constable*, Vaugh. 183. Thirdly, another reason why the apprentice is not bound to serve the executor is, because the covenant to instruct is personal, and dies with the master, and cannot extend to the executors, who may not be capable of instructing. See *Wadsworth v. Gye*, 1 Keb. 820; S. C. 1 Sid. 216.

"The interest the master has in his apprentice is a right to his service only, as appears by the case of *Hall v. Walker*. By this is probably meant the case of *Walker v. Hull*, 1 Lev. 177, which is stated in the report of *Baxter v. Burfield*, in Strange, to have been denied by the Court. Apprentices, how far assignable, is a single case, and certainly is not law, as appears by 1 Salk. 68, *Castor v. Aicles*. And there was afterwards another case in this court of *Hems v. Drake*. Debt on bond to stand to an award that an apprentice should be assigned, and the award was held bad, for an indenture of an apprenticeship is not assignable by law or equity, unless it be by custom, and then by the master during his life; and even then, not without the consent of the apprentice.

"If, therefore, a master cannot assign during his life, because his indenture is fiduciary, it is absurd to say he shall do it by his death. There is a great difference between a covenant to maintain and a covenant to instruct, for the first is a lien upon the executor, though not named, in right of the testator's assets being come to his hands; but the other is a fiduciary trust annexed to the person of the master. In Wentworth's *Office of Executor* it is said that apprenticeship is gone by the death of the master, and that he is not bound to serve the heir or executor. We therefore are of opinion, upon the whole, that the covenant to serve is confined to Baxter only, as there is no mention of his executors or administrators; and that the interest in the apprentice is a mere personal trust, not assignable in the life of the master, either in law or equity, except by custom and with the consent of the apprentice; and if not assignable in his life, is not transferable to his executors, and therefore the plaintiff cannot maintain her action."[1]

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[1] So in *Rex v. Peck*, 1 Salk. 66, *Eyre, J.*, said, "an apprentice is a personal trust between the master and servant, and determines by the death of either of them; and by the death of either of them, the end and design of the apprenticeship cannot be attained; and it may be the executor is of another trade." *See* also *Rex v. Eukiny*, Burr. Sess. Cas. 320. *Rex v. Chaplin*, Comb. 324. In *Rex v. Channell*, 3 Keb. 519, it was held, that the assignment of an apprentice by executors is not good, though the apprentice subscribes the assignment. But if the executor, at the pauper's request, agree that he shall go to live with another person, he may gain a settlement by a service with such person. *R. v. Stockland*, Dougl. 70. So a servant may gain a settlement by hiring and service under a service with the executor of the master. *R. v. Ladock*, Burr. Sess. Cas. 179.

(B) *By coming of Age of Apprentice.*

(*a*) *If of full Age, the Apprentice may elect to avoid the Agreement.*

Ex-parte Mary Ann Davis, 5 T. R. 715.

If of full age, the apprentice may elect to avoid the agreement.[1]

The apprentice bound herself by indentures for seven years, and was described in the indentures as of the age of fourteen; but, in fact, she was at the time of the binding above seventeen years. On her attaining twenty-one years and upwards, an *habeas corpus* was moved for, to bring her up to be discharged from the indentures.

Per Lord Kenyon. "It is clear the apprentice must be discharged; every indenture of an infant is voidable at his election, and in cases of that description the master must trust to the covenant of those who engaged for the infant. Where the binding is under the authority of an act of parliament, that necessarily does away the power of electing to vacate the indenture. But I know of no act which prohibits the party, in a case like the present, to make such election upon coming of age. According to the argument of counsel against the rule, an infant who has improvidently bound himself to the age of *fifty*, or otherwise, would be bound to serve till that time, but it is impossible to support such a proposition. The apprentice ought not to have been bound longer than she was twenty-one: we must now discharge her." The other judges concurred.

(C) *By Consent.*

(*a*) *And even while under Age an Apprentice may consent to avoid the Agreement, if it be manifestly for his Benefit so to do.*

Rex v. Great Wigston, 3 B. & C. 484.

And even while under age an apprentice may consent to avoid the agreement, if it be manifestly for his benefit so to do.[2]

An infant bound himself apprentice for seven years, and served three of them; having then quarrelled with his master, the latter offered to sell him the remainder of his time for sixpence. The infant paid the money and went away, and bound himself to another master in another parish. The question was raised whether any settlement was acquired under the second binding.

Abbott, C. J. "It is a general rule of law that an infant cannot do any act to bind himself, unless it be manifestly for his benefit. Binding himself an apprentice has been considered such an act, and, therefore, it has been held that an infant is competent to make such a contract. If, then, it is for the benefit of the infant to bind himself an apprentice, it is impossible to say generally that it is for his benefit to dissolve such a connexion; such a position involves a contradiction. That being the general rule, we must inquire whether in the particular instance it is for the advantage of the infant to dissolve his apprenticeship. In the case of *Rex v. Mountsorrel*, 3 M. & S. 497, the master had absconded, and the infant could no longer derive instruction or support from him. Under those circumstances the Court thought that the dissolution of the relation of master and apprentice was beneficial to the latter, for unless that had been done the apprentice must have remained unemployed and uninstructed. Here no facts are stated whence we can infer that it was for the infant's benefit to put an end to the apprenticeship. This case, therefore, falls within the

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[1] An apprentice bound by indenture for seven years while under twenty-one, is entitled to put an end to the apprenticeship when he attains that age; but must give to his master reasonable notice of his intention so to do. *Coghlan v. Callaghan*, 7 Ir. Com. L. R. 291.

[2] It is equally clear, that as an adult is bound by his contract with an infant, the master himself cannot, without the concurrence of the apprentice, put an end to the apprenticeship on account of the apprentice having come of age; and if a person of full age bind himself apprentice for seven years, he cannot legally vacate his contract. An infant may insist on his nonage as a defence to an action of covenant on the indenture. *Gylbert v. Fletcher*, Cro. Car. 179. See *Lilly's case*, 7 Mod. 16. *Whittingham v. Hill*, Cro. Jac. 494.

general rule. The first binding not being dissolved, the second was necessarily invalid, and the service under it could not confer a settlement."[1]

(D) *By Misconduct of Apprentice.*

(a) *The Master cannot justify Refusal to Instruct, &c. the Apprentice on the ground of mere Misconduct on the Apprentice's part.*

PHILIPS v. CLIFT, 4 H. & N. 168; 28 L. J. Ex. 153.

The master cannot justify refusal to instruct, &c. the apprentice on the ground of mere misconduct on the apprentice's part.[2]

The declaration was for breach of the covenants in a deed of apprenticeship to instruct the apprentice and provide him with board and lodging. The defendant pleaded that the apprentice conducted himself in so improper and dishonest and unfaithful a manner in the defendant's said business, and defrauded and robbed the defendant, so that it became unsafe for the defendant to continue the said W. R. in his service, or to continue to instruct him in his business, or to permit him to reside or remain with the defendant; whereupon, as he lawfully might, he dismissed him from his service, and refused any longer to permit him to remain therein.

The Court, on demurrer, held the plea to be bad, for the master may correct the misconduct of his apprentice by moderate chastisement, but has no power on that ground to determine the contract; and without saying whether, if the apprentice were convicted of a *felonious* stealing, that would justify the master, nothing of that kind appeared on the plea.

(E) *By Bankruptcy of Master.*

(a) *On Bankruptcy of Master the Apprentice is discharged from his Indentures.*

EX-PARTE HAYNES, 2 Glyn & J. 122.

And so he will be, although serving under an agreement of apprenticeship not executed.[3]

The agreement of apprenticeship was concluded, and the apprentice-fee was paid, and the apprentice was, at the time of the bankruptcy of his master, serving under the concluded agreement, and the execution of the indentures had not taken place through mere inattention.

The Court held that the case was within the 49th section of the Bankrupt Act, 6 Geo. 4, c. 16,[4] which enacts that the bankruptcy shall be a discharge of the indentures, and that the father was entitled to a return of part of the apprentice-fee.

VI. JURISDICTION OF JUSTICES OF THE PEACE CONCERNING APPRENTICES.

(A) *The Justices may entertain Complaints of Masters and Apprentices against each other, and may Discharge the Apprentice from his Apprenticeship.*

Justices may entertain complaints of masters and ap-

5 Eliz. c. 4, s. 35, enacts, that "if any such master shall misuse or evil entreat his apprentice, or the apprentice shall have any just cause to complain, or the apprentice do not his duty to his master, then the said master or appren-

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[1] See *Rex v. Gurnear*, 1 Ad. & E. 152. The indentures ought to be cancelled (*Rex v. Spawnton*, Burr. 801), or mutually given up. *Rex v. St. Mary Kallendar*, id. 274. *Rex v. Harberton*, 1 T. R. 139. *Rex v. Chipping Warden*, 8 id. 109. *Rex v. Skeffington*, 3 B. & A. 382.

[2] In *Shepperd v. Maidstone*, 10 Mod. 144, the action was on a bond breach, that property of the East India Company came to the hands of the defendant, as their servant, which he unlawfully and fraudulently embezzled, and converted to his own use, &c. contrary to the terms of the indenture under which he was engaged to serve. Demurrer. *Per Cur.* Had the party been an apprentice, the breach here assigned would have been a forfeiture of his indentures.

Sed vide Gray v. Cookson & Clayton, 16 East, 13; *see* 1 Roll. Abr. 124; 1 Str. 227; 2 Burr. 773; Gilb. Rep. 238. *See ante*, p. 403.

[3] *See* also *ex-parte Soames*, 3 Deac. & Chit. 320.

[4] *See* 12 & 13 Vic. c. 106, s. 170, to same effect. An articled clerk was held not to be an apprentice within this section. *Ex-parte Prideaux*, 3 Mylne & C. 327. But such a person may acquire a settlement by apprenticeship, 29 L. J. M. C. 146; S. C. 6 Jur. N. S. 700.

prentices against each other, and may discharge the apprentice from his apprenticeship if the master was in fault, and punish the apprentice if the fault was in him.[1]

tice being grieved, and having cause to complain, shall repair unto one justice of the peace within the county, or to the mayor or other head officers of the city, town-corporate, market-town, or other place where the said master dwelleth, who shall by his wisdom and discretion take such order and direction between the master and his apprentice as the equity of the cause shall require; and if, for want of good conformity with the master, the said justice of peace, or the said mayor or other head officer, cannot compound and agree the matter between him and his apprentice, then the justice or the mayor, or other head officer, shall take bond of the master to appear at the next sessions, then to be holden in the county, or within the said city, town-corporate, or market-town, to be before the justices of the said county, or the mayor or head officer of the said town-corporate, or market-town, if the master dwell within any such; and upon his appearance and hearing of the said matter before the said justices, or the mayor or other head officer, if it be thought meet unto them to discharge the apprentice of his apprenticehood, then the justices, or four of them at least, whereof one to be of the quorum, or the mayor or head officer, with the consent of three other of his brethren, or men of best reputation within the city, town-corporate, or market-town, shall have power by authority hereof, in writing under their hands and seals, to pronounce and declare that they have discharged the apprentice of his apprenticehood; and the cause thereof and the writing so being made and enrolled by the clerk of the peace, or town-clerk, amongst the records that he keepeth, shall be a sufficient discharge for the said apprentice against his master, his executors, and administrators, the indenture of the said apprenticehood, or

[1] The intention of the statute of 5 Eliz. c. 4, s. 35, is, that a master shall be discharged of a bad apprentice, as well as that an apprentice shall be discharged of a bad master. *Hawkesworth and Hillary's case*, 1 Saund. 314; 1 Mod. 2. *Rex v. Duhammel*, 2 Show. 289; Skin. 108. The sessions have a discretion either to punish or discharge the apprentice. *Watkins v. Edwards*, 1 Mod. 286; S. C. 1 Vent. 174; 2 Keb. 696. But these powers can only be executed by general sessions. *Anon.* Skin. 98; S. C. 1 Bott, 578. An original jurisdiction is vested in the sessions as to discharging an apprentice. *The King v. Gill*, 1 Str. 143; 1 Bott, 577; S. P. *Argliss v. Heaseman*, Ca. Temp. Hard. 101; but see opinion of *Twisden and Ramsford*, 1 Mod. 287; 1 Salk. 67. And, therefore, the sessions may discharge an apprentice, though no complaint has been made to two justices. *The King v. Hayes*, 12 Mod. 349.

A complaint in writing, preferred by the master and verified by the oath of another, is sufficient to give magistrates jurisdiction to discharge an apprentice under 20 Geo. 2, c. 19, s. 4. *Finley v. Jowle*, 12 East, 248. The justices and sessions have jurisdiction over the place where the master lives, although the apprentice is bound elsewhere. *The King v. Collingbourn*, 2 Ld. Raym. 1410; S. C. 1 Str. 663. It was formerly held that the power vested in justices extended only to such trades as are specially named in the act. *The King v. Gateby*, 5 Mod. 138; Carth. 198, 366; Comb. 353; 2 Salk. 471. *Watkins v. Edwards*, 1 Vent. 174; 2 Keb. 822. But in subsequent decisions it has been determined that it extends to every description of apprentice. *The King v. Collingbourn*, 2 Ld. Raym. 1410; 1 Str. 663. The sessions, however, have no authority to order the executors, master of an apprentice, to maintain the latter. *The King and Queen v. Pratt*, 12 Mod. 27; 1 Salk. 67; 3 id. 41. *Pett v. The Inhabitants of Wingfield*, Carth. 231. But under the equity of the statute magistrates may compel a master to refund an apprentice-fee. *Dillian's case*, 1 Salk. 67. *Rex v. Cherry*, Const. 203. *The King v. Johnston*, 1 Salk. 68. *The King v. Vandeleer*, 1 Str. 69, *contra*. Or to receive back his apprentice. *Rex v. Barney*, Comb. 405. The sessions may order the discharge of an apprentice, although the master does not appear. *Ditton's case*, 2 Salk. 490; 1 Bott, 572. But not unless the master has been summoned. *Argliss v. Heaseman*, Ca. Temp. Hard. 101; S. C.; 2 Str. 1013. Sickness does not authorise the sessions to discharge a master from his apprentice. *The King v. The Inhabitants of Hales Owen*, 1 Str. 99.

The order for an apprentice's discharge must be enrolled according to the requisitions of the statute, and signed by four justices. *Anon.* 12 Mod. 83. *Gately v. Green*, Comb. 344. *Punting's case*, 3 Salk. 41. The return by a magistrate of a regular conviction of an apprentice for absenting himself was holden conclusive by the Court of King's Bench in discharge of a *habeas corpus*, though, from matter *dehors*, the conviction appeared illegal. *Ex-parte Gill*, 7 East, 376; 3 Smith, 369.

It was long thought, that whenever jurisdiction is given by the legislature to discharge an apprentice, the power of ordering a proportional restitution of the apprentice-fee was incident to it. *Rex v. Vandeleer*, 1 Str. 69. *Rex v. Amis*, 1 Bott, 574. But the contrary has been determined in *East v. Pell*, 4 Mee. & W. 665.

any law or custom to the contrary notwithstanding; and if the default shall be found to be in the apprentice, then the justices, or the mayor, or other head officer, with the assistance aforesaid, shall cause such due correction and punishment to be ministered unto him as by their wisdom and discretions shall be thought meet."

(B) *The Jurisdiction of Justices in cases of Apprentices upon whose Binding out no larger Sum than 25l. has been paid.*

Jurisdiction of justices applies to apprentices upon whose binding out no larger sum than 25*l.* has been paid.

By 4 Geo. 4, c. 29, after reciting 20 Geo. 2, c. 19, and 33 Geo. 3, c. 55, it is enacted, that after August, 1823, the power of justices with respect to apprentices under these acts shall be extended to all apprentices upon whose binding out no larger sum than 25*l.* was or shall be paid.

(C) *In case of Misconduct of Master.*

(*a*) *The Justices may Discharge the Apprentice if the Master has been guilty of Cruelty towards him.*

And justices may discharge a parish apprentice, or any other apprentice, where the premium did not exceed 25*l.*, if he has been ill-treated by his master.[2]

By 20 Geo. 2, c. 19, s. 3, "it shall and may be lawful to and for any two or more justices of the peace of the county, riding, city, liberty, town-corporate, or place where such master or mistress shall inhabit, upon any complaint or application by any apprentice put out by the parish, or any other apprentice upon whose binding out no larger sum than 5*l.*[1] of lawful British money was paid, touching or concerning any misusage, refusal of necessary provision, cruelty, or other ill-treatment of or towards such apprentice by his or her master or mistress, to summon such masters or mistress to appear before such justices at a reasonable time to be named in such summons; and such justices shall and may examine into the matters of such complaints; and upon proof thereof made upon oath to their satisfaction (whether the master or mistress be present or not, if service of the summons be also upon oath proved), the said justices may discharge such apprentice by warrant or certificate under their hands and seals, for which warrant or certificate no fees shall be paid."

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[1] Now 25*l.* by virtue of 4 Geo. 4, c. 29.

[2] By 32 Geo. 3, c. 57, s. 11, in every case where any parish apprentice whatsoever shall be discharged from his apprenticeship by two justices, under and by virtue of the statute of 20 Geo. 2, c. 19, such two justices may order such master or mistress to deliver up to such apprentice his or her clothes and wearing apparel, and also to pay to such churchwardens or overseers of the poor of the parish or place to which such apprentice shall belong, some or one of them, a sum not exceeding 10*l.* to be applied for the again binding out such apprentice, or otherwise for his or her benefit, as to such justices shall seem meet; and also to pay a sum not exceeding 5*l.* in case such master or mistress shall refuse to deliver up such clothes and wearing apparel; and on refusal to pay the sums so ordered, or any part thereof, such two justices, by warrant under their hands and seals, may levy the same by distress and sale of the goods and chattels of such master or mistress, together with the reasonable expenses of such distress; and also may compel such churchwardens and overseers of the poor, some or one of them, to enter into a recognizance for the effectual prosecution by indictment of such master or mistress for such ill-treatment of any such apprentice so discharged as aforesaid, and also order that the expenses of such prosecution shall be reimbursed to such person entering into such recognizance, one moiety thereof out of the poor-rates of the parish or place to which such apprentice shall belong, and the other moiety thereof out of the common stock of the county in which such parish or place shall lie; and in case the churchwardens and overseers of the poor of such parish or place for the time being shall refuse to pay such their moiety as aforesaid, such two justices, by warrant under their hands and seals, may levy the same by distress and sale of the goods and chattels of such churchwardens and overseers of the poor, any or either of them, together with the reasonable expenses of such distress.

By sect. 12, in every case where any parish apprentice shall have been so discharged from any master or mistress as aforesaid, under and by virtue of the said last-mentioned act, and such master and mistress shall have been convicted of such offence, in consequence of such prosecution as aforesaid, or shall have been found guilty thereof in any action brought at the suit of the party injured, the churchwardens and overseers of the poor of any parish or place, or the major part of them, shall not bind any other apprentice upon such person: provided that such master or mistress from whom any

(b) Or they may impose a Fine on the Master, and apply it towards Compensating the Apprentice.

Or they may impose a fine on the master, and apply it towards compensating the apprentice.

By 33 Geo. 3, c. 55, s. 1, "two or more of his majesty's justices of the peace, assembled at any special or petty sessions of the peace, upon complaint being made upon oath before them, by or on the behalf of any apprentice, to any trade or business whatsoever, whether bound apprentice by any parish or township, or otherwise, provided that not more than the sum of 25*l.* be paid upon the binding of such apprentice, against his or her master or mistress, of any ill-usage of such apprentice by such master or mistress, such master or mistress, having been duly summoned to appear and answer such complaint, may impose, upon conviction, any reasonable fine or fines, not exceeding the sum of 40*s.* upon such master or mistress, as a punishment for such ill-usage, and by warrant under the hands and seals of any two or more of such justices assembled at any such special or petty sessions as aforesaid may direct such fine or fines, if not paid, to be levied by distress and sale of the goods and chattels of the person or persons so offending, rendering the overplus (if any), after deducting the amount of such fine or fines, and the charges of such distress and sale, to such offender or offenders; and such fine or fines, which may be imposed upon any such master or mistress, shall, at the discretion of the justices imposing the same, be either so applied and disposed of as aforesaid, or be otherwise paid and applied to or for the use and benefit of such apprentice, for or towards a recompense or compensation for the injury which may have been by him or her sustained by reason of such ill-usage as aforesaid."

(c) And the Justices may order a Return of the Premium, or Part of it.

And the justices may order a return of the premium, or part of it.[1]

4 Geo. 4, c. 29, s. 2. "The justices may order all or part of the premium to be returned, and enforce the repayment by distress, or by imprisonment not exceeding two months."

(D) *In case of Misconduct of Apprentice.*[2]

(a) If the Apprentice has been guilty of Ill-behaviour, the Justices may commit him to the House of Correction, or discharge him from his Apprenticeship.

If the apprentice has been guilty of ill-behaviour, they may commit the

By 20 Geo. 2, c. 19, s. 14, "it shall be lawful to and for such justices, upon application or complaint made upon oath, by any master or mistress against any such apprentice, touching or concerning any misdemeanour, miscarriage, or ill-behaviour, in such his or her service (which oath such justices are hereby

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parish apprentice shall be discharged under and by virtue of the 20 Geo. 2, c. 19, may appeal against the order made for such discharge.

By sect. 13, in all cases where any parish apprentice shall be discharged by two justices under and by virtue of the said last-mentioned act, from his or her apprenticeship, on account of any misdemeanour, miscarriage, or ill-behaviour on the part of such apprentice, such two justices, if they think proper, may, by warrant under their hands and seals, punish such offender by commitment to the house of correction, there to remain and be kept to hard labour for a reasonable time, not exceeding three calendar months.

By sect. 14, if any person shall be aggrieved by anything done, or omitted to be done, by any churchwarden or overseer of the poor, or by any of his majesty's justices of the peace, or by any other person whomsoever by virtue of this act, besides such matters or things for which an appeal is hereinbefore specially given, such person may appeal to the next general quarter sessions of the peace, when the same shall be heard and finally determined, and such court may award reasonable costs and expenses to either party before them.

[1] By 4 Geo. 4, c. 34, s. 2, the justices may order payment of wages due to apprentice by the indentures, provided the sum in question does not exceed 10*l.*, and may enforce payment by distress.

[2] By 5 Eliz. c. 4, s. 47, "if any servant or apprentice of husbandry, or of any art, science, or occupation aforesaid, unlawfully depart or flee into any other shire, it shall be lawful to the justices of the peace, and to the mayors, bailiffs, and other head officers of cities and towns corporate for the time being, justices of peace there, to make and grant writs of *capias*, so many and such as shall be needful, to be directed to the

empowered to administer), to hear, examine, and determine the same, and to punish the offender by commitment to the house of correction, there to remain and be corrected, and held to hard labour for a reasonable time not exceeding one calendar month, or otherwise by discharging such apprentice in manner and form before mentioned."

apprentice to the house of correction, or discharge him from his apprenticeship.

(*b*) *The Complaint may be made by a Steward of the Master.*

By 4 Geo. 4, c. 34, not only masters, but their stewards or agents, may make complaint against apprentices for misconduct before justices, who may commit the offender to the house of correction to hard labour, for a time not exceeding three months.

The complaint may be made by a steward of the master.

(*c*) *Apprentices with whom less than* 10*l. has been received may be compelled to make up Time lost by Absenting without Leave.*

By 6 Geo. 3, c. 25, s. 1, "if any apprentice (except such whose master shall have received with such apprentice the sum of 10*l.*) shall absent himself from his master's service before the term of his apprenticeship shall be expired, every such apprentice shall, at any time or times thereafter, whenever he shall be found, be compelled to serve his said master for so long a time as he shall have so absented himself from such service, unless he shall make satisfaction to his master for the loss he shall have sustained by his absence from his service; and so from time to time, as often as any such apprentice shall, without leave of his master, absent himself from his service before the term of his contract shall be fulfilled, and in case any such apprentice shall refuse to serve as hereby required, or to make such satisfaction to his master, such master may complain upon oath to any justice of the peace of the county or place where he shall reside, which oath such justice is hereby empowered to administer, and to issue a warrant under his hand and seal for apprehending any such apprentice; and such justice, upon hearing the complaint, may determine what satisfaction shall be made to such master by such apprentice; and in case such apprentice shall not give security to make such satisfaction according to such determination, it shall and may be lawful for such justice to commit every such apprentice to the house of correction for any term not exceeding three months."

The apprentice with whom less than 10*l.* has been received may be compelled to make up time lost by absenting without leave.[1]

By sec. 3, "provided that no apprentice shall be compelled to serve for any time or term, or to make any satisfaction to any master, after the expiration of seven years next after the end of the term for which such apprentice shall have contracted to serve."

(E) *An Appeal lies to the Quarter Sessions from the Order of the Justices.*

By 6 Geo. 3, c. 25, s. 5, "if any person shall think himself aggrieved by such determination, order, or warrant of any justice of the peace as aforesaid, except

An appeal lies to the quarter sessions from the order of the justices.[2]

sheriffs of the counties, or to other head officers of the places whither such servants or apprentices shall so depart or flee, to take their bodies, returnable before them at what time shall please them; so that if they come by such process that they be put in prison till they shall find sufficient surety well and honestly to serve their masters, mistresses, or dames, from whom they so departed or fled, according to the order of the law."

[1] The remedy against, and jurisdiction of justices over apprentices, conferred by stat. 6 Geo. 3, c. 25, s. 1, is cumulative to, and not in lieu of that given by stat. 20 Geo. 2, c. 19, s. 4. *Gray v. Cookson*, 16 East, 13.

[2] By the 33 Geo. 3, c. 55, s. 1, persons aggrieved by the imposition of the fine or fines thereby imposed, or by any order or warrant of distress for raising and levying the same, or by the judgment or determination of the justices, or by any act to be done in the execution of such warrant of distress, may appeal to the next general or quarter sessions of the peace. An appeal to the quarter sessions is also given by the 20 Geo. 2, c. 19, s. 5.

an order of commitment, every such person may appeal to the next general quarter sessions of the peace to be held for the county or place where such determination or order shall be made; such person giving *six days' notice* of his intention of bringing such appeal,[1] and of the cause and motive thereof, to such justice of the peace and the parties concerned, and entering into a recognizance within three days after such notice before some justice of the peace for such county or place, with sufficient surety conditioned to try such appeal at, and abide the order or judgment of, and pay such costs as shall be awarded by the justices at such quarter sessions; which said justices at their said sessions, upon due proof of such notices being given, and of entering into such recognizances as aforesaid, shall and are hereby directed to proceed in, hear, and determine the causes and matters of all such appeals, and there give such relief and costs to the parties appealing or appealed against as they, in their discretion, shall judge proper and reasonable; and their judgments and order therein shall be final and conclusive to all parties concerned."

But by sec. 6, " this act shall not extend to the stannaries of Devon and Cornwall, or lessen the jurisdiction of the Chamberlain of London, or of any other court within the said city, touching apprentices."

(F) *But no* Certiorari *can issue.*

But no *certiorari* can issue.

By 20 Geo. 2, c. 19, ss. 6, 7, " it is also provided that no *certiorari* or other process shall issue or be issuable to remove any proceedings whatsoever had in pursuance of this act into any of his majesty's courts of record at Westminster; and that nothing in this act shall extend to the stannaries of Devon and Cornwall."

VII. Of Parish Apprentices.

(A) *Who may be Bound as.*

Poor children, being not less than nine years of age, may be bound apprentice by the parish officers.[2]

By 43 Eliz. c. 2, s. 5, " the churchwardens and overseers, or the greater part of them (by the assent of two justices), may bind out poor children to be apprentices when they shall see convenient, till such man child shall come to the age of twenty-four years, and such woman child to the age of twenty-one years, or the time of her marriage, the same to be as effectual to all purposes

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[1] *See* now, as to notice of appeal, 12 & 13 Vic. c. 45, s. 1, creating a uniform period of fourteen days, except in certain specified cases.

[2] As to apprentices to chimney-sweepers, it is by the 3 & 4 Vic. c. 85, s. 3, enacted, that " it shall not be lawful to apprentice to any person using the trade or business of a chimney-sweeper, any child under the age of sixteen years, and that every indenture of such apprenticeship which may be entered into after such date (Jan. 1, 1840) shall be null and void."

And as to apprentices in mines, by the 5 & 6 Vic. c. 99, s. 4, " no person shall take any apprentice who shall be bound to work, or be liable to be called on to work, or be otherwise occupied within a mine or colliery, who shall be under the age of ten years, or for a longer term of apprenticeship than eight years, except as the apprentice of a mason, joiner, enginewright, or other mechanic, whose services may be required occasionally below as well as above ground; and every indenture of apprenticeship whereby any person shall be hereafter bound contrary to the provisions of this act shall be void."

In *Rex v. Hipswell*, 8 B. & C. 466, an indenture in contravention of a prior statute, to the same effect as the 3 & 4 Vic. c. 85, s. 3, relating to chimney-sweepers, was held void, the words of the statute being express. But where no such intention is declared, an indenture of a child within the specified age will be voidable only. Thus, in *Rex v. St. Gregory* (2 Ad. & E. 99), by a local statute (1 Geo. 2, c. 20) certain guardians of the poor had power to bind children apprentices, provided such children were not bound for a longer term than until they shall have attained the respective ages following: viz. a boy the age of twenty-two, and a girl that of twenty. A boy of the age of fifteen years being apprenticed for the full term of seven years, a question arose whether it was legal.

Per Cur. The act of parliament here neither declares that the binding shall be null and void, nor contains any words to render it illegal, nor is public policy in any way concerned in the binding being set

as if such child were of full age, and by indenture of covenant bound him or herself."

But now, by 18 Geo. 3, c. 47, "the apprenticeship for a male child, pursuant to the last-mentioned statute, shall be for no longer term than till such child shall come to the age of twenty-one years."

And by 56 Geo. 3, c. 134, s. 7, it is enacted, "that it shall not be lawful for any parish officers to bind out any child as a parish apprentice until such child shall have attained the age of nine years."

(B) *May be bound Apprentice by the Guardians.*[1]

Poor children may be bound apprentices by the guardians.[2]

By the 7 & 8 Vic. c. 101, s. 12, it is enacted, "that after the first day of October next no poor child shall be bound apprentice by the overseers of any parish included in any such union, or subject to a board of guardians under the provisions of the first-recited act (4 & 5 Wm. 4, c. 76); but it shall be lawful for the guardians of such union or parish respectively to bind any such poor child[3] to be an apprentice, and in such case the indenture of apprenticeship shall be executed by the said guardians, and shall not need to be allowed, assented to, or executed by any justice or justices of the peace,[4] and the

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aside. Then, the decisions where indentures had been held voidable only apply to the present case.

Where a servant or apprentice is taken from the workhouse, the guardians or overseers are required to send the relieving-officer, or some other officers, to visit the servant or apprentice twice a-year, so long as he or she is under sixteen years of age, if the master reside within the parish or union, or within five miles of it, and to report whether he has found reason to believe that such young person is not supplied with proper food, or is subject to cruel or illegal treatment. 14 Vic. c. 11, s. 4. If the residence of the master or mistress be beyond the five miles, the guardians and overseers of the union or parish in which he or she resides must send an officer, as above, to visit and report. Sect. 5.

[1] The stat. 43 Eliz. c. 2, applied, in respect of the parish officers being parties to indentures of apprenticeship, to apprentices sent out against their will, and not to voluntary bindings. *The King v. The Inhabitants of Arundel*, 5 M. & S. 257. But if any expense were incurred by the public parochial funds, by reason of the binding out of the apprentice, to render the apprenticeship by overseers effectual, it was necessary that it should be approved by justices. 56 Geo. 3, c. 139, s. 11. And, therefore, it is now necessary, in such a case, that the binding should be by the guardians. Or if in a parish (not being in a union), and in which there are no guardians, the assent of justices would still be necessary to the binding by the overseers.

[2] By sec. 13, so much of the 43 Eliz. c. 2, and 8 & 9 Wm. 3, c. 3, or of any other act of parliament, whether general or local, as compels any person to receive any poor child as an apprentice, is repealed.

[3] It is discretionary in the parish officers to select those children whom they shall think their parents unable to maintain. *Rex v. Crosse*, Comb. 289.

[4] By the 56 Geo. 3, c. 139, s. 1, it is necessary, where any child is bound apprentice by the churchwardens and overseers, to carry him before two justices, who decide upon the fitness of the proposed master. *See* also 42 Geo. 3, c. 46, s. 1. One of the justices must be of the quorum. *The King v. The Inhabitants of Woolstanton*, 2 Str. 1110. The assent by the justices must be given in the presence of each other. *Rex v. Hanstall Ridware*, 3 T. R. 380. But it is sufficient although one magistrate sign the indentures when alone, provided he be present afterwards when the other signs it. *Rex v. The Inhabitants of Winwick*, 8 id. 454; 1 Bott, 625. And when the master has executed the counterpart, he shall not be admitted afterwards to give evidence that at the time of the execution it was signed only by one justice. *Rex v. Saltem*, Cald. 444; S. C. 1 Bott, 613. An indenture of apprenticeship sufficiently declares the consent of the proper justices by describing them of the said county. *The King v. The Inhabitants of Hinkley*, 1 B. & A. 273.

Where county justices had a concurrent jurisdiction with district justices, it was held that the former might consent to a binding of a district pauper in the county. *Rex v. Inhabitants of Witney*, 5 Ad. & E. 191. The justices have a discretion as to the propriety of the binding. *Rex v. Mills*, 2 B. & Adol. 578.

The act of justices on determining on the propriety of making an order to bind an apprentice under the 56 Geo. 3, c. 139, is judicial, and must purport to have been made by them within their jurisdiction. *Reg. v. St. George, Bloomsbury*, 4 Q. B. 520. *Reg. v. Holborn Union*, 25 L. J. M. C. 110. But on execution of the indenture their allowance, in pursuance of the order previously made, is not a judicial act, and consequently need not purport to be exe-

guardians shall have all the powers for binding or assigning any such apprentice which are now possessed by overseers, and shall cause all apprentices so bound or assigned by them to be registered by their clerk, according to the form prescribed by the statute 42 Geo. 3, relating to the registration of parish apprentices, so far as the same may be applicable to such binding or assignment: Provided always, that nothing herein contained shall, directly or indirectly, interfere with the provisions of any act of parliament relating to apprentices to be bound to the sea-service."[1]

(C) *And the Master, on Breach of Conditions of Indenture, is subject to a Penalty.*

On breach of conditions inserted in indenture pursuant to order of Poor-Law Board, the master is subject to penalty.[2]

By the 7 & 8 Vic. c. 101, s. 12, it is enacted, "that the Poor-Law Commissioners may, by order under their hands and seal, prescribe the duties of the masters to whom poor children may be apprenticed, and the terms and conditions to be inserted in the indentures by which such children may be so bound as apprentices, and every master of such apprentice who wilfully refuses or neglects to perform any of such terms or conditions so inserted in any such indenture shall be liable, upon conviction thereof before any two justices, to forfeit any sum not exceeding 20*l.*"

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cuted within the jurisdiction of the justices signing it. *Reg. v. Totness*, 11 Q. B. 80; 3 New Sess. Cas. 356; 13 Jur. 168; 18 L. J. M. C. 46. *See* also, as to allowance of indenture by justices, *Reg. v. Ashburton*, 8 Q. B. 871; 2 New Sess. Cas. 316; 10 Jur. 474; 15 L. J. M. C. 97. *Reg. v. Aldborough*, 13 Q. B. 190; 3 New Sess. Cas. 486; 13 Jur. 322; 18 L. J. M. C. 81. *Reg. v. St. George, Bloomsbury*, 16 Q. B. 1005; 20 L. J. M. C. 200; 15 Jur. 799. *Reg. v. Macclesfield*, 11 Q. B. 78; 3 New Sess. Cas. 70. *Reg. v. Staniforth*, 11 Q. B. 66; 17 L. J. M. C. 25; 3 New Sess. Cas. 53; 12 Jur. 95. The order must be referred to by its date, &c., either in the indenture or the allowance, which is part of the indenture, otherwise it is void. *R. v. Bawbergh*, 2 B. & C. 222. *Reg. v. Aldborough*, 13 Q. B. 190.

An order under the stat. Eliz. to bind out an apprentice must state it to be by the churchwardens. *The King v. Fairfax and another*, 3 Mod. 269; Carth. 94, S. C.; Comb. 164; 1 Show. 76; Foley, 223.

The binding of an apprentice by the churchwardens of a township, and one of two overseers, is rendered valid by the 54 Geo. 3, c. 107, s. 2. *Reg. v. Staniforth*, 11 Q. B. 66; 17 L. J. M. C. 25; 3 New Sess. Cas. 53; 12 Jur. 95. It has been held that where a pauper was bound apprentice under the 56 Geo. 3, c. 139, it was sufficient under sect. 2 if a notice of the intended binding, directed generally to the overseers of the parish into which the apprentice was to be bound, was served on one of such overseers. *Reg. v. Holne*, 9 Q. B. 70; 15 L. J. M. C. 125; 2 New Sess. Cas. 364; 10 Jur. 737.

[1] By the Merchant Shipping Act (17 & 18 Vic. c. 104, s. 142), "in the case of every boy bound apprentice to the sea-service by any guardians or overseers of the poor, or other persons having the authority of guardians of the poor, the indentures shall be executed by the boy and the person to whom he is bound in the presence of, and shall be attested by two justices of the peace, who shall ascertain that the boy has consented to be bound, and has attained the age of twelve years, and is of sufficient health and strength, and that the master to whom the boy is to be bound is a proper person for the purpose."

Sect. 143. "All indentures of apprenticeship to the service shall be exempt from stamp-duty, and all such indentures shall be in duplicate, and every person to whom any boy whatever is bound as an apprentice to the sea-service in the United Kingdom shall, within seven days after the execution of the indenture, take or transmit the same to the Registrar-General of Seamen, or to some shipping-master, and the said registrar or shipping-master shall retain and record one copy, and shall indorse on the other that the same has been recorded, and shall re-deliver the same to the master of the apprentice; and whenever any such indenture is assigned or cancelled, and whenever any such apprentice dies or deserts, the master of the apprentice shall, within seven days after such assignment, cancellation, death, or desertion, if the same happens within the United Kingdom, or if the same happens elsewhere so soon afterwards as circumstances permit, notify the same, either to the said Registrar of Seamen or to some shipping-master, to be recorded, and every person who fails to comply with the provisions of this section shall incur a penalty not exceeding 10*l.*

[2] The following points have been decided upon the construction of the rules of the Poor-Law Commissioners respecting the binding of poor children apprentices, in *Reg. v. St. Mary Magdalen, Bermondsey*, 2 E. & B. 809. By these rules it was ordered, that no child should be bound who could not write his own name; that no person above the age of fourteen should be bound without his own

(D) *Assignment of Parish Apprentices.*

(*a*) *Parish Apprentices may be Assigned to other Master or Mistress.*

Parish apprentices may be assigned to other master or mistress.[1]

By 32 Geo. 3, c. 57, s. 7, "any master or mistress of any parish apprentice, by indorsement on the indenture of apprenticeship, or by other instrument in writing (with the consent of two justices for the county or place where such master or mistress shall dwell, testified by such justices under their hands), may assign such apprentice to any person who is willing to take such apprentice for the residue of the term mentioned in such indenture, provided that such person to whom such apprentice is intended to be assigned shall, at the same time, by indorsement on the counterpart of such indenture,[2] or by writing under his or her hand, stating the said indenture of apprenticeship, and the indorsement and consent aforesaid, declare his or her acceptance of such apprentice, and acknowledge himself, his or her executors and administrators, to be bound by the agreements and covenants mentioned in the said indenture on the part of the master or mistress of such apprentice; and in such case such apprentice shall be deemed to be the apprentice of such master or mistress to whom such assignment shall be made, to all intents and purposes whatsoever, and so from time to time, as often as it shall be necessary or convenient for any such master or mistress to part with any such apprentice; and all justices of the peace shall have the like power and authority, in the several cases last mentioned, with respect as well to the subsequent master or mistress, masters or mistresses, as to the apprentice, as such justices shall then have by any law for the better regulation of parish apprentices."

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consent: that no child under the age of sixteen should be bound without the consent of his father, or if his father was dead or disqualified (as after specified) to consent, or if the child should be a bastard, without the mother's consent, if living; and these disqualifications of the parent were specified, and in the case of a mother being so disqualified no consent was to be required: that the indenture should be executed in duplicate by the master and guardians (or person authorised to do so), and should not be valid unless signed by the apprentice without aid, in the presence of the guardians; and the consent of the parent, where requisite, should be testified by the parent's signature and mark, and where such consent was dispensed with (as above provided) the cause should be stated at the foot of the indenture: that any justice ordering or allowing the binding should certify at the foot of the indenture that he had ascertained that the rules had been complied with. The Court of Queen's Bench held, 1st. That on an appeal against a removal founded upon a settlement gained under the indenture, the above rules, excepting that as to the signature by the apprentice, were directory only, and non-compliance with them did not make the indenture void. 2d. That the apprentice's consent, though he be above the age of fourteen, need not appear on the face of the indenture, otherwise than by his signing. 3d. That the fact of such consent would be assumed in default of proof of non-consent, both from the ordinary presumption that all things were duly performed, and from that arising from the justice's certificate at the foot of the indenture. 4th. That in default of proof to the contrary, the execution of the indenture in duplicate would be assumed from the same presumptions. 5th. That no consent of the parent or ground of dispensation appearing on the indenture, it would be assumed that both were dead, and so no consent or dispensation requisite, from the same presumptions.

[1] In unions or in parishes where there are guardians the consent must be given by the guardians, and the consent of the justices is not necessary. 7 & 8 Vic. c. 101, s. 12.

By 32 Geo. 3, c. 57, s. 8, two justices of the county or place where any such master or mistress shall live, on the application of such master or mistress, he or she having become insolvent, or being unable to employ or maintain such apprentice, may inquire into the matter of such allegation, and discharge any such apprentice from his apprenticeship, in case the said justices shall find such allegation to be true.

By sect. 9, nothing hereinbefore contained shall extend to any indenture of apprenticeship where a larger sum than 5*l.* shall be given.

By sect. 10, no indorsement on any parish indenture of apprenticeship hereinbefore mentioned shall be charged with any higher duty than with the duty imposed or to be imposed on parish indentures of apprenticeship.

[2] See *Rex v. Spreyton*, 3 B. & Adol. 818. *Rex v. Exminster*, 6 Ad. & E. 598.

(E) *On the Death of his Master the Obligation to Maintain the Apprentice ceases after the Expiration of Three Months.*

On the death of his master the obligation to maintain the apprentice ceases after the expiration of three months.

By stat. 32 Geo. 3, c. 57, s. 1, after reciting, "that in the event of the death of the master of any parish apprentice during the term of apprenticeship, the agreement for service on the part of the apprentice is at an end, but the covenant for maintenance on the part of the master still continues in force, as far as his assets will extend, and doubts have arisen with respect thereto, it is enacted, that in the case of the death of the master or mistress of any parish apprentice during the term of such apprenticeship, upon which binding no larger sum than 5*l.* shall be paid, any covenant for the maintenance of such apprentice inserted in the indenture shall not be in force longer than three calendar months next after the death of such master or mistress, and that during such three months such apprentice shall continue to live with and serve as an apprentice the executors and administrators of such master or mistress, or such person as they, or some, or one of them shall appoint; and such master or mistress and apprentice, during such three months, shall be subject to all the laws in force for regulating masters and parish apprentices."

But the apprentice may be bound for the residue of his term of apprenticeship to the widow or son, &c. of deceased master.[1]

Sect. 23. "And whereas it is reasonable that such apprentice as aforesaid, in case of his master's death, should be obliged to make some satisfaction by his labour to the family or representatives of his deceased master, for the advantages he has received in his childhood when his service could not be equal to the expenses of his maintenance, it is enacted, that within such three calendar months after the death of such master or mistress, two justices, on the application of the widow of such master, or by the husband of the mistress, or by any son or daughter, brother or sister, or executor or administrator of such person deceased, by indorsement on such indenture or counterpart thereof, or by any other instrument or writing, may order and direct that such apprentice shall serve as an apprentice any one of such persons so making application as aforesaid (such person having lived with, and having been part of the family of such master or mistress at the time of his or her death), as they shall think fit, during the residue of the term mentioned in such indenture; and the person obtaining such order shall declare his acceptance of such apprentice by subscribing his or her name to such order, and after such order shall be made, the executors and administrators, and the personal assets, estates, and effects of the master or mistress so dying, shall be discharged from any covenant in such indenture; and the person obtaining the same shall be deemed the master or mistress of such apprentice, in like manner as if he had been originally bound to such master or mistress; and such last-mentioned master or mistress, his or her executors and administrators, shall be bound by the covenants contained in such indenture, in like manner as if he had executed the counterpart thereof; and such master or mistress and apprentice shall be subject to the several penalties, provisions, and regulations which shall then be in force for governing apprentices; and all justices shall have the like power and authority with respect thereto, as they shall then have by any act of parliament relating to parish apprentices; and so on the death of the subsequent master."

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[1] Sect. 4 provides, that "if no such application shall be made as aforesaid within such three calendar months, or in case such two justices shall not think fit that such apprentice should be continued, then such apprenticeship shall be determined, and the indenture and covenants therein shall be at an end, in like manner as they would have been at the expiration of the term."

And by sect. 5, "nothing therein shall extend to any parish apprentice, but to such only as shall be living with and shall make part of the family, or be in the actual employment of such original master or mistress, or of any subsequent master or mistress appointed by virtue of this act, at the time of his or her death."

(F) *Of Vacating Parish Indentures.*[1]

APPROPRIATION of Fund for Legacies. *See* Legacy.

APPROPRIATION of Goods Sold equivalent to Delivery.[2]

APPROPRIATION of Payments.

(A) *Must be according to Intention of Payer, indicated by Words or Conduct*, p. 421.

(B) *But if no Intention is indicated, the Payee is justified in applying it to which of several Accounts he pleases*, p. 421.

(C) *Unless the Account to which he seeks to apply it is an Illegal Demand*, p. 421.

(D) *But where one Account is in respect of a Debt due individually, and the other as Executor, the Creditor cannot elect to apply it to the latter*, p. 422.

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[1] A parish apprentice under age cannot be discharged by his consent (*the King v. The Inhabitants of Austrey*, Burr. 441, S. C.), even though his father concur (*Rex v. Langham*, Cald. 126). As he is bound out by the parish officers under a special authority, they ought to be consulted and give their assent to his discharge, otherwise the whole policy of the 43 Eliz. might be defeated. But such assent is unnecessary after he attains the age of twenty-one, at which time the master and apprentice may cancel the indentures by mutual agreement. For at twenty-one the apprentice is *sui juris*, and his discharge from the indenture concerns at that time himself and his master only, and there is no necessity to procure the acquiescence of the parish officers. *Rex v. Ecclesal Bierlow*, 1 Bott, 608. But an agreement between a master and a parish apprentice, that the apprentice shall work when he pleases on his own account, and pay the master so much a-week in satisfaction of his service, is not a dissolution of the indentures. *Rex v. Offerton*, 1 id. 611. Nor are the indentures of a parish apprentice cancelled by being delivered up by the son of the master to whom he is bound. *Rex v. Motton*, 1 id. 609. And although the master, after three years' service, tell the apprentice to go about his business and work for himself, and he accordingly works with other persons for the remainder of the term, and applies the money he earns to his own use, without his master's requiring him to account, or knowing where he was, yet if the indentures are neither cancelled nor given up there is no dissolution of the apprenticeship. *Rex v. St. Luke's*, Burr. 542, S. C.; 1 Bott, 608. If a parish apprentice appear afterwards to be an idiot, the justices may discharge the master and send back the boy to the parish. *Anon.* Skin. 114.

By the 9th section of 56 Geo. 3, c. 134, s. 9, it shall not be lawful for any master or mistress to put away or transfer any parish apprentice to any other, or in any way to discharge from his or her service any parish apprentice, without such consent of justices as is directed by 32 Geo. 3, c. 57; and no settlement shall be gained by any service of such apprentice after such putting away or transfer, unless such service shall have been performed under the sanction of such consent as aforesaid.

By sect. 10, any person who shall put away or transfer any parish apprentice without such consent as aforesaid, shall forfeit a sum not exceeding 10*l.* for every apprentice so transferred.

By sect. 12, all penalties and forfeitures imposed for any offence against this act shall be recovered by information before two justices of the county or district where such offence shall be committed. *See* sect. 13 as to application of penalty, and sect. 14 empowering the levying thereof by distress.

[2] The appropriation of specific goods sold may be equivalent to delivery. For where at the time of the bargain everything is already done which according to the intention of the parties was necessary to transfer the property, the property in the goods will pass. The reason is, that the very appropriation of the chattel is equivalent to delivery by the vendor, and the assent of the vendee to take the specific chattel, and to pay the price, is equivalent to his accepting possession. The effect of the contract, therefore, is to vest the property in the bargainee. *Wait v. Baker*, 2 Ex. 9. *Langton v. Higgins*, 4 H. & N. 402. *Dixon v. Yates*, 5 B. & Adol. 340. *Godby v. Rose*, 17 C. B. 238. If, however, the thing sold is not ascertained, and something is to be done before it is ascertained, it does not pass till it is ascertained. Thus, "if I agree to deliver a certain quantity of oil—as ten out of eighteen tons—no one can say which part of the whole quantity I have agreed to deliver until a selection is made." As soon, however, as the vendor has appropriated a specific part of the bulk for the benefit of the vendee, and the latter has assented to such appropriation (*Godby v. Rose*, 17 id. 229), the property in that specific part passes to the vendee. *Aldridge v. Johnson*, 7 E. & B. 897. *Alexander v. Gardner*, 1 Bing. N. C. 671. *Rhode v. Thwaites*, 6 B. & C. 388; 4 id. 219; 2 Q. B. 218; 2 Ex. 1; 6 id. 903.

(E) *And if one Debt be due from the Firm of which the Debtor is a member, and the other from him individually, a Payment generally with the Money of the Firm will be applied to the Partnership Debt*, p. 422.

(F) *And a general Payment must be applied to a prior legal Debt, and not to a subsequent equitable Demand*, p. 423.

(G) *And a Surety cannot claim to appropriate a general Payment to the Debt for which he is Surety*, p. 423.

(H) *And the Doctrine as to the Appropriation of Payments does not apply where there are not* distinct *Accounts*, p. 423.

(I) *Accordingly, where a Creditor continues his Transactions with a Firm after the Death of a Partner, blending in one Account the Items before and after that event, Payments by the surviving Partners must be applied to the Old Debt*, p. 424.

(A) *Must be according to the Intention of Payer, indicated by Words or Conduct.*

Shaw v. Picton, 4 B. & C. 715; 7 D. & R. 201.

Must be according to intention of payer, indicated by words or conduct.[1]

A. having large demands against B. upon bill transactions with himself, and also as agent for several persons to whom B. had granted annuities, secured by C., caused an attorney to make application to B. and C. on behalf of these annuitants, and B., in consequence of that application and the remonstrance of C., the surety, paid to A. certain sums of money, without making any specific appropriation of them at the time of payment.

The Court held that A. must be considered as having received the payments on account of the annuitants, and that the latter were entitled to have those monies divided among them in proportion to the amount of their respective demands: because, although it is true that if a party who owes money to another on two different accounts makes a payment generally, the party receiving it may apply it to either; yet it is not necessary that the person paying the money should declare the appropriation of it at the time of payment. It is sufficient if it can be collected from other circumstances that he intended at the time of payment to appropriate it to one account specifically. See *Clayton's case*, 1 Mer. 572, and 14 East, 239; 3 B. & Adol. 320; 2 Stark. 101.

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[1] It may be proved either by his previous or subsequent declarations (*Waters v. Tomkins*, 2 C., M. & R. 723); but the appropriation must be made at the time of payment. *Per Bayley, J.*, 3 B. & C. 557. Nor will an entry in the books of the creditor applying a payment to a particular demand preclude him from afterwards applying it to another demand, unless such entry has been communicated to the party paying. *Simson v. Ingham*, 2 B. & C. 65. *Williams v. Rawlinson*, 3 Bing. 76.

The following rule may be used in ascertaining the intention with which any particular payment was made and received, and the mode in which it ought to be applied. Where a creditor receives without objection what is offered by his debtor, *solvitur in modum solventis.* Where the creditor objects, *recipitur in modum recipientis. Per Tindal, C. J., Webb v. Weatherby*, 1 Bing. N. C. 502. *See* also Cro. Eliz. 68. *Goddard v. Case*, 2 Str. 1194. *Newmarch v. Tealby*, 14 East, 239, 243 n. a. *Peters v. Anderson*, 5 Taunt. 596; S. C. 1 Marsh. 238.

The French law is to the same effect as ours as to the right of the debtor at the time he pays to direct to what account the money shall be applied, except that when a payment is made on account of a debt bearing interest, the money must be placed to the account of interest then due, and not to the account of the capital, they being distinct. *Code Civil*, book iii. tit. 3, arts. 1253, 1254. *See* 1 Pothier by Evans, 368, and *per Sir W. Grant Clayton's case*, 1 Mer. 605.

(B) *But if no intention is Indicated, the Payee is justified in applying it to which of several Accounts he pleases.*

PETERS v. ANDERSON, 5 Taunt. 596.

But if no intention is indicated, the payee is justified in applying it to which of several accounts he pleases.[1]

The plaintiff served the defendant three years under a covenant, and three-and-a-quarter years more under a simple contract. He received goods and money during the first period in part payment; he also received goods and money during the second period; the whole receipts more than covered the salary due under the covenant; the parties kept a blended account, but made no rest in it at the end of the first period. The plaintiff brought covenant for the balance of wages for the first period, and assumpsit for the balance of wages for the last. The defendant attempted to appropriate by set-off to the discharge of the covenant debt as much of the goods and money as would cover it. The plaintiff claimed the election to ascribe to the second debt, for which he had the worse security, the value received in the second period.

Per Cur. The plaintiff was at liberty to apply the money he received to which of the accounts he pleased, and therefore might appropriate it to his latter account, for which he had the worse security, and might leave the first account open. The person who pays money may, when he pays it, apply the payment to which account he pleases; but if he does not at the time of payment apply it to any specific account, the receiver may apply it to which account he pleases. This is admitted to be the general law. It is further admitted, if there were a debt due on bond, and another for goods sold; the person receiving an unappropriated payment might apply it to which account he would: but here it was said that there was only one running account. But it is impossible to say that, because they accrued for only one species of service they were not therefore two distinct debts: a debt arising on a deed and a debt on simple contract are very different in their consequences. The debts are distinct, and, if so, there is nothing to impeach the validity of application of the general rule, that payments made without specific appropriation may be applied by the person receiving the money to such debt as he pleases. See *Webb v. Weatherby*, 1 Bing. N. C. 502.

(C) *Unless the Account to which he seeks to apply it is an Illegal Demand.*

WRIGHT v. LAING, 3 B. & C. 165; 4 D. & R. 738.

Unless the account to which he seeks to appropriate it is an illegal demand.[2]

When a person has two demands upon another, one arising out of a lawful contract, the other out of a contract forbidden by law, and the debtor makes a payment which is not specifically appropriated by either party at the time

[1] The payee is not bound to make an immediate application (*Simson v. Ingham*, 2 B. & C. 65; see *Cox v. Troy*, 5 B. & A. 474); and though it was once said that perhaps he ought to make one within a reasonable time (*vide Simson v. Ingham, per Best, J.*) it seems now pretty well established that he may make it at any time before the matter comes to the consideration of a jury. *Philpott v. Jones*, 4 Nev. & M. 16; 2 Ad. & E. 42.

This rule, however, applies only to the case of payments, properly so called; and, therefore, if the money was received by the plaintiff without the knowledge of the defendant, so that he never had the power of exercising the option which the law allows him, the right of the plaintiff, which would accrue upon the defendant's failure to appropriate, does not arise. *Per Tindal, C. J. Waller v. Lacy*, 1 Scott, N. R. 186, 200. But the doctrine as to the right of a creditor to appropriate general payments holds, although one of the debts be due on a bond or other specialty, and the other be due on simple contract, or one be due in respect of a debt contracted by the defendant's wife *dum sola*, and the other in respect of a debt incurred by him on his own account. *Goddard v. Cox*, 2 Str. 1194. And so in the absence of any appropriation by the debtor at the time of making a payment, the creditor may apply it in satisfaction of a debt which is barred by the Statute of Limitations. *Mills v. Fowkes*, 7 Scott, 444; S. P. *Williams v. Griffith*, 5 Mee. & W. 300.

[2] The doctrine as to the appropriation of payments has never been held to authorise

of payment, the law will appropriate it to the debt recognised by law; and therefore, where distinct sums of money were due, one for goods sold, the other for money lent on a usurious contract, and a payment was made which was not specifically appropropriated to either debt by debtor or creditor, it was held that the law would afterwards appropriate such payment to the debt for goods sold.

(D) *But where one Account is in respect of a Debt due individually, and the other as Executor, the Creditor cannot elect to apply it to the latter.*

Goddard v. Cox, 2 Str. 1194; S. C. 2 Tyr. 213.

But where one account is in respect of a debt due individually, and the other as executor, the creditor cannot elect to apply it to the atter.

In this case, it appeared that one Owen was indebted to the plaintiff for coals. He died, and made his wife executrix. She continued to deal with the plaintiff on her own account; then she married the defendant, who dealt with the plaintiff, and paid him monies generally on account. The action was against the defendant for his own debt.

The *Chief Justice* held, that the defendant being by the marriage equally a debtor for what his wife received *dum sola* as for what was received after, the plaintiff might apply the money received to discharge the wife's own debt; but as to the demand against her as executrix, the validity of which depended upon the question of assets and manner of administering them, he was of opinion the plaintiff could not apply any of the money paid by the defendant to the discharge of that demand.

(E) *And if one Debt be due from the Firm of which the Debtor is a member, and the other from him individually, a Payment generally with the Money of the Firm will be applied to the Partnership Debt.*

Thompson v. Brown, M. & M. 40.

And if one debt be due from the firm of which the debtor is a member, and the other from him individually, a payment with the money of the firm will be applied to the partnership debt.

Abbott, C. J. "The general rule certainly is, that when money is paid generally, without any appropriation, it ought to be applied to the first items in the account; but the rule is subject to this qualification, that when there are distinct demands, one against persons in partnership and another against one only of the partners, if the money paid be the money of the partners, the creditor is not at liberty to apply it to the payment of the debt of the individual: that would be allowing the creditor to pay the debt of one person with the money of others."

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a creditor, who receives money on account, to apply it towards the satisfaction of what does not, nor ever did, constitute any legal or equitable demand against the party making the payment. *Per Cur. Lamprell v. Guardians of Billericay Union*, 3 Ex. 283, 307; 18 L. J. Ex. 282, 287. Thus, where the plaintiff paid two demands against a corporation for work done, but one of those was held not to be valid because the work had been done under a contract entered into by the corporation, not under their common seal, the Court of Exchequer decided that a payment which had been made by the corporation generally on account could not be applied by the plaintiff in liquidation of that demand. (Id.) But in a similar case, where an attorney had a claim against a corporation in respect of several bills of costs, two of which were for business done for the corporation on a retainer under their common seal, the Court of Common Pleas held that the attorney had a right to appropriate a general payment in liquidation of these two bills, because his claim thereon was a just and equitable claim, although, from the absence of a contract under seal, it could not be made the subject of an action at law. *Arnold v. Mayor of Poole*, 4 Man. & G. 860, 897.

This rule, which applies a general payment to a legal, and not to an illegal demand, where both co-exist, does not extend, however, to cases in which the law, although it may prevent the party from suing on the contract, yet does not invalidate the contract itself. *Mills v. Fowkes*, 7 Scott, 444; and see *Philpott v. Jones*, 2 Ad. & E. 41: and in *Cruikshanks v. Rose*, 1 M. & Rob. 100; S. C. 5 Car. & P. 19, it was held that although one of two demands be for spirituous liquors, supplied in small quantities, contrary to 24 Geo. 4, c. 40, s. 12, yet the creditor may apply a general payment to such demand, instead of to the other debt.

(F) *And a general Payment must be applied to a prior legal Debt, and not to a subsequent equitable Demand.*

GODDARD v. HODGES, 1 C. & M. 33; S. C. 2 Tyr. 213.

And a general payment must be applied to a prior legal debt, and not to a subsequent equitable demand.[1]

Per Cur. If there be a legal debt, and a claim which would only become a legal debt on a settlement of the partnership accounts, and a striking of a balance, we are bound to consider a general payment as applicable to the legal debt.

(G) *And a Surety cannot claim to appropriate a general Payment to the Debt for which he is Surety.*

PLOMER v. LONG, 1 Stark. 153.

But a surety cannot claim to appropriate a general payment to the debt for which he is surety.[2]

A payment by the obligor of a bond to the obligee, to whom the obligor is also otherwise indebted, cannot, without some circumstances to show that it was intended to be made in discharge of the bond, be so applied in favour of the surety of the obligor, in an action upon the bond.

(H) *And the Doctrine as to Appropriation of Payments does not apply where there are not* distinct *Accounts.*

BODENHAM v. PURCHAS, 2 B. & A. 39.

The doctrine as to appropriation of payments does not apply where

A bond was given to the several persons constituting the firm of a banking-house, conditioned for the repayment of the balance of an account, and of such further sums as the bankers might advance to the obligor. One of the partners died, and a new partner was taken into the firm; and at the time a considerable

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[1] But in *Bosanquet v. Wray* (6 Taunt. 597; 2 Marsh. 519), where the equitable demand occurred before the legal debt, it was held that the general payment might be placed to the account of the equitable claim. *See* 2 Marsh. 74.

If there be a debt which was contracted whilst the debtor was a trader within the bankrupt laws, and another which was contracted afterwards, and the debtor make a general payment, the law will apply such payment to the former demand, so as to prevent the creditor from obtaining a fiat in bankruptcy thereon. *Miggott v. Mills*, 1 Ld. Raym. 216. *Dawe v. Holdsworth*, Peake, 64. *Peters v. Anderson*, 5 Taunt. 602. *Plomer v. Long*, 1 Stark. 155 n. *Ex-parte Hunter*, 6 Ves. jun. 94.

[2] See *Martin v. Brecknell*, 2 M. & S. 39. *Williams v. Rawlinson*, 3 Bing. 76; S. C. 10 Moore, 362. But where security had been given by a surety for goods to be supplied to his principal, and not in respect of a previously existing debt, the goods were accordingly supplied, and payments from time to time made by the principal in respect of some, of which discount was allowed for prompt payment, it was inferred in favour of the surety that these payments were intended to be in liquidation of the latter account. *Marryatt v. White*, 2 Stark. 101. A person who kept cash with a banker, deposited with him the note of a third person for a sum of money, telling him at the same time that it was a note made for his accommodation, and he afterwards paid a sum of money into the bank without making any specific appropriation of it: *Lord Kenyon* held that this money must be placed, as far as it would go, towards the discharge of the then existing debt, and that the banker could not hold the maker of the note responsible for more than the balance remaining due at the time of such payment, although he afterwards trusted his debtor with a further sum of money. *Hammersley v. Knowles*, 2 Esp. 66. See *Shaw v. Picton*, *supra*, p. 420.

If a creditor receive dividends upon a debt which is partly secured by the guarantee of a third person, the dividends must not be appropriated to the excess of the debt above the sum guaranteed, but must be applied rateably to the whole debt. *Raikes v. Todd*, 8 Ad. & E. 846. And accordingly, where the defendant guaranteed the plaintiffs against debts to be contracted by L. M. to the extent of 400*l.*, and L. M. became indebted to the plaintiffs to the amount of 625*l.*, upon which, by a composition with his creditors, he paid them 8*s.* 7*d.* in the pound, thereby leaving 356*l.* due to the plaintiffs out of their whole claim, it was held that the defendant was entitled to deduct from that sum 171*l.* 13*s.* 4*d.*, being the amount of the dividend of 8*s.* 7*d.* in the pound upon 400*l.* *Bardnell v. Lydall*, 5 M. & P. 327; S. C. 7 Bing. 489.

there are not *distinct* accounts, or where separate accounts are treated as one entire account by all parties.[1]

balance was due from the obligor to the firm. Advances were afterwards made by the bankers, and payments on account were made to them by the obligor, who was credited by the new firm with several payments, and charged with the original debt and subsequent advances, as constituting items in one entire account. After the balance due at the time of the partner's death had been considerably reduced, that reduced balance was, by order of the obligor, transferred by the bankers to the account of another customer, who, with his assent, was charged with the then debt of the obligor; and the person so charged having become insolvent, the surviving partners of the original firm brought their action upon the bond.

The Court held, that as they had not originally treated it as a distinct account, but had blended it in the general account with other transactions, they were not at liberty so to treat it at a subsequent period, and that having received in different payments a sum more than sufficient to discharge the debt due upon the bond at the time of the death of the deceased partner, the bond was to be considered as paid.

(I) *Accordingly, where a Creditor continues his Transactions with a Firm after the Death of a Partner, blending in one Account the Items before and after that event, Payments by surviving Partners must be applied to the Old Debt.*

Simson v. Ingham, 2 B. & C. 65; 3 D. & R. 252.

Accordingly where a creditor continues his transactions with a firm after the death of a partner, blending in one account the items before and after that event, payments by surviving partners must be applied to the old debt.[2]

Bayley, J. "The general rule is, that the party who pays money has a right to apply that payment as he thinks fit. If there are several debts due from him, he has a right to say to which of those debts the payment shall be applied. If he does not make a specific application at the time of payment, then the right of application generally devolves on the party who receives the money. But there is a third rule, namely, that where one of several partners dies, and the partnership is in debt, and the surviving partners continue their dealings with a particular creditor, and the latter joins the transactions of the old and the new firm in one entire account, then the payments made from time to time by the surviving partners must be applied to the old debt. In that case, it is to be presumed that all the parties have consented that it should be considered as one entire account, and that the death of one of the partners has produced no alteration whatever."

APPROVER, Evidence of, Admissible.[3]

[1] When there is an account current between the parties, *ex. gr.* a banking-account, the law, in the absence of any other specific arrangement between them, presumes that they intended to apply the first item on the credit side to the first item on the debit side, and so on; or where separate accounts are treated as one entire account by all parties, payments made generally are presumed to have been made in discharge of the earlier items of the account. *Clayton's case*, 1 Mer. 572, 608. *Per Cur. Wilson v. Hurst*, 4 B. & Adol. 760, 767. *Bodenham v. Purchas*, 2 B. & A. 45. *Stoveld v. Eade*, 12 Moore, 370; 4 Bing. 81, 154. *Field v. Carr*, 2 M. & P. 46; S. C. 5 Bing. 13. But a particular mode of dealing, and more especially any stipulation between the parties, may entirely vary the above rule. And, accordingly, if it should appear that a bond was given to secure the plaintiffs against advances which they might from time to time make to the defendant, the rule would not apply, because that would show that the amount of the bond was not to be brought into account like any other item. *Per Cur. Henniker v. Wigg*, 4 Q. B. 792, 794.

[2] See *Mow v. Hill*, Peake, *Addl. Ca.* 10. As to when retiring partners are not discharged by the creditor taking the bill of the remaining partners, see *David v. Ellice*, 5 B. & C. 196; 7 D. & R. 690. And see *Kirwan v. Kirwan*, 2 C. & M. 617. *Thompson v. Percival*, 6 B. & Adol. 925.

[3] The evidence of an accomplice or an approver is admitted, notwithstanding the suspicious and untrustworthy nature of such testimony. The necessity, says Mr. Best (Best on Ev. 232), for admitting this kind of evidence has been recognised by the laws of all countries, and the practice is of extreme antiquity in our own. The reasons

APPURTENANT, Appurtenances. *Cum pertinentiis.*[1]

AQUA cedit solo. *Water belongs to, or goes with the land* [which it covers]. Co. Litt. 4 a.-b; 2 Bl. Com. 18; Hale de Jure Mar. pars. 1, c. 1.

AQUA currit et debet currere, ut currere solebat. *Water runs, and ought to run as it has used to run.* 3 Bulstr. 339. A running stream should be left to flow in its natural channel, without alteration or diversion. A fundamental maxim in the law of watercourses. 26 Penn. R. 413, A. R.

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for it were thus explained by a very able judge on an important occasion:—"If it should ever be laid down as a practical rule in the administration of justice that the testimony of accomplices should be rejected as incredible, the most mischievous consequences must necessarily ensue, because it must not only happen that many heinous crimes and offences will pass unpunished, but great encouragement will be given to bad men by withdrawing from their minds the fear of detection and punishment, through the instrumentality of their partners in guilt, and thereby universal confidence will be substituted for that distrust of each other which naturally possesses men engaged in wicked purposes, and which operates as one of the most effectual restraints against the commission of those crimes to which the concurrence of several persons is required. No such rule is laid down by the law of England or of any other country." *C. J. Abbott's* Charge to the Grand Jury, March 1820: 33 Ho. St. Tr. 689.

Although in strictness a jury may legally (except in cases where two witnesses are required by law) convict on the unsupported evidence of an accomplice, or *socius criminis* (*R. v. Atwood*, 1 Leach, C. L. 464. *R. v. Durham*, id. 478. *R. v. Jones*, 2 Camp. 132; 28 Ho. St. Tr. 487. *R. v. Hastings*, 7 Car. & P. 152. *R. v. Wilkes*, id. 273. *R. v. Sheehan*, Jebb, Cr. C. 54. *R. v. Stubbs*, 1 Dears. 555), yet a judicious practice has grown up, so generally followed as almost to have the force of law, by which judges always advise juries to require such evidence to be corroborated in some material part by untainted testimony. It is not, however, every participation in a crime which will render a party an accomplice in it so as to require his evidence to be confirmed; for if the offence be one of a purely legal character, as non-repair of a highway, or if it imply no great moral delinquency, the parties concerned, although in the eye of the law criminal, will not be considered such accomplices as to render necessary any confirmation of their evidence. *R. v. Hargrave*, 5 Car. & P. 170. *R. v. Jarvis*, 2 M. & Rob. 40.

The nature of the confirmation in each case must depend very considerably on its peculiar circumstances; but a few general principles may be stated. First, it is not necessary that the story told by the accomplice should be corroborated in every circumstance he declares in evidence, for if so, the calling him as a witness might be dispensed with altogether. 31 Ho. St. Tr. 980. Again, notwithstanding some old cases to the contrary, it seems now settled that the corroboration should not be merely as to the *corpus delicti*, but should go to some circumstances affecting the identity of the accused as participating in the transaction. *R. v. Farlar*, 8 Car. & P. 106. *R. v. Addis*, 6 id. 388. *R. v. Wilkes*, 7 id. 272. *R. v. Moores*, 1 id. 270. *R. v. Dyke*, 8 id. 261. *R. v. Stubbs*, 1 Deasl. C. C. 555. "A man," says *Lord Abinger*, "who has been guilty of a crime himself, will always be able to relate the facts of the case; and if the confirmation be only on the truth of that history, without identifying the persons, that is really no corroboration at all." *R. v. Farlar*, 8 Car. & P. 108. It is thought that confirmatory evidence by the wife of an accomplice will not suffice, for they must for this purpose be considered as one person. *R. v. Neale*, 7 id. 168. Neither ought the jury to be satisfied merely with the evidence of several accomplices who corroborate each other. *R. v. Noakes*, 5 id. 108, 326. *R. v. Magill*, Ir. Cir. R. 418; 31 Ho. St. Tr. 1122.

[1] These comprehensive terms, or the word "appendant," are used in deeds and leases, with the intention to include all things, rights and privileges, not enumerated, but belonging to and used with the principal thing conveyed or demised, and intended to pass, and to be enjoyed therewith, though not expressly named. There cannot be strictly an appendant or appurtenant to a personal chattel, whether in possession or action, for it is only fixed and permanent property that can have such an incident (1 Co. Litt. 207): but, nevertheless, there are instances in which certain things, besides those particularly enumerated in a deed or writing, will pass, and be included under that term; as in the case of a sale of a ship, certain things, besides masts and rigging, which, though moveable, are yet usually affixed, but also even boats, and a new rudder and cordage purchased for the ship, though not affixed, will pass (*Woods v. Russell*, 5 B. & A. 948); and the fishing stores of a vessel engaged in the Greenland fisheries were considered as appurtenances of a vessel, under 53 Geo. 3, c. 159, and, therefore, liable to contribute in compensation for damage done. *Dundee*, 1 Hagg. 109. But farming utensils will not pass as appurtenances in a bequest of a leasehold farm. *Stuart v. Bute*, 11 Ves. 657.

The above words in a deed cannot strictly pass any *corporeal* real property. Co. Litt. 121 b. *Buzzard v. Capel*, 8 B. & C. 150.

AQUÆDUCTUS. Lat. From *aqua*, water, and *ductus*, a leading; a duct or pipe. In the civil law, the right of leading water through another's land; or, as Bracton more fully defines it, the right of leading water from another's land and through another's land to one's own, for the purpose of irrigation or other convenience. Bract. fol. 231 b. A species of rural servitude, the opposite of the *servitus aquæ educendæ*, which was the right of leading off the water from one's own on to another's ground. Dig. 8, 3, 29.

AQUATIC Rights. Rights to the use of the sea and rivers for the purpose of fishing and navigation; and also to the soil in the sea and rivers. Schulte's *Aquatic Rights*, per tot.; 3 Kent's Com. 419, 427. *See* Hale's *De Jure Maris;* Hall on Seashores.

But only incorporeal easements, or rights and privileges, it being a general rule of law that under the word "appendant" or "appurtenant," in a feoffment or deed, nothing can be conveyed that was itself substantial, corporeal, real property, and capable of passing by feoffment and livery of seisin; and one kind of corporeal real property cannot be appendant or appurtenant to another description of the like real property, but only such things as can properly and consistently be appurtenant or appendant, as common of pasture to land, or a way or a pew to a house, &c. Thus, land cannot, in the strict legal sense, be appurtenant or appendant to land, or to a house or other corporeal real property, nor *vice versâ*. *Buzzard v. Capel*, 8 B. & C. 150; in error, 6 Bing. 150. Thus, if a wharf, with the appurtenances, be demised, and the use of the water adjoining the wharf were intended to pass, yet no distress for rent of the demised premises could be made on a barge on the water, because it was not in a place that could pass as part of the thing demised. *Buzzard v. Capel, supra.* In short, appurtenances consist of such incorporeal hereditaments as are not naturally and originally appendant to corporeal hereditaments, but have been annexed to them either by some express deed of grant, or by prescription from long enjoyment. Rights of common, or rights of way, or passage over the property of another person, are the principal kinds of incorporeal hereditaments usually found appurtenant to lands. When thus annexed, they will pass by a conveyance of the lands to which they have been annexed, without mention of the appurtenances (Co. Litt. 121 b), although these words, "with the appurtenances," are usually inserted in conveyances for the purpose of distinctly showing an intention to comprise such incorporeal hereditaments of this nature as may belong to the lands. But if such rights of common or of way, though usually enjoyed with the lands, should not be strictly appurtenant to them, a conveyance of the lands merely with their appurtenances, without mentioning the rights of common or way, will not be sufficient to comprise them. *Harding v. Wilson*, 2 B. & C. 96. *Barlow v. Rhodes*, 1 C. & M. 439. *See* also *James v. Plant*, 4 Ad. & E. 749. *Hinchliffe v. Earl of Kinoul*, 5 New Cas. 1. *Pheysey v. Vicary*, 16 Mee. & W. 484. *Ackroyd v. Smith*, 10 C. B. 164.

Tithes will not pass under the term appurtenant, because they are collateral to the land. *Chapman v. Gatscombe*, 2 Scott, R. 738.

Prescription cannot make anything appendant or appurtenant, unless there be a propriety of relation between the principal and the adjunct. The existence of such relation may be ascertained by considering whether they so agree in nature and quality as to be capable of union without incongruity. Co. Litt. 121 b, by Thomas. For otherwise there will be no reasonable intendment in support of the prescription, or rather of the original grant which it presumes. Thus, a thing corporeal cannot properly be appendant to a thing corporeal, nor a thing incorporeal to a thing incorporeal. But things incorporeal, which lie in grant, as an advowson, a right of common, and the like, may be appendant to things corporeal, as to a manor, house, or lands. So things corporeal may be appendant to things incorporeal, as lands to an office. 1 Co. Litt. 208. But common of turbary, or estovers, cannot be appendant or appurtenant to land, because it is not appropriate in nature or quality to the enjoyment of land; but it may be to a house, to be spent there. Neither can a leet, which is temporal property, be appendant to a church or chapel, which is ecclesiastical; nor a seat in the body of a church by prescription be claimed as appendant or belonging to land, but to a house. 1 Co. Litt. 206; 1 Vent. 386; Willes' R. 227. *Scholes v. Hargreave*, 5 T. R. 46. Further, nothing can be properly appendant or appurtenant to anything, unless the principal or superior thing be of perpetual subsistence and continuance. Thus, an advowson, which is said to be appendant to a manor, generally is, in truth, appendant to the corporeal demesnes of the manor, which are of perpetual subsistence and continuance, and not to any rents or services which are subject to extinguishment and destruction. Dyer, 70 b; 2 Leonnard, 222; 1 Co. Litt. 207.

Such incorporeal hereditaments as stand separate and alone are generally distinguished from those which are appendant or appurtenant by the appellation "in gross." As a seignory in gross, which is a seignory which has been severed from the demesne lands of the manor to which it was anciently appendant. 1 Scriv. Cop. 5. *See* 16 Mee. & W. 484.

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I. Subject Matter of Reference.

(A) *What can be Referred by Consent of Parties.*[1]

Knight v. Burton, 6 Mod. 231; S. P. Johnson v. Wilson, Willes, 248.

The terms of partition between joint-tenants may be referred.

It appeared by the recital of an award that the parties to the submission were joint-tenants of certain lands, the award ordered that they should make partition by mutual conveyances; no objection was taken to the power of the arbitrator to order the partition to be made, but to the uncertainty of the manner in which it was directed, it not being pointed out what moiety or part the one should have and what the other: but even this objection was overruled; and it was resolved that, although they were joint-tenants before, they would now become tenants-in-common.

Linch v. Dacy, 1 Keb. 848.

Or charges of slander.

Action for slander; the plaintiff pleaded submission and award, which was holden good on demurrer.

Soilleux v. Herbst, 2 B. & P. 444.

Or the adjustment of the terms of a marriage separation.

A bond of submission to arbitration between the trustee of a wife and her husband recited, that a suit for separation and divorce *à mensâ et thoro* had been instituted between the husband and wife in the Ecclesiastical Court at Doctors' Commons; and that, in order to terminate all disputes about the terms of the separation, it had been agreed that the terms of such separation and all matters in dispute should be made the subject of a reference. It was objected (upon a rule being obtained, calling on the obligor in the bond to show cause why it should not be made a rule of court), that the matter in dispute was only the subject of ecclesiastical jurisdiction, and therefore that this bond could

[1] It may be safely advanced as a general principle that all controversies respecting personal property (9 Rep. 78), or injuries to persons individually or relatively, where damages would be recoverable, may constitute the subject of a reference (Bac. Ab. Arb. A.; 6 Rep. 43; 7 Taunt. 422); or breaches of contract (16 Edw. 4, 2 pl. 6); partnership transactions (*Hewitt v. Hewitt*, 1 Q. B. 110); disputes as to the purchase price of property (2 Dowl. N. S. 446), may be referred. With respect to real estate, notwithstanding prior adjudications to the contrary (14 H. 4, 19; 23 Hen. 8; Keb. 996, 9844; Bro. Abatement, pl. 15; Fitz. Abatement, pl. 16; *Marks v. Marriot*, 1 Ld. Raym. 114); it is now clearly settled that the same rule obtains, and that where parties may by their own act transfer such property, or exercise any act of ownership with respect to it, they may refer any dispute concerning it to the decision of a third person, who may order the same acts to be done which the parties themselves might have effected by their own agreement: therefore, when it is stated that an arbitrator cannot make an award of freehold, that he cannot award the freehold of one man to another, or that partition cannot be by an award, these expressions must be understood to mean no more than that land cannot be transferred, or a division made of it, by the mere words of the award, but that it is necessary that the award should order such acts to be done as would, if done by the voluntary agreement of the parties, amount to a proper transfer, or partition at law. *See* Roll. Ab. C. 2; id. B. 14; K. 15.

not be made a rule of court, in compliance with 9 & 10 Wm. 3, c. 15, but the Court were of a different opinion, and said that many causes of action at law, and many suits in equity, might arise out of the disputes proposed to be referred. Rule absolute. See *Bateman v. Countess of Ross*, 1 Dowl. Rep. 235.

PROSSER v. GORINGE, 3 Taunt. 425.

Or questions concerning tithes.

This cause had been referred to an arbitrator to ascertain what lands were titheable to the rectors of S. and K., and what description of tithe was due to each in respect of a certain farm; to devise all means to prevent future litigation between the parties; to settle all matters in difference between them; and to order and determine what he should think fit to be done by either of them respecting the matters in dispute. The arbitrator (*inter alia*) awarded that the parties should accept undivided moieties of the tithes, as it was impossible for him to ascertain the boundaries of the particular land out of which the tithe of the respective parties was to issue. A rule *nisi* had been obtained to set aside the award.

Per Cur. The arbitrators have not exceeded their authority. The power given them is couched in very large and unusual terms, in order to enable the arbitrators to make a wise and judicious award, and to avoid the inconvenience accruing from the difficulty that would otherwise exist in ascertaining the particular lands. Rule discharged.

THE QUEEN v. SIR GILBERT HEATHCOTE, 10 Mod. 59; S. P. AINSLEY v. GOFF, cited in Kyd. 354, 2d ed.

Or the construction to be put on a clause in a will.[1]

Per Powis, J. "Suppose a clause in a will, that whatever controversy shall arise upon the construction of it shall be decided by such and such arbitrators, the parties will have their election to decide their controversies either by arbitrators or by law. See *Young v. Walters*, 9 Ves. 367.

BAKER v. TOWNSEND, 7 Taunt. 422; S. C. 1 Moore, 120.

Or an indictment for an assault.

The defendant had been convicted at the quarter sessions on an indictment for an assault, but the judgment was respited until a subsequent sessions, when it was recommended that the assault, and all other matters in dispute between the parties, should be referred to arbitration. The arbitrator accordingly awarded a compensation to the plaintiff for the assault. An objection was subsequently taken to the award, on the ground that a criminal prosecution could not be made the subject of a reference; or, at least, after an indictment being preferred, the previous leave of the Court was necessary to sanction the submission.

Sed per Cur. We entertain no doubt but that an assault may be legally referred to arbitration; and it is clear, beyond all question, that where a party has a remedy by action as well as by indictment, nothing can impede him from exercising his discretion in having it adjusted by arbitration, even though a criminal prosecution may have been commenced.[2]

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[1] And, generally, any question of pure law, as a demurrer (*Ching v. Ching*, 6 Ves. 281; 9 id. 364. *Mathew v. Davis*, 1 Dowl. N. S. 679); the construction of an act of parliament (*Price v. Hollis*, 1 M. & S. 105); the liability of a party on a promissory note (*Wilkinson v. Page*, 1 Hare, 276), or like disputes, may be referred. And contingent damages on a demurrer may be referred equally with damages on issues in fact. *Cooper v. Langdon*, 9 Mee. & W. 60.

[2] When, however, an indictment has been actually found, the matter can only be referred with leave of the Court. *R. v. Hardy*, 14 Q. B. 529; 19 L. J. Q. B. 200. And although the law will permit a compromise of all offences for which the injured party might sue and recover damages in an action, yet, if the offence is of a public nature, no agreement can be valid that is founded on the consideration of stifling the prosecution of the charge. Thus, where the offence was not confined to personal injury, but was accom-

(B) *What cannot be Referred.*

PHILIPS v. KNIGHTLEY, Fitzg. 53; S. C. 2 Str. 903.

A *qui tam* action cannot be referred.[1]

Per Cur. This being a *qui tam*, in which the poor had an equal interest with the plaintiff, it was not in the power of the arbitrators to order it to cease.

THORP v. COLE, 2 C., M. & R. 367; S. C. 4 Dowl. P. C. 457; S. C. on error, 1 Mee. & W. 531.

Nor a poor-rate.

On assumpsit on an award, it appeared that the submission to arbitration recited that the plaintiff had been rated to the relief of the poor, and conceiving himself to be overrated, had given notice of appeal to the churchwardens and overseers, and other persons, who had proposed to defend the same; but that the appeal was not entered, in consequence of the plaintiff and the said churchwardens and overseers, as far as they lawfully might or could agree to abide by the award of the arbitrators concerning the said matters in difference, and of and concerning the costs of the agreement, and counterpart of the notice of appeal, and of the preparations to resist such appeal, and all matters relating thereto. The costs of the reference to be in the discretion of the arbitrators. The arbitrators awarded that the churchwardens and overseers should pay to the attorney for the plaintiff 16*l.* 12*s.*, his bill already delivered, and the amount of his costs attending the reference and procuring the assent of his clients to an enlargement of time; and directed them to deduct 10*s.* on all future rates, and refund 10*s.* on all past rates, paid while the then scheme was in operation. They then directed that, as a dispute was made with regard to the quantity of a lathe occupied by the plaintiff, that the quantity should be ascertained by the parish, and the rate altered accordingly, agreeably to the price set against it in a schedule.

On demurrer,—

Lord Abinger, *C. B.*, and *Bolland*, *B.*, were of opinion, that the submission and award were bad, the rate not being a subject capable of being referred to arbitration; and that the costs being incidental to the determination of the question, the consideration for the submission failed; that the direction to repay portions of rates made since the scheme on which the rates had been made had come into operation was bad, as not binding on the then officers, and there was no power to compel them to obey the award in that respect.

But *Parke*, *B.*, differed from the rest of the Court, and held that, though the submission of the rate was void, the other matters were distinct, and might be the subjects of an arbitration; consequently the award was not bad as to them.

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panied with riot and obstruction of a public officer in the execution of his duty, it was held to be a matter of public concern, and therefore not legally the subject of a submission. *Keir v. Leman*, 6 Q. B. 308; 8 Jur. 824. *Edgcombe v. Rodd*, 5 East, 294. Indictments for nuisances may be referred (*Dobson v. Groves*, 6 Q. B. 637. *Fallowes v. Taylor*, 7 T. R. 475. *R. v. Moate*, 3 B. & Adol. 237. *R. v. Gore*, 8 Dowl. 102): so a presentment and proceedings before commissioners of sewers. *Doddington v. Bailward*, 7 Dowl. 640. After conviction for a misdemeanour, the Court will often sanction a compromise (*Beeley v. Wingfield*, 11 East, 46. *Kirk v. Strickwood*, 4 B. & Adol. 421); and this, though the court be one of quarter sessions. *Baker v. Townsend*, 7 Taunt. 422. Russell on Awards, 16. *Reg. v. Blakemore*, 14 Q. B. 544.

[1] Nor can any case of felony, as it must be punished for the public good, or any matter technically criminal which cannot be made the subject of a civil suit. Bac. Ab. Arb. A. Nor any agreement not to give evidence on a charge of felony, or to compound it (*Mason v. Watkins*, 2 Vent. 109; 1 Leon. 203); or to forbear examining a bankrupt as to monies unaccounted for (*Nerot v. Wallace*, 3 T. R. 17); or to drop proceedings on a rule to strike an attorney off the roll (*Kirwan v. Goodman*, 9 Dowl. 330). Or an indictment for the non-repair of a highway. *R. v. Cotton*, 3 Camp. 444. But *see R. v. Inhabitants of Cotesbatch*, 2 D. & R. 265.

II. Of the Submission.

(A) *Parties to.*[1]

(*a*) *Infant.*

Biddell v. Dowse, on Error, 6 B. & C. 255; S. C. 9 D. & R. 404; S. C. 3 Bing. 20; S. C. 10 B. Moore, 272.

An infant cannot bind himself by submission to arbitration.[2]

A suit and all matters between the parties (some adults, some infants, others married females) were, by consent of the attornies of the parties in the suit, referred to arbitration, with a provision that the death of any party should not abate the reference; and, before the award made, one died; and, by the award, his executors were ordered to pay, &c.:—*Held*, that no sufficient authority being shown to refer on the part of the infants, who were not competent, there was no mutuality, and that the award founded thereupon could not be sustained.

Roberts v. Newbold, Comb. 318.

Though a guardian may submit for him, and bind himself.

Upon an objection being taken to an arbitration-bond that one of the parties was an infant, the Court observed, that though an infant could not submit to arbitration, yet his guardian might for him, and bind himself that the infant should perform the award. *See* March. 111, 141. *Cavendish v.* ——, 1 Ch. Ca. 279; 1 Eq. Ca. Abr. 49; Jenk. 116. *Bacon v. Dubarry*, Comb. 439. *See* also 3 D. & L. 524; 15 Mee. & W. 198.

Bowyer v. Blorksidge, 3 Lev. 17.

And one of the parties being an infant will not affect the liability of the others.[3]

This was an action of debt on a submission-bond, that the obligor and A. B. his son (an infant) should perform the award of C. D. The defendant pleaded that his son was within age. The Court held that, whatever might be the case with respect to the father being bound for his son, yet the submission was good as to himself; and judgment was accordingly given for the plaintiff.

(*b*) *Married Woman.*[4]

(*c*) *Executor or Administrator.*

Elletson v. Cummins, 2 Str. 1144.

An executor or administra-

Debt upon an arbitration-bond, whereby the plaintiff and defendant sub-

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[1] Generally, every one capable of acting for himself in his own right can make a submission; but not persons attainted or outlawed, or (in general) married women, or persons under duress. Com. Dig. Arb. D.; Bac. Ab. Arb. C.

[2] An infant is not bound by his submission. *Knight v. Stone*, W. Jones, 164. He may execute or avoid it at his option, as he may his contracts in general (Bac. Ab. Arb. C. *Harvey v. Ashley*, 3 Atkins. 607. *Godfrey v. Wade*, 6 Moore, 488); and though, as a general rule, equity will not decree an award to bind an infant (*Cavendish v.* ——, 1 Ch. Ca. 279; 2 P. W. 450), yet, when an infant is party to a suit, it will sometimes refer to the master to ascertain whether it would be for the benefit of the infant that the suit should be submitted to arbitration, and will make an order according to the report. *Davis v. Page*, 9 Ves. 350; 10 Moore, 286. And an award is not bad by reason of its directing an infant to pay costs. *Proudfoot v. Poile*, 15 Mee. & W. 198; 3 D. & L. 524.

[3] *See* also *Wrightson v. Bywater*, 3 Mee. & W. 199. *Jones v. Powell*, 6 Dowl. 483.

[4] A married woman cannot be a party to a submission (1 Com. Dig. Arb. D. 2) unless the husband be *civiliter mortuus* (Co. Lit. 133, a; 2 Vern. 104; 1 T. R. 5; 4 id. 361; 2 B. & P. 105; 4 Esp. 27; 1 Selw. N. P. 237; Bac. Ab. Baron and Feme, M.; 1 Dowl. 235); or she be a *feme sole*, trader in London (2 B. & P. 23); or the reference be respecting property in which she is interested as executrix or administratrix (1 Inst. 351, a; Plow. 294; Vin. Ab. Baron and Feme, 222; Com. Dig. id. V.); or in equity, though not in law (*Marshall v. Rutton*, 8 T. R. 545) with respect to property settled upon her, and of which she has the entire and separate disposal (2 Ves. 517; 2 id. 190; 5 id. 846; 1 Br. Ch. Cas. 16); or with respect to the adjustment of the terms of her separation from her husband (1 Dow, Rep. 235).

If, however, a party knowingly enter into a submission with a married woman, a court of law will refuse at his instance to set the

mitted all matters in difference between them, or either of them. The arbitrators awarded 30*l.* to the plaintiff in full of all demands, either in her own right or as executrix to her husband; and on demurrer it was insisted that the arbitrators had exceeded their authority. But, after argument, the Court gave judgment for the plaintiff. *See* 1 T. R. 691; 5 id. 8; Williams on Executors.

Executor may submit a matter in dispute in right of the deceased.[1]

DAWNEY v. VESEY, 2 Vent. 249; S. P. FREEMAN v. BERNARD, 1 Ld. Raym. 247.

In an action of debt by an administratrix on an award made between the defendant and the testator, the Court were of opinion that an award creates a duty which survives to the executor or administrator, and that they shall be compelled to perform the act awarded to be done on the part of their testator or intestate.

And they are bound by the submission of their testator or intestate.

(*d*) *Attorney or Counsel.*

SMITH AND ANOTHER v. TROUP, 7 C. B. 757; 6 D. & L. 679; 18 L. J. C. P. 209.

An attorney appeared for a defendant in an action of assumpsit; and, after delivery of the declaration, consented to a judge's order referring the cause to an arbitrator, who awarded a sum of money to the plaintiffs. The order was made a rule of court, and the plaintiffs' costs taxed. The defendant was afterwards personally served with a demand for 126*l.* 8*s.*, together with the master's allocatur, &c. the amount of the sum awarded, and the taxed costs. On a rule to show cause why the defendant should not pay the money, &c., it appeared on affidavit that the defendant never consented to a reference, but, on the contrary, always protested, and sent the arbitrator and the plaintiffs (before the award was made) notice of his protest against the proceedings.

The attorney on the record has an authority to refer a cause.[2]

Held that, under ordinary circumstances, the attorney on the record has power to refer, and that if, when he does so, he goes beyond his authority, the remedy of the party is against the attorney. *See* also *Cayhill v. Fitzgerald*, 1 Wils. 28, 58. *Adams v. Bankart*, 1 C., M. & R. 681. *Jamieson v. Benns*, 4 Ad. & E. 945. *Paul v. Paul*, 2 C. & M. 235. *Bodington v. Harris*, 1 Bing. 187. *Latuch v. Pasherante*, 1 Salk. 86; Russ. on Arb. 28, 2d ed.

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award aside on the ground that she is not bound by it. *In re Warner*, 2 D. & L. 148.

The husband may in general submit for himself and his wife (Sty. 351); and he will be amenable for its performance (id.; 5 Ves. 846); and such a reference suffices for a debt due from the wife in a representative character, for the husband is made chargeable with it by the intermarriage (1 Rol. Ab. 246, l. 5, 10); or if there be a submission by the husband only respecting a lease for years, and which his wife has as executrix, this binds the latter after his death (1 Rol. 245, l. 50; Marr. 77. *See* also Bac. Ab. Arb. C. *Smith v. Ward*, Styles, 351; March. 77. *Hunter v. Rice*, 15 East, 100. *Oglander v. Boston*, 1 Vern. 396.

[1] But if he does so it will amount to an admission of assets, and he will not afterwards be allowed to plead *plene administravit* to an action on the arbitration-bond. *Barry v. Rush*, 1 T. R. 691. *Robson v.* ——, 2 Rose, 50. *Riddell v. Sutton*, 5 Bing. 200. He should, therefore, stipulate against the reference being taken as an admission of assets, sufficient to pay what may be the amount of the award. And see *Worthington v. Barlow*, 7 T. R. 453. *Pearson v. Henry*, 5 id. 6. *Love v. Honey*, 4 D. & R. 814. *Joseph v. Webster*, 1 R. & M. 496.

[2] And if in referring he exceed his actual authority, the remedy of the client is against him; but the latter is, nevertheless, bound by the award. *See* principal case; also *Filmer v. Delber*, 3 Taunt. 486. The attorney in a cause may also refer, together with the cause, all matters in difference. *Dowse v. Coxe*, 3 Bing. 20. *Thomas v. Hewes*, 2 C. & M. 519. If also he appear for a corporation, with the knowledge of the directors, he can bind the corporation by an agreement to refer, without being authorised to appear by an authority under seal. *Faviell v. Eastern Counties Railway Co.* 2 Ex. 344; 6 D. & L. 54; 17 L. J. Ex. 297. He also can consent to an enlargement of time (*R. v. Hill*, 7 Price, 636), or the making an order a rule of court. *Paul v. Paul*, 2 Dowl. 340. It is said, however, that a solicitor in Chancery cannot refer without the express consent of his client. Bac. Ab. Arb. C. *Colwel v. Child*, Ch. Cas. 86; 1 Ch. Rep. 104. *Swinfen v. Swinfen*, 27 L. J. Ch. 35; id. 491; 28 id. 849. The confidential clerk of an attorney cannot bind his principal or client to refer. *Greenwood v. Titterington*, 9 Ad. & E. 699.

SWINFEN v. SWINFEN, 25 L. J. C. P. 303; 18 C. B. 485; 1 C. B. (N. S.) 364; 26 L. J. C. P. 97.

And where a compromise has been effected by counsel duly instructed, a court of common law will not, on a proceeding between the parties to enforce such compromise, inquire into the existence or extent of his authority to enter into it.[1]

This was an issue directed by the Master of the Rolls to try the validity of the will of Samuel Swinfen. The plaintiff claimed as devisee under the will, and the defendant was heir-at-law to the testator. On the second day of the trial the counsel for the parties agreed to a compromise. The terms were to the effect that a juror should be withdrawn, the estate conveyed by the plaintiff to the defendant, and an annuity secured by the defendant to the plaintiff, &c.; and it was signed by the counsel in the presence of the attornies. A juror was accordingly withdrawn, and the terms of the compromise embodied in an order of Nisi Prius. Before the compromise was agreed upon by the counsel it had been submitted to the plaintiff, who expressed her disapproval, and said she wished the case to be tried by the jury, and that she would abide by the will; and the arrangement was subsequently made without communicating with her any further. Plaintiff's attorney made no objection to the compromise, but said that her counsel must defend him against his client; whereupon counsel said he was willing to take the responsibility jointly with the other counsel who were engaged with him. The plaintiff having refused to perform the agreement, a rule *nisi* was obtained for an attachment against her. On the argument to make the rule absolute it was contended (*inter alia*) that no attachment ought to be granted, because there was a repudiation by the plaintiff of the authority of counsel to enter into the agreement. But,—

Per Creswell, J. "It is said that the compromise entered into by the counsel for the parties was made without the authority of the plaintiff. I think the Court cannot listen to such an objection. It would be fatal to the administration of justice if the authority of counsel could be called into question. And there is no hardship in the matter; for if a party or his attorney think his counsel is adopting a course prejudicial to his interests, he can withdraw his brief, and say, 'You are no longer my counsel.' But if counsel, duly instructed, take upon himself to consent to a compromise which he believes to be for the interest of his client, the Court will not enter into an inquiry as to the existence or extent of his authority."

Williams and Willes, J.J., concurred, but the rule was discharged on a technical ground.[2]

SWINFEN v. SWINFEN, 27 L. J. Chan. 35.

But this was held to be otherwise in equity.[3]

The facts of this case were afterwards brought before the Master of the Rolls, on a bill to enforce specific performance of the compromise, when it was held that a compromise of a trial at law, made by counsel under the circumstances disclosed in the case, was not binding on the client, who was not aware of it, had never sanctioned it, and would not acquiesce in it.

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[1] *See* also *Chambers and others v. Mason*, 28 L. J. C. P. 10. And in general a reference by the consent of counsel in a cause will be binding on his client: at all events at law (*Furnival v. Bogle*, 4 Russ. 142. *In re Hobler*, 8 Beav. 101. *Mole v. Smith*, 1 Jac. & W. 673. *College v. Horne*, 3 Bing. 119; 10 Mod. 202). And this is the same in the Scotch law. *Baillie v. Edinburgh Oil Gas-Light Co.* 3 Clark & Fin. 639.

[2] The technical defect being remedied, the above case came on again on motion for an attachment, when it was held by *Crowder, J.*, against the majority of the Court, that, although in the conduct of the cause counsel has authority to act entirely on his own judgment, uncontrolled by his client, yet, when a compromise is contemplated, and litigation is to cease upon terms to be arranged, counsel can only act under special instructions from his client. *Swinfen v. Swinfen*, 26 L. J. C. P. 97; 1 C. B. (N. S.) 364. *See* also *Swinfen v. Lord Chelmsford*, 29 L. J. Ex. 382; S. C. 6 Jur. 1035. *See* 5 C. B. 59; 28 L. J. C. P. 10.

[3] This decision was confirmed on appeal to the Lords Justices, 27 L. J. Chan. 491. *Swinfen v. Bacon*, 30 L. J. Ex. 33.

(*e*) *By a Partner.*

ADAMS v. BANKART AND HEYGATE, 1 C., M. & R. 681.

One partner cannot bind his co-partner by a reference without his consent.[1]

The plaintiff was the surviving partner of A., and the defendants were partners. Certain accounts existing between the plaintiff and A. and the defendants had been referred to arbitration. The plaintiff had attended the arbitrator and recognised his authority; but it was not shown that A. had done so. The submission was not by deed. The arbitrator had made his award in favour of the plaintiff, and directed that the defendants should pay a certain sum to them.

Per Cur. One partner cannot bind his co-partner by his submission to arbitration without the consent of the latter. If one bind himself for his partner, he may be liable, though his partner is not bound; and so will the co-partner, if he give authority to bind him. But this is not a matter which arises naturally out of the partnership, nor is it within the ordinary scope of a partner's authority.

STEAD v. SALT, 3 Bing. 101; S. C. 10 Moore, 389.

A submission by three of five joint-contractors does not bind their co-contractors.

In assumpsit for work and labour, it appeared that the plaintiffs performed the work in question on a joint undertaking, which was confined to the particular contract, and that they were not general partners; and the only question was, whether the account which they had sent in to the defendant for the only work done had been settled by the terms of an award. It appeared that the submission had been made by articles of agreement not under seal, and which had been signed by the defendants, and three of the plaintiffs only, for the whole five.

Bayley, J., at the trial, held the submission not binding; and the case coming before the Court, they said :—"It appears that the submission to arbitration was signed by three of the plaintiffs only; and the question now is, whether that submission is binding on the five, or can be given in evidence against them? Now, we are of opinion that it cannot. It is quite clear that there was no express authority for the three plaintiffs to enter into a submission for arbitration, as it formed no part of the transactions in which they were engaged; and there is no ground by which an authority can be implied, that they could bind the others by such a submission to perform an award that might be made under it."

(*f*) *By an Agent.*

SHELF v. BAILY, 1 Com. 183. ADAMS v. STALEY, 2 Show. 386; S. C. 2 Lev. 235. BARKER v. LEES, 2 Keb. 64. S. P. GOODSON v. BROOKES, 4 Camp. 163.

An agent may refer for his principal.[2]

The condition of a submission-bond recited that a replevin suit was depending between Baily, one of the parties to the submission, and one Webb, who made conusance as bailiff to Isaac Shelf, the other party, and Margaret his wife,

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[1] The party referring will, however, be bound, if his partner refuse to perform the award. *Strangford v. Green*, 2 Mod. 227; Bac. Ab. Arb. C. But where an individual partner executes a deed for himself separately, on the faith and understanding that it is to be executed by his co-partners, it does not bind him, unless the signatures of the rest be procured, on the principle that the submission is incomplete. It has, therefore, been determined, that an award made against one member of a firm by virtue of a deed of reference executed only by such member, upon the basis that it was to be executed by all the partners, is not evidence of a debt due from such partner. *Antram v. Chase*, 15 East, 209. *See* also *Dutton v. Morrison*, 17 Ves. 193. *Johnson v. Baker*, 4 B. & A. 440; and *post*, Partnership.

[2] The agent need not have any interest in the matter in dispute. But if he bind himself for the performance of the principal, he is himself bound by the award. Bac. Ab. Arb. C.; 1 Wils. 28; Dyer, 216 b. He must, however, be duly authorised; and if the submission be under seal, the authority must also be under seal. Dyer, 216 b.; 1 Wils. 28.

and then stated that the plaintiff Shelf, and the defendant Baily, were to stand to the award of arbitrators, on proviso that the award were made concerning the premises by a certain day. The award recited that Baily had brought an action of replevin for taking his cattle against Webb, to which Webb had made conusance, as bailiff to Shelf, and Margaret his wife, and after stating the proceedings in that action awarded "of and upon the premises, and of all matters in difference between the parties," that all proceedings in the replevin suit should cease, that Baily should pay 7*l.* 10*s.* for the rent in arrear to Shelf, and 10*l.* costs, and that Shelf should give him a general release. In avoidance of this award it was argued, that Webb was a stranger to the submission, and that by it the action between Baily and him was to cease; that so much was to be paid to Shelf, who was to give a release, which would not discharge Baily from the claim of Webb, who was entitled to costs if the plaintiff in replevin did not proceed. It was answered, that Shelf was the party concerned in interest, and that a person might submit to an award for another; and the Court expressed the inclination of their opinion to be, that if one submitted on the behalf of another, his bond was forfeited if the stranger did not perform his part of the award, but that it did not appear here that Shelf undertook for Webb or submitted on his behalf. However, as in this case Shelf was the principal in the avowry, and Webb only an agent; the award appears to be conclusive against Webb, and might have been set up as a defence to any claim of costs by him against Baily. *See post*, Principal and Agent; and 1 Camp. 43; Paley, 221, 2d edit.

CURTIS v. BARCLAY, 5 B. & C. 141; S. C. 7 D. & R. 539.

And such an authority may be derived from the nature of the employment.[1]

In this case, A., a merchant residing abroad, made consignments to B., his agent, B. accepting bills on the receipt of the bills of lading, after deducting his charges. A. consigned some goods on those terms to B., and indorsed the bills of lading to him. The master of the ship refusing to deliver the goods to B., he incurred expenses in endeavouring to settle the dispute by arbitration.

And the Court held B. entitled to the expenses, and said—Had any part of these expenses been improperly incurred, had the reference been an improper step, had there been any misconduct in the plaintiff, it would have been otherwise. But the bill of lading authorised him to act for the benefit of all concerned.

(*g*) *By an Assignee.*

BANFILL v. LEIGH, 8 T. R. 571.

The assignee of debts under a power to compound and receive them may refer.[2]

In an action on an award, the declaration, after stating that all debts due to B. & G. had been assigned to the plaintiff, an attorney, "with authority to receive or compound them, at his discretion,"—

Held, that he had power to refer, as the whole equitable interest was assigned to him.

(*h*) *Assignees of Bankrupts.*

Assignees of a bankrupt may refer with leave of the Court.[3]

By the Bankrupt Law Consolidation Act, 1849, 12 & 13 Vic. c. 106, s. 153, "The assignees, with the leave of the Court first obtained, &c., may submit to

[1] So one who underwrites, and settles losses for a principal, has an implied authority to refer. *Goodson v. Brooke*, 4 Camp. 163. *See* also *Henley v. Soper*, 8 B. & C. 16; S. C. 2 M. & R. 155. And an agent who has authority to refer, has the same powers in the conduct of the reference as his principal would have had. *Hamilton v. Rankin*, 3 De Gex & S. 782. *Backhouse v. Taylor*, 20 L. J. Q. B. 233.

[2] And so may the assignee of a contract, with a power of attorney to deal as he thinks proper. *Hancock v. Reid*, 2 Pr. Rep. 584; 15 Jur. 1036; 21 L. J. Q. B. 78.

[3] As to revocation of a submission to arbitration in bankruptcy, see *Marsh v. Wood*, 9 B. & C. 659; 4 M. & R. 504. *Snook v. Hellyer*, 2 Chit. 43. *Andrews v. Palmer*, 4 B. & A. 250. If, however, on a reference by a party before bankruptcy, the

arbitration any difference or dispute between the assignees and any other person, for or on account, or by reason of anything relating to the estate and effects of the bankrupt."

By sect. 154, such agreement of reference may be made a rule of court of any of the superior courts of law at Westminster.

Agreement may be made a rule of court.

(*i*) *Assignees of Insolvents.*

By 1 & 2 Vic. c. 110, s. 51, "it shall be lawful for the assignee or assignees of any such prisoner, &c. to submit to arbitration any difference or dispute between such assignee or assignees, and any person or persons for or on account of, or by reason of any matter, cause, or thing, relating to the estate and effects of such prisoner: Provided nevertheless, that no such submission to arbitration shall be made without the consent[1] in writing of the major part in value of the creditors of such prisoner, who shall meet together pursuant to a notice of such meeting, to be published at least fourteen days before such meeting in the *London Gazette*, and also in some newspaper most usually circulated in the neighbourhood of the place where such prisoner had his or her last usual residence before his or her imprisonment aforesaid, nor without the approbation of the said Court, or of one of the commissioners thereof."

Assignees of an insolvent may refer, with consent of majority in value of creditors, and the approbation of the Court.

The Protection Stat. 7 & 8 Vic. c. 96, s. 13, contains a similar provision in the same words.

So also assignees under the protection statutes.

WANSBOROUGH v. DYER, 2 Chit. Rep. 40.

Per Cur. The trustees of the insolvent, by entering into this bond of submission to arbitration as to all matters in difference, and agreeing to pay what should be awarded, confess that they have assets, and are therefore responsible for the costs which they have been awarded by the arbitrators to pay. *See* 3 Esp. 101; 7 T. R. 453; 5 id. 6; 1 id. 691.

Trustees of an insolvent, by submitting to arbitration, admit that they bear assets.

(*j*) *By Corporations.* *See* Corporations.

(*k*) *By Direction of the Court or Judge.*[2]

assignees are chosen while the reference is pending, and they appear and adopt the proceedings, they will be bound. *Dod v. Herring*, 2 Sim. 143; 1 R. & M. 153. *Taylor v. Shuttleworth*, 8 Dowl. 281. If the assignees refer, and do not at the same time protest against the reference being taken as an admission of assets, it will be held to amount to such an admission. *Robson v.* ——, 2 Rose, 50; 1 T. R. 691; 5 id. 7; 7 id. 453. Though a bankrupt cannot make a valid submission, so as to bind the estate, yet such submission is not void, and will be binding on him; and if costs are awarded against him, he may be made to pay them. *Milnes v. Robertson*, 24 L. J. C. P. 29; 15 C. B. 451; 18 Jur. 1108. *See* also *Whiteacre v. Pawlin*, 2 Ver. 229.

[1] The want of this consent, however, cannot be taken advantage of by the defendant in the proceedings. *Sutcliffe v. Brooke*, 15 L. J. Ex. 118; 9 Jur. 1112; 14 Mee. & W. 855.

[2] (1) *At any time before trial, Court or Judge may order the cause to be referred if it appear to be wholly or part matter of account.*] By 17 & 18 Vic. c. 125, s. 3, "if it be made appear at any time after the issuing of the writ to the satisfaction of the court or a judge, upon the application of either party, that the matter in dispute consists wholly or in part* of matters of mere account, which cannot conveniently be tried in the or-

* Where the matter consists, wholly or in part, of matters of mere account (claim for dilapidations is within the act, 27 L. J. Ex. 216), the court or judge may order the whole, or a part only, to be referred under this statute. *Browne v. Emerson*, 25 L. J. C. P. 104. And the order may be amended for the purpose of carrying out the intention of the Court when it was made (*Bell v. Postlethwaite*, 25 L. J. Q. B. 63); and even after award made. *Kendil v. Merritt*, 25 L. J. C. P. 251. The particulars of demand may also be amended at any time before the award is made. *Gibbs v. Knightley*, 26 L. J. Ex. 294. In the absence of any provision for that purpose, the arbitrator has no power over the costs. *Leggo v. Young*, 16 C. B. 626; 24 L. J. C. P. 200. The arbitrator must proceed as in an ordinary reference, and he cannot refuse to inquire into a question of fraud raised before him as to a part of the accounts in dispute. *Insull v. Moogen*, 27 L. J. C. P. 75. And an order referring a cause to the arbitration of a judge of a county court under this section is obligatory on the judge. If the judge is desirous to have the

(*l*) *By the Judge of a County Court.*[1]

dinary way, it shall be lawful for such court or judge, upon such application, if they or he think fit, to decide such matter in a summary manner, or to order that such manner, either wholly or in part, be referred to an arbitrator appointed by the parties, or to an officer of the court, or, in country causes, to the judge of any county court, upon such terms, as to costs and otherwise, as such court or judge shall think reasonable; and the decision or order of such court or judge, or the award or certificate of such referee, shall be enforcible by the same process as the finding of a jury upon the matter referred." *See* 1 H. L. Cas. 125; 27 L. J. Q. B. 2.

(2) *At the Trial the Judge may refer matters of Account.*] By sect. 6, "if upon the trial of any issue of fact *by a judge* under this act, it shall appear to the judge that the questions arising thereon involve matter of account which cannot conveniently be tried before him, it shall be lawful for him, at his discretion, to order that such matter of account be referred to an arbitrator appointed by the parties, or to an officer of the court, or, in country causes, to a judge of any county court, upon such terms, as to costs and otherwise, as such judge shall think reasonable; and the award or certificate of such referee shall have the same effect as hereinbefore provided as to the award or certificate of a referee before trial; and it shall be competent for the judge to proceed to try and dispose of any other matters in question, not referred, in like manner as if no reference had been made." This clause does not extend to jury causes, but only to those to be decided by the judge. *Robson v. Lees*, Ex. H. T. 1861. It applies, although the "matter of account" is not between the plaintiff and defendant, but between one of the parties in the cause and a third party, provided it is by plea or otherwise mixed up with the cause of action or defence. *Adams v. Yeoman*, 2 F. & F. 92; but not, "and all matters in difference." *Kendal v. Merrett*, 4 W. R. 594.

(3) *Proceedings before and Power of the Arbitrator to be the same as in a reference by consent under Rule or Order.*] By sect. 7, "the proceedings upon any such arbitration as aforesaid shall, except otherwise directed hereby, or by the submission or document authorising the reference, be conducted in like manner, and subject to the same rules and enactments as to the power of the arbitrator and of the court, the attendance of witnesses, the production of documents, enforcing or setting aside the award, and otherwise, as upon a reference made by consent under a rule of court or judge's order."

(4) *The Award may be sent back to Arbitrator for Re-consideration.*] By sect. 8, "in any case where reference shall be made to arbitration as aforesaid, the court or a judge shall have power at any time, and from time to time, to remit the matters referred, or any or either of them, to the re-consideration and re-determination of the said arbitrator,* upon such terms, as to the costs and otherwise, as to the said court or judge may seem proper."

This section also applies to references by consent. *Morris v. Morris*, 25 L. J. Q. B. 261; 2 Jur. N. S. 542.

(5) *Application to set aside Award to be made within Seven Days of the Term following the Publication.*] By sect. 9, "all applications to set aside any award made on a compulsory reference under this act, shall and may be made within the first seven days of the term next following the publication of the award to the parties, whether made in vacation or term; and if no such application is made, or if no rule is granted thereon, or if any rule granted thereon is afterwards discharged, such award shall be final between the parties."

(6) *The Award may be enforced by a Judge after Seven Days from Publication, though time not elapsed for moving.*] By sect. 10, "any award made on a compulsory reference under this act may, by authority of a judge, on such terms as to him may seem reasonable, be enforced at any time after seven days from the time of publication, notwithstanding that the time for moving to set it aside has not elapsed."

[1] *The Judge of a County Court may refer a Cause with the Consent of the Parties.*†] By 9 & 10 Vic. c. 95, s. 77, it is enacted, "that the judge may in any case, with the consent of both parties to the suit, order the same, with or without other matters, within the jurisdiction of the court, in dispute between such parties, to be referred to arbitration, to such person or persons, and in such manner and on such terms, as he shall think reasonable and just, and such reference shall not be revocable by either party, except by consent of the judge, and the award of the arbitrator or arbitrators, or umpire, shall be entered as the judgment in the cause,

propriety of the reference to him questioned, he must apply to set aside the order. *In re Cummins v. Birkitt*, 27 L. J. Ex. 216. Where an order has been assented to by a party, he cannot some time after apply to have it set it aside on the ground of its not being matter of mere account. *Rogers v. Kearns*, 29 id. Ex. 328.

* But where some trivial error has been made, the Court will be reluctant to reopen the matter. *Brown v. Hellaby*, 26 L. J. Ex. 217.

† The judge has no power to refer without the consent of the parties, so that in pleading such an order of reference it is not necessary to mention that it was made by order of the judge, but it is enough to state that the parties mutually agreed to refer. *Roper v. Levy*, 2 L., M. & P. 621; 21 L. J. Ex. 28; 7 Ex. 55.

(*m*) *Parties empowered or directed to Refer by Special Acts.*

(1) *Trustees of Savings' Banks.*[1]

(2) *Friendly and Benefit Building Societies.*[2]

and shall be as binding and effectual to all intents as if given by the judge: Provided that the judge may, if he think fit, on application to him at the first court held after the expiration of one week after the entry of such award, set aside any such award so given as aforesaid, or may, with the consent of both parties as aforesaid, revoke the reference, or order another reference to be made in the manner aforesaid." 21 L. J. Ex. 28.

Every Arbitrator has Power to Administer an Oath to a Witness legally called before him.] By stat. 14 & 15 Vic. c. 99, s. 16, "every court, judge, justice, officer, commissioner, *arbitrator*, or other person now or hereafter having by law or by consent of parties authority to hear, receive, and examine evidence, is hereby empowered to administer an oath to all such witnesses as are legally called before them."*

[1] *Disputes arising between the Trustees of Savings' Banks and a Depositor or his Personal Representative must be referred to Arbitration.*†] By 7 & 8 Vic. c. 83, s. 14, "if any dispute shall arise between the trustees and managers of any savings' bank and any individual depositor therein, or any executor, administrator, next of kin, or creditor or assignee of depositor, who may become bankrupt or insolvent, or any person claiming to be such executor, administrator, next of kin, creditor, or assignee, or to be entitled to any money deposited in such savings' bank, then and in every such case the matter in dispute shall be referred in writing to the barrister-at-law ‡ appointed under the said recited acts, who shall have power to proceed, *ex parte* on notice in writing to the said trustees or managers, left or sent by the said barrister to the office of the said institution; and whatever award, order, or determination shall be made by the said barrister shall be binding and conclusive on all parties, and shall be final to all intents and purposes, without any appeal; and no submission to, or award, order, or determination of the said barrister shall be subject or liable to, or charged with any stamp-duty whatever."

[2] *Rules for Arbitration, when such is appointed by Rules of the Society.*] By 18 & 19 Vic. c. 63,§ it is enacted, that "in all friendly societies established under this act, or any of the said repealed acts, all applications for the removal of any trustee, or for any other relief, order, or direction, or for the settlement of disputes that may arise or may have arisen in any society, the rules of which do not prescribe any other mode of settling such disputes, or to enforce the decision of any arbitrators, or to hear or determine any dispute, if no arbitrator shall have been appointed, or if no decision shall be made by the said arbitrators within forty days after application has been made by the member or person claiming through or under a member, or under the rules of the society, shall be made to the county court of the district within which the usual or principal place of business of the society shall be situated; and such court shall, upon the application of any person interested in the matter, entertain such application, and give such relief, and make such orders and directions in relation to the matter of such application as hereinafter

* Before this enactment an arbitrator appointed by a county court had no power to administer an oath. *R. v. Hallett*, 20 L. J. M. C. 197.

† And the parties have no other remedy. *Crisp v. Banbury*, 8 Bing. 394. *R. v. Mildenhall*, 6 Ad. & E. 952. *R. v. Cheadle*, 3 Nev. & M. 418; 1 Ad. & E. 323. *Marshall v. Nicholls*, 21 L. J. Q. B. 343. *Reeves v. White*, id. 169; 17 Q. B. 995. *R. v. Witham*, 1 Ad. & E. 321.

‡ By sect. 15 of the above act the barrister has power to inspect books and administer oaths.

§ This statute, being to consolidate and amend the laws relating to friendly societies, repeals the previous statutes on the subject, and amongst them the 10 Geo. 4, c. 56, and the 4 & 5 Wm. 4, c. 40, except so far as they may be applicable to any benefit building society established under the 6 & 7 Wm. 4, c. 32. But as the 6 & 7 Wm. 4, c. 32, incorporates the provisions of the 10 Geo. 4, c. 56, and the 4 & 5 Wm. 4, c. 40, so far as they are applicable to any benefit building society, it would seem that the arbitration clauses in the two last-mentioned statutes are still in force as to benefit building societies.

Where a member of a benefit building society (the rules of which provided for the settlement of disputes between the society and its members by arbitration) has, upon having the amount of his shares advanced to him, executed a mortgage to the society to secure the payment of the subscriptions, interest, and bonus, payable by the rules of the society in respect of those shares, a dispute as to the amount payable by him according to the rules, in order to redeem his mortgage and have the deeds given up to him, is not a dispute between the member, as such, and the society, as to make it determinable only by arbitration. *Queen v. Trafford and others*, 24 L. J. M. C. 20. *Fleming v. Self*, 1 Kaye, 518. *Cutbill v. Kingdom*, 1 Ex. 494; 17 L. J. Ex. 177. *Mullock v. Jenkins*, 14 Bear. 628. But where the dispute is between the member, *as member*, and the society, the only mode of determination is by arbitration, if arbitrators have been duly appointed. *Reeves v. White*, 17 Q. B. 995; 21 L. J. Q. B. 169.

mentioned, or as may now be given or made by the Court of Chancery, in respect either of its ordinary or its special or statutory jurisdiction; and the decision of such county court upon and in relation to such application as aforesaid, shall not be subject to any appeal: Provided always, that in Scotland the sheriff within his county, and in Ireland the assistant barrister within his district, shall have the same jurisdiction as is hereby given to the judge of a county court."

How the Attendance of Witnesses is to be Enforced.] By 17 & 18 Vic.* c. 56, s. 6, "all powers and provisions of any act or acts of parliament for ordering and enforcing the attendance of witnesses before an arbitrator, under any reference made a rule of court, and for punishing disobedience to any such order, shall apply to any arbitration of any difference or dispute under or pursuant to the rules of any of the societies intended to be affected and provided for by this act; for which purpose a copy of the resolution of the board of directors, or committee, or board of management of any such society, authorising such reference, signed by the chairman or any director or the secretary of such society, may be made a rule of any of her Majesty's courts at Westminster."

[1] *By 5 Geo. 4, c. 85, s. 2, Expenses of Prisoners may be referred to Barrister appointed by Justices of Assize.*] Sect. 2. "And be it further enacted, that the monies to be paid under any such contract as aforesaid shall be raised in the same manner as monies for defraying the expenses of the gaol or house of correction, for which a substitute shall be provided under such contract; and where such expenses are not wholly defrayed from the same fund, and there shall arise a difference of opinion between the parties interested in the several funds applicable to the several purposes of the prison, as to the proportion in which those funds respectively shall contribute to the sum to be paid to the county, riding, or division, for the use of its prison, and such difference shall not be adjusted by agreement between themselves it shall be lawful for either of such parties to apply to the justices of assize of the last preceding circuit, or of the next succeeding circuit, or to one of such justices, who shall, by writing under their or his hands or hand, nominate a barrister-at-law, not having any interest in the question, to arbitrate between the parties; and such arbitrator may, if he shall see fit, adjourn the hearing from time to time, and require all such further information to be afforded by either of the parties as shall appear to him meet and necessary, and shall, by his award in writing, determine the proportions in which such parties shall contribute towards the said expenses, and his award shall be final and conclusive between the parties; and such arbitrator shall also assess the costs of the arbitration, and shall direct by whom, and out of what fund, the same shall be paid."

By 5 & 6 Wm. 4, c. 76, s. 114, Expenses of Prosecution of Offenders may be referred if Disputes arise as to the Treasurer's Account.] Sect. 114. "That the treasurer of every county in England and Wales shall keep an account of all costs arising out of the prosecution, maintenance and punishment, conveyance and transport, of all offenders committed for trial to the assizes in such county, from any borough in which a separate court of quarter sessions of the peace shall be holden; and the treasurer of every such county shall, not more than twice in every year, send a copy of the said account to the council of each of the said boroughs, and shall make an order for payment of the same on the council of such borough, and the council of every such borough shall forthwith order the same, with all reasonable charges of making and sending such account, to be paid to the treasurer of such county out of the borough fund; and in case any difference shall arise concerning the said account, it shall be decided by the arbitration of a barrister to be named, as is provided in the case of differences with respect to the payment of monies under contracts made by authority of an act made in the fifth year of his late Majesty King George the Fourth, intituled 'An Act for Amending an Act of the last Session of Parliament relating to the Building, Repairing, and Enlarging of certain Gaols and Houses of Correction, and for Procuring Information as to the State of all other Gaols and Houses of Correction in England and Wales:' Provided that nothing herein contained shall be construed to alter or restrain the powers given by the last-mentioned act of contracting with the justices of the peace having authority or jurisdiction in and over any gaol or house of correction of the county wherein or where such borough is situated, or whereto it is adjacent, for the conveyance, support, and maintenance, in such last-mentioned gaol or house of correction, of prisoners committed thereto from such borough, save only that all such powers shall, after the 1st day of May, 1836, be vested in the council of such borough in the name of the body corporate whose council they are, and in none other; and for the purpose of making such contracts as aforesaid, the council of such borough, and none other, shall have power to make the orders required by the said last-mentioned act to be made by the justices of the borough at the borough sessions."

By 5 & 6 Vic. c. 98, s. 20, Disputes relating to the Expenses of Conveyance and Mainte-

* This act only extends to friendly societies which grant policies of assurance payable at death exceeding 1000*l.* *See* sect. 1.

nance of Prisoners may be referred to Arbitration.] Sect. 20. "And be it enacted, that the expenses heretofore incurred, or hereafter to be incurred, in the conveyance, transport, maintenance, safe-custody, and care of such prisoners (prisoners from a borough with a separate court of quarter sessions kept in county prison not under contract) as aforesaid, shall be paid out of a rate to be made and levied for that purpose by the council of such borough, in the nature of a borough-rate; and any such rate may be made and recovered in the same manner as any borough-rate may be made or recovered; and the amount of all such expenses of conveyance, transport, maintenance, safe-custody, and care of prisoners as aforesaid, shall, in case of dispute, be settled by such barrister-at-law as shall be determined upon in writing between the visiting justices of such prison and the council of such borough; and in case no appointment of such barrister be agreed upon by the said parties within the space of fourteen days next after such dispute shall have arisen, such dispute shall be decided by the arbitration of a barrister, to be named as provided in the case of differences with respect to the payment of monies under contracts made by authority of an act passed in the fifth year of the reign of King George the Fourth, intituled 'An Act for Amending an Act of the last Sessions of Parliament relating to the Building and Enlarging of certain Gaols and Houses of Correction, and for Procuring Information as to the state of all other Gaols and Houses of Correction in England and Wales.'"

By 7 & 8 Vic. c. 93, s. 1, the arbitrating Barrister, upon receiving a Requisition in Writing from the Treasurer of the County or Visiting Justices, &c. may state a Special Case.] Sect. 1 enacts, "that in any case in which a barrister-at-law shall have been or shall hereafter be named, as in the said recited acts, or either of them, is mentioned, to arbitrate between the parties, such barrister-at-law upon the requisition in writing of the treasurer of the county, or of the visiting justices of the prison, or of the town-clerk of the borough, or on behalf of the council of the borough who shall be interested in the decision of such barrister, shall be empowered, if he shall think fit, before making his award, to state one or more special case or cases touching any of the matters referred to such barrister-at-law for the opinion of such one of the superior courts of common law at Westminster as he shall direct, or to raise in any award to be at any time made by him any question or questions for the opinion of such court; and such court shall hear and determine the matter according to the practice of the court on special cases, and make such order as to the costs, and by and to whom, and in what manner the same shall be paid or borne, as to such court shall seem meet, and the decision of the court shall be binding on such barrister in making his award."

By sect. 2, in case the Barrister die before making his Award another to be chosen.] Sect. 2. "In case any barrister who shall have been or shall hereafter be named in pursuance of the said recited acts, or either of them, or of this act, shall die or refuse to act, or be disabled from acting, either from ceasing to practise as a barrister or from any other reason before making his award, the several parties in the said several acts mentioned shall be authorised and required to name another barrister-at-law for all the purposes in the said several acts mentioned, or any of them, in like manner as if no appointment had been made under the same; and the barrister so newly named shall have the same authority to decide the matters in difference as if no other appointment had been made; and in every such case in which, before the passing of this act, a second barrister has been appointed to settle or determine any matters in difference left unsettled or undetermined by the barrister first appointed for that purpose, the appointment of such second barrister shall be deemed good, and the barrister so secondly appointed shall be deemed to have, and to have had, from his appointment, the same authority as if appointed under this act."

[1] *By 5 Geo. 4, c. 96, s. 2, causes of Dispute as to Price of, or Injury done to the Work, or Delay in Finishing the Work: or in not Finishing it in a Workmanlike Manner, or according to Contract, or to Bad Materials: or as to Compensation for Implements in working new Patterns: or as to the Length, Breadth, or Quality: or in case of Cotton, the Yarn, or Wool, or the Wages for great length: or on the Cotton Manufacture as to Cravats, &c.: or arising out of a particular Trade which cannot be otherwise adjusted: or as to Sizing or Ornamenting Goods, may be referred.*] 5 Geo. 4, c. 96, s. 2. "That the following subjects of dispute arising between masters and workmen, or between workmen and those employed by them, in any trade or manufacture in any part of the United Kingdom of Great Britain and Ireland, may be settled and adjusted in manner hereafter mentioned; that is to say, disagreements respecting the price to be paid for work done, or in the course of being done, whether such disputes shall happen or arise between them respecting the payment of wages as agreed upon, or the hours of work as agreed upon, or any injury or damage done or alleged to have been done to the work, or respecting any delay or supposed delay in finishing the work, or the not finishing the work in a good and workmanlike manner, or according to any contract, or to bad materials; cases where the workmen are to be employed to work any new pattern which shall require them to purchase any new implements of manufacture, or to make any alteration upon the old implements for the working thereof, and the

masters and workmen cannot agree upon the compensation to be made to such workmen for or in respect thereof; disputes respecting the length, breadth, or quality of pieces of goods, or, in the case of cotton manufacture, the yarn thereof, or the quantity and quality of the wool thereof; disputes respecting the wages, or compensation to be paid for pieces of goods that are made of any great or extraordinary length; disputes in the cotton manufacture respecting the manufacture of cravats, shawls, policat, romal and other handkerchiefs, and the number to be contained in one piece of such handkerchiefs; disputes arising out of, for, or touching the particular trade or manufacture, or contracts relative thereto, which cannot be otherwise mutually adjusted and settled; disputes between masters and persons engaged in sizing or ornamenting goods: but nothing in this act contained shall authorise any justice or justices acting as hereinafter mentioned to establish a rate of wages, or price of labour or workmanship at which the workmen shall in future be paid, unless with the mutual consent of both master and workman: Provided always, that all complaints by any workmen as to bad materials shall be made within three weeks of his receiving the same; and all complaints arising from any other cause shall be made within six days after such cause of complaint shall arise."

By sect. 3, *Appointment of Referees is provided for.*] Sect. 3. "That whenever such subjects of dispute shall arise as aforesaid, it shall be lawful for the masters and workmen, or either of them, to demand and have an arbitration or reference thereof in manner following; that is to say, where the party complaining and the party complained of shall come before, or agree by any writing under their hands to abide by the determination of any justice of the peace or magistrate of any county, riding, division, stewartry, barony, city, burgh, town, or place, within which the parties reside, it shall and may be lawful for such justice of the peace or magistrate to hear and finally determine, in a summary manner, the matter in dispute between such parties; but if such parties shall not come before, or so agree to abide by the determination of such justice of the peace or magistrate, then it shall be lawful for any such justice or magistrate, and such justice of the peace or magistrate is hereby required, on complaint made before him, and proof by the examination of the party making such complaint, that application has been made to the person or persons against whom such cause of complaint has arisen, or his, her, or their agent or agents, if such dispute has arisen with such agent or agents, to settle such dispute, and that the same has not been settled upon such complaint being made, or where the dispute relates to a bad warp, that such cause of complaint has not been done away with within forty-eight hours after such application, to summon before him such person or persons, or agent or agents, on some day not exceeding three days, exclusive of Sunday, after the making such complaint, giving notice to the person making such complaint of the time and place appointed in such summons for the attendance of such person or persons, agent or agents, as aforesaid; and if at such time and place the person or persons so summoned shall not appear by himself, herself, or themselves, or send some person on his, her, or their behalf, to settle such dispute, or appearing shall not do away such cause of complaint, then and in such case it shall be lawful for such justice, and he is hereby required, at the request of either of such parties, to nominate arbitrators or referees for settling the matters in dispute; and such justice shall then and there at such meeting propose not less than four nor more than six persons, one-half of whom shall be master-manufacturers, or agents or foremen of some master-manufacturer, and the other half of whom shall be workmen in such manufacture; such respective persons residing in or near to the place where such disputes shall have arisen; out of which master-manufacturers, agents, or foremen, the master engaged in such dispute, or his agent, shall choose one; and out of which workmen so proposed the workman or his agent shall choose another, who shall have full power to hear and finally determine such dispute."

This clause is probably imperative, and would preclude a party from suing if an arbitration be demanded. *Crisp v. Banbury*, 8 Bing. 394; 1 M. & Scott, 646.

By sect. 4, *Appointment of other Referees where those appointed refuse or delay to accept the Reference, or accepting, do not act therein.*] Sect. 4. "That in case any or either of the persons so proposed by any such justice shall refuse or delay to accept such arbitration, or accepting shall not act therein within two days after such nomination, the justice shall proceed to name another or other persons of the descriptions aforesaid, in the room of the person so refusing as aforesaid, to be arbitrator or arbitrators in the place of any such arbitrator or arbitrators so refusing or delaying to accept, or who shall not act; and in every case of a second nomination the arbitrators shall meet within twenty-four hours after the application for the same, and at the same place at which the meeting of the referees first named was appointed, or at some other convenient place as the justice may appoint; and the expense of every such application for the appointment of a second referee shall be borne and defrayed by the party through whose default, or the default of whose referee, such application is rendered necessary; and the justice making such second appointment shall certify the same in the form for that purpose hereafter set forth, or in some other form to the like effect; and in every case where a second arbitrator shall be appointed as aforesaid, and such second arbitrator shall not attend at the same time and place appointed for settling the matters in dispute, it shall be lawful for the other arbitrator, at such time and place, to proceed by himself to the hear-

ing and determining of the same matters in dispute; and in such case, the award of such sole arbitrator shall be final and conclusive as to all matters in dispute submitted to such arbitrator, without being subject to review, appeal, or suspension."

By sect. 5, *Justice is to appoint Meeting of Referees, notice of which shall be given.*] Sect. 5. "That the arbitrators or referees being so nominated as aforesaid, the said justice shall thereupon appoint a place of meeting according to the directions of this act, and also a day for the meeting, notice of which nomination, and of the day of meeting, shall thereupon be given by such justice to the persons so nominated arbitrators or referees, and to any party to any such dispute who may not have attended the meeting before such justice as aforesaid; which appointment shall be by such justice certified in the form following, or in some other form to the like effect, that is to say,—

I, A. B., one of the justices of the peace acting for do hereby certify, that C. D. and E. F. are duly nominated referees to settle the matters in difference between G. H. of master-manufacturer [*or* agent, *or* foreman, *as the case may be*], and T. R. of weaver [*or otherwise, as the case may be*], pursuant to an act passed in the fifth year of the reign of his present Majesty; and that the said referees are hereby directed to meet at on the day of at of the clock in the forenoon [*or* afternoon, *as the case may be*]. A. B.

I, A. B., one of the justices of the peace acting for do hereby certify, that the above-named C. D. and E. F. [*or* one of them, *as the case may be*], having refused or delayed to act in the above-mentioned reference, L. M. and N. O. [*L. M. only, as the case may be*], are [*or* is] by me duly nominated referees [*or* referee], together with the above-named C. D. [*or* E. F.], to settle the matters in difference between the above-named G. H. and I. K.; and the said C. D. or E. F., together with the said L. M. [*or* the said L. M. or N. O., *as the case may be*], are directed to meet at the place above-mentioned on the day of in the year of our Lord at of the clock in the forenoon [*or* afternoon, *as the case may be.*] A. B.

And the persons so appointed as aforesaid shall hear and examine the parties and their witnesses, and determine such dispute, within two days after such nomination, exclusive of Sundays; and the determination of such arbitrators shall be final and conclusive."

Place for the Meeting of Referees.] By sect. 6, "that in all cases where complaints are made respecting bad warps or utensils by workmen, the place of meeting of the referees shall be at or as near as may be to the place where the work shall be carrying on; and in all other cases at or as near as may be to the place or places where the work has been given out."

By sect. 7, *Person complaining, and not attending, not entitled to benefit of act.*] Sect. 7. "That if any person so complaining as aforesaid shall not attend, or send some person on his or her behalf, at the time and place appointed by such justice of the peace for the purpose of naming such persons as aforesaid, such person shall not in such case be entitled to the benefit of this act; and if any person against whom any such complaint shall have been made as aforesaid shall not attend, or send some person on his or her behalf, the justice of the peace shall thereupon nominate a person for him out of such persons so proposed as aforesaid."

By sect. 8, *Mode of Investigation of the Complaint.*] Sect. 8. "That the said arbitrators and referees shall meet at the time and place fixed by the justice of the peace by whom such referees were appointed, and shall, by inspection of the work in regard to which the dispute may have arisen, by hearing and examining the parties, or any other persons on their behalf, or that attend to give evidence respecting the matters in dispute, upon oath (which the said arbitrators and referees are hereby empowered to administer) or otherwise, or by otherwise ascertaining the true state of the case, in such manner as to such arbitrators and referees shall appear necessary, proceed to determine the matter or matters in dispute referred to them; and the award to be made by such arbitrators and referees shall be final and conclusive between the parties, without being subject to review or challenge by any court or authority whatsoever."

Sect. 9 *provides for Arrest and Commitment of Refractory Witnesses.*] Sect. 9. "That it shall be lawful for any arbitrator or arbitrators, referee or referees, and he or they are hereby authorised and required, at the request in writing of any of the parties, to issue his or their summons to any witness or witnesses to appear and give evidence before such arbitrator or arbitrators, referee or referees, at the time and place appointed for hearing and determining any such dispute, and which time and place shall be specified in such summons; and if any person so summoned to appear as a witness as aforesaid shall not appear before such arbitrator or arbitrators, referee or referees at the time and place specified in such summons, or offer some reasonable excuse for the default, or, appearing according to such summons, shall not submit to be examined as a witness, and give his evidence before such arbitrator or arbitrators, referee or referees, touching the matter of such dispute, then and in every such case it shall be lawful for any one or more of his Majesty's justices of the peace acting in and for the county, stewartry, riding, division, barony, city, burgh, town, or place where such dispute shall have arisen, and they are hereby authorised (proof on oath in the case of any person not appearing according to such summons having been first made before such justice or justices, of the due service of such summons on every such person, by delivering the same to him, or by leaving the same twenty-four hours before the time

appointed for such person to appear before such arbitrator or arbitrators, referee or referees, at the usual place of abode of such person), by warrant under the hands of any such justice or justices to commit any such person so making default in appearing, or appearing and refusing to give evidence, to some prison within the jurisdiction of any such justice or justices, there to remain, without bail or mainprize, for any time not exceeding two calendar months nor less than seven days, or until such person shall submit himself to be examined and give his evidence before such arbitrator or arbitrators, referee, or referees as aforesaid: Provided always, that in case such dispute shall be heard and determined before such offender shall submit to be examined and give evidence as aforesaid, then and in every such case he, she, or they shall be imprisoned the full term of such commitment."

By sect. 10, *Adjournment of the Complaint from the Referees to a Justice may be made in certain cases.*] Sect. 10. "That in case such arbitrators and referees so appointed cannot agree upon and decide such matter or matters in dispute so referred as aforesaid, or shall not make and sign their award within three days after the date of the order of such justice certifying their appointment, then the said arbitrators and referees shall, without delay, go before the justice by whom they were appointed, and in case of his absence or indisposition, before any other of his Majesty's justices of the peace acting in and for the county, stewartry, riding, division, barony, city, burgh, town, liberty, or place, and residing nearest to the place where the meeting to settle such dispute shall have taken place, and shall state to such justice or justices who may be present the points in difference between them, the said arbitrators and referees, which points in difference the said justice or justices shall, and is, and are hereby authorised and required to hear and determine upon the statement of the arbitrators and referees; and the said justice or justices is and are hereby directed and required to settle and determine the matter in dispute with all possible dispatch, and in all cases within the space of two days after the expiration of the time hereby allowed to the arbitrators and referees to make and sign their award; and the determination of such justice or justices shall be final and conclusive between the parties so differing as aforesaid, without being subject to review or challenge by any court whatsoever."

By sect. 11, *where one Referee refuses to go before the Justice, he may determine Dispute on representation of the other.*] Sect. 11. "That if either arbitrator or referee shall neglect or refuse to go before such justice of the peace in the manner herein directed, it shall and may be lawful for such justice, after summoning the arbitrators to attend him, to determine the matter or matters in dispute upon the statement and representation of either of the arbitrators who shall come before him."

By sect. 12, *Manufacturer or Agent cannot act as Justice.*] Sect. 12. "That no justice of the peace, being also a master-manufacturer or agent, shall act as such justice under this act."

By sect. 13, *Disputes may be adjusted by any other mode of Arbitration upon which the parties may agree, and the Proceedings herein provided for enforcing Awards shall apply.*] Sect. 13. "That as well in all cases of dispute as aforesaid, as in all other cases, if the parties mutually agree that the matter in dispute shall be arbitrated and determined in a different mode to the one hereby prescribed, such agreement shall be valid, and the award and determination thereon final and conclusive between the parties, and the same proceedings of distress, sale, and imprisonment, as hereafter mentioned, shall be had towards enforcing such award (by application to any justice of the peace of the county, stewartry, riding, division, barony, city, town, burgh, or place within which the parties shall reside), as are by this act prescribed for enforcing awards made under and by virtue of its provisions."

By sect. 14, *Partners, Agents, and Servants of Masters, to be considered Principals.*] Sect. 14. "That where any work shall have been delivered to any workman by the agent or servant of any master or masters, to be, when finished, delivered to such agent or servant; and also where two or more persons shall carry on the business of such manufacture as partners; in every such case respectively the like proceedings shall and may be had and made against such agent, servant, or any partner, and shall be as effectual as if the same had been had and made against the principal, or all the partners; and all the said persons respectively shall obey the award made thereupon, and all such order or orders as shall be made by the said justice or justices in or respecting the matters in dispute, and shall be subject to the same proceedings and consequences for refusing or delaying to abide by or perform the same, as if the proceedings had been had against the principal, or against all the partners."

By sect. 15, *Master or Workmen may depute another Person to act for them.*] Sect. 15. "That it shall be lawful in all cases for any master or workman, by writing under his hand, to authorise any person to act for him in submitting to arbitration, and attending arbitrators or justices touching the matter of any arbitration."

By sect. 16, *in case of Bankruptcy, &c. of Master, Assignee, &c. to be liable in his room.*] Sect. 16. "That in all cases where any proceedings may be had against a master or masters under this act, or where such proceedings shall have been commenced, and the master or masters shall become or be bankrupt, or any assignment of his or their estate or effects shall have been made under the said bankruptcy, or otherwise by deed or in law, the factor or trustee upon, or the assignee or assignees of such estate or effects, shall be liable to the proceedings authorised by this act against the master or

masters as fully as the master or masters was or were before the bankruptcy or assignment; and such proceedings may be commenced or carried on against such factor, trustee, assignee or assignees, who shall fulfil and abide by the award made thereupon, and all such order or orders as shall be made by the said justice or justices in or respecting the matters in dispute, and shall be subject to the same proceedings and consequences for wilfully refusing or delaying to abide by or perform the same, as if the proceedings had been had against the master or masters before his or their bankruptcy, or the assignment of his or their estate or effects: provided that all sums of money to be paid in pursuance of such award or orders shall be recoverable only out of the estate or effects of such master or masters, and not out of the proper money of such factor, trustee, assignee, or assignees."

By sect. 17, *in whose name Proceedings shall be where the Complainant is a Married Woman or Infant, is provided for.*] Sect. 17. "That where any married woman, or infant under the age of twenty-one years, shall have cause of complaint in any of the cases provided for by this act, against any master or masters, his or their agent or servant, or factor or trustee, or assignee or assignees as aforesaid, such complaint may be lodged, and all further proceedings thereupon had, by and in the name of the husband of such married woman, and of the father, or, if dead, of the mother, or if on the death of both parents, of any of the kindred of any such infant, or of the surety or sureties in any indenture of apprenticeship of any such infant, being an apprentice, or of any person nominated by such infant, if he or she shall not have parent, kindred, or surety; and all such proceedings shall be as effectual, valid, and binding, as if such married woman was *sole*, and such infants were of full age, and pursued by themselves the remedies provided by this act."

By sect. 18, *if Parties agree, Tickets of Particulars shall be given out with the Work, and shall be Evidence of their Contents.*] Sect. 18. "That with every piece of work given out by the manufacturer to a workman to be done, there shall (if both parties are agreed) be delivered a note or ticket, in such form as the said parties shall mutually agree upon; and which said note or ticket, in the event of dispute between the manufacturer and workman, shall be evidence of all matters and things mentioned therein or respecting the same."

By sect. 19, *Duplicates of such Tickets to be kept by Master, and to be Evidence if Original not produced.*] Sect. 19. "That a duplicate of every such note or ticket shall be made and kept by the master or agent delivering the same, which duplicate shall be evidence of all the matters and things therein contained in case the workman shall not produce to the arbitrators, or the said justice, as the case may be, the said note or ticket so delivered to him with the said work."

By sect. 20, *Manufacturers receiving Articles without Objection not to complain afterwards.*] Sect. 20. "That it shall not be allowable to any manufacturer, who shall have received into his possession any article without objection made within twenty-four hours by himself, or his clerk or foreman, afterwards to make any complaint on account of work so received."

By sect. 21, *Extension of the Time limited for making the Award.*] Sect. 21. "That if the parties by and between whom the said reference shall take place as aforesaid shall think it expedient, or be desirous to extend the time hereby limited for the making the award or umpirage, it shall and may be lawful for them to extend the same accordingly by indorsement, according to the form in the schedule hereunto annexed, on the back of the order of the justice of peace certifying the appointment of the referees, to be signed by both of them in the presence of one or more credible witness or witnesses."

By sect. 22, *Form of the Award may be as in Schedule.*] Sect. 22. "That the award or umpirage to be made upon any reference demanded under this act shall and may be drawn up and written at the foot or upon the back of the said order certifying the appointment of the referees, according to the form in the schedule hereunto annexed."

By sect. 23, *on the Award being fulfilled, the fulfilment shall be acknowledged, and Award delivered up.*] Sect. 23. "That upon fulfilment of the award or umpirage the same shall be acknowledged by the party in whose behalf the same was made, by an acknowledgment at the foot of the said award, in the form of the schedule hereunto annexed, which, with the award, shall thereupon be delivered to the party fulfilling the same."

By sect. 24, *the Performance of the Award may be enforced by Distress, and, failing that, the Party shall be Imprisoned.*] Sect. 24. "That if any party shall refuse or delay to fulfil an award under this act, for the space or term of two days after the same shall have been reduced into writing, it shall be lawful for any such justice as aforesaid, on the application of the party aggrieved, and he is hereby required by warrant under his hand, according to the form of the schedule hereunto annexed, or in some other form to the like effect, to cause the sum and sums of money directed to be paid by any such award to be levied by distress and sale of any goods and chattels of the person or persons liable to pay the same, together with all costs and charges attending such distress and sale, such sale to take place within such time, not exceeding five days, as the said justice shall think proper; and the overplus, if any, to arise by such sale to be rendered to the owners of the goods and chattels distrained; and in case it shall appear by any return to such warrant that no sufficient distress can be readily had, which return may be in the form contained

in the schedule hereunto annexed, or in some other form to the like effect, it shall be lawful for any such justice as aforesaid, and he is hereby required by warrant under his hand according to the form of the schedule hereunto annexed, or in some other form to the like effect, to commit the person or persons so liable as aforesaid to the common gaol, or some house of correction within his or their jurisdiction, there to remain without bail for any time not exceeding three months."

By sect. 25, *in certain cases the Warrant of Distress shall be withheld, and the Defaulter committed to Prison.*] Sect. 25. "And whereas cases may occur where the recovery of such sum or sums of money by distress and sale of the goods and chattels of the defaulter may appear to the justice or justices of the peace, by whom the warrant is to be issued, to be attended with consequences ruinous, or in an especial manner injurious, to the defaulter and his family:" to prevent which consequences be it further enacted, "that the said justice or justices, in all such cases, shall withhold such warrant, and commit the defaulter to the common gaol or some house of correction within his or their jurisdiction, there to remain without bail for any time not exceeding three months; such commitment to be in the form or to the effect of the form in the schedule to this act annexed."

By sect 26, *on Payment of the Sum awarded, with the Costs and Charges, the Party shall be discharged from Prison.*] Sect. 26. "That where any person shall be committed to prison for refusing or delaying to fulfil an award as aforesaid, and such person shall, at any time during the period of his or her imprisonment, pay to the governor or keeper of the prison the full amount of the sum awarded, with all reasonable expenses incurred through such refusal or delay, it shall be lawful for such governor or keeper of such prison, and he is hereby required, forthwith to discharge such person from his custody."

By sect. 27, *Warrant of Commitment for not appearing, to be in Form set forth in Schedule.*] Sect. 27. "That the justice or justices by whom any person or persons shall be committed to prison for not appearing as a witness, or not submitting to be examined, shall cause the warrant or order for such commitment to be drawn up in the form or to the effect set forth in the schedule to this act."

By sect. 28, *no Appeal or* Certiorari *shall lie.*] Sect. 28. "That no appeal or *certiorari* shall lie against any proceedings under this act."

By sect 29, *Proceedings not invalid for want of Form.*] Sect. 29. "That no proceedings under this act shall be invalid for want of form."

By sect. 30, *Fees to be taken for Proceedings under this Act.*] Sect. 30. "That the following and no higher fees shall be allowed to be taken for any proceedings under this act; (that is to say,)

To the Clerk of the Justice or Justices:

For each summons	Twopence
For every oath of affirmation .	Threepence
For drawing and entering the order	Fourpence
For every warrant	Sixpence

To the Constable or other Peace Officer:

For service of summons or order	Fourpence
For executing warrant of distress and sale of goods . .	One Shilling
For custody of goods distrained, per diem	Threepence
For every mile he shall travel	Threepence
For every caption	Sixpence

And a table of fees, signed by the clerk to such justice or justices, shall be hung up in every place where any general or quarter sessions, or petty or other sessions of the peace shall be held."

By sect. 31, *Costs and Expenses how to be settled.*] Sect. 31. "That all costs, time, and expenses attending the application to justices to be made under this act, and of the arbitration pursuant thereon, shall be settled by the arbitrators or arbitrator by whom such dispute shall be settled; and where the same shall be determined by any justice of the peace pursuant to this act, then the costs, time, and expenses aforesaid shall be settled by such justice; and where the arbitrators appointed as aforesaid cannot agree as to the costs, time, and expenses to be allowed, the same shall be settled by the justice or justices of the peace by whom the said arbitrators were named, and, in case of his absence or indisposition, by any justice of the peace for the same county, stewartry, riding, division, barony, city, burgh, liberty, town, or place nearest to the place at which the arbitrators met to settle the dispute: Provided always, that no master-manufacturer, his foreman or agent, shall in any case be allowed for costs, time, or expenses, by the said justice or justices, unless it shall appear to him or them that the proceedings of the workmen were vexatious and oppressive."

By sect. 32, *Proceedings exempt from Stamp Duty.*] Sect. 32. "Provided always, that every agreement, submission, award, ticket, matter or thing under or by virtue of this act, or relating to any other mode of arbitration as aforesaid, shall and may be drawn up and written upon unstamped paper."

By sect. 33, *Limitation of Time for Suing those who act in Execution of this Act to be Six Months.*] Sect. 33. "Provided also, that no action shall be brought against any arbitrator, justice of the peace, constable, headborough, or other officer, or against any other person or persons whomsoever, for any matter or thing whatsoever done or committed under or by virtue or in the execution of this act, unless such action shall be brought within six calendar months next after the doing or committing of such matter or thing."

By sect. 34, *Persons sued for acting in Execution of this Act may plead the General Issue.*] Sect. 34. "Provided also, that if any action or suit shall hereafter be commenced or prosecuted against any person or persons for anything done under, by virtue, or in the execution of this act, such person or persons may plead the general issue, and give this act and the special matter in evidence; and if the plaintiff shall become nonsuited or suffer discontinuance, or forbear further prosecution, or if judgment shall be given for the defendant or defendants, such defendant or defendants shall recover his, her, or their full costs, and for which he, she, or they shall have like remedy as in cases where costs by law are given to defendants."

By sect. 35, *this Act not to extend to Repeal any Act not hereby repealed.*] Sect. 35. "Provided always, that nothing in this act contained shall extend or be construed to extend to repeal, abridge, annul, or make void, any of the clauses, provisions, remedies, or powers contained in any law or statute now in force, and not repealed by this act."

SCHEDULE.—1. *Form of the Award, to be written at the Foot or upon the Back of the Order of the Justices of Peace certifying the Reference.*

We, J. K. and L. M. [*name and describe the referees*], the referees appointed to settle the matters in dispute between the parties within named [*or*, J. K. *one of the referees so appointed; or*, L. M., *the other referee appointed, having failed to attend; or*, I., N. O., *the justice, as the case may be*], do hereby judge and determine that [*here set forth the determination; to which the referee or referees, or justice, as the case may be, shall subscribe their names*].

2. *Form of Indorsement, extending the Time limited for making the Award.*

We, A. B. and C. D., parties to the within reference, do hereby agree to extend the same to the day of inclusive.

Witness our hands, this day of

A. B.

C. D.

Witness,

3. *Form of Acknowledgment of Fulfilment of the Award, to be written at the Foot or on the Back thereof.*

I, A. B., do hereby acknowledge that the above award hath been fulfilled by C. D., who is hereby discharged of the same.

Witness my hand, this day of .

A. B.

Witness,

4. *Form of the Oath to be administered by the Arbitrators or Justice to the Parties and Witnesses under this Act.*

The evidence that you shall give before us, the arbitrators appointed by A. B. and C. D. [*the parties*] to determine the matters in difference between them, under and by virtue of an act passed in the fifth year of the reign of King George the Fourth, intituled "an Act" [*state the title of this act*], shall be the truth, the whole truth, and nothing but the truth.

So help you God.

5. *Form of Commitment of a Person summoned as a Witness before the Arbitrators.*

Whereas proof on oath hath been made before me, one of his Majesty's justices of the peace for the county [*or* riding, stewartry, division, city, burgh, liberty, town, or place] of on this day of that A. B. hath been duly summoned and hath neglected to appear and give evidence before C. D. and E. F., the arbitrators appointed by and between G. H. and I. K. to determine the matters in dispute between them at in the county [*or* riding, stewartry, division, city, burgh, liberty, town, or place] of on the day of under and by virtue of an act made in the fifth year of the reign of his present Majesty, intituled "an Act" [*here set forth the title of this act*], and the said A. B. being required by me, the said justice, to give evidence before the said arbitrators, and still refusing so to do, therefore I, the said justice, do hereby, in pursuance of the said act, commit the said A. B. to the [*describing the prison and the house of correction*], there to remain without bail or mainprize for his [*or* her] offence aforesaid until he [*or* she] shall submit himself [*or* herself] to be examined, and give his [*or* her] evidence before the said arbitrators touching the matters referred to them as aforesaid, or shall otherwise be discharged by due course of law: And you the [*constable or other peace-officer or officers to whom the warrant is directed*] are hereby authorised and required to take into your custody the body of the said A. B., and him [*or* her] safely to convey to the said prison [*or* house of correction], and him [*or* her there to deliver to the gaoler [*or* keeper] thereof, who is hereby authorised and required to receive into his custody the body of the said A. B., and him [*or* her] safely to detain and keep, pursuant to this commitment.

Given under my hand, this day of in the year of our Lord .

This commitment to be directed to the proper peace-officer, and the gaoler [*or* keeper] of the prison [*or* house of correction].

6. *Form of Warrant of Distress.*

To the constable of .

Whereas of under an award made by on the day of in the year of our Lord , pursuant to an act passed in the fifth year of the reign of his present Majesty, intituled "an Act" [*state the title of this act*], is liable to pay to of the sum of and also the sum of and the said having refused or neglected to pay the same for the space of two days and upwards subsequent to the making such award, these are therefore to command you to levy the said sum of by distress and sale of

the goods and chattels of the said and I do hereby order and direct the goods and chattels so to be distrained to be sold and disposed of within days, unless the sum of for which such distress shall be made, together with the reasonable charges of taking and keeping such distress, shall be sooner paid; and you are also hereby commanded to certify to me what you shall do by virtue of this my warrant.

Given under my hand and seal, at the day of

7. *Form of the Constable's Return to the Warrant of Distress.*

I, constable of do hereby certify to justice of the peace of that I have made diligent search for, but do not know of, nor can find any goods and chattels of by distress and sale whereof I may levy the sum of pursuant to his warrant for that purpose.

Dated the day of in the year of our Lord.

Given under my hand this day of in the year of our Lord

8. *Form of Commitment thereupon to the House of Correction.*

Here name the county. } To the constable of and also to the keeper of the house of correction at

Whereas of under an award made by on the day of in the year of our Lord pursuant to an act passed in the fifth year of the reign of his present Majesty, intituled "an Act" [*state the title of this act*], became liable to pay to the sum of and also the sum of for costs, time, and expenses, making together the sum of and having refused or neglected to pay the same for the space of two days and upwards subsequent to the making of such award, my warrant was, according to the provisions of the said act, duly made and issued for the levying the said sum of by distress and sale of the goods and chattels of the said ; and whereas it appears by the return of constable of dated the day of that he hath made diligent search for, but doth not know of, nor can find any goods and chattels of the said by distress and sale whereof the said sum of may be levied pursuant to my said warrant: These are therefore to command you, the said constable of to apprehend the said and convey him to the said house of correction at aforesaid, and deliver him there to the keeper of the said house of correction; and these are also to command you, the keeper of the said house of correction, to receive him, the said into the said house of correction, and there keep him, without bail or mainprize, for the space of months, unless the said sum of so ordered to be paid as aforesaid shall be sooner satisfied, with all reasonable expenses.

Given under my hand and seal, at the day of .

9. *Form of Commitment where the Warrant of Distress is withheld.*

Here name the county. } To the constable of and also to the keeper of the house of correction at .

Whereas of under an award made by on the day of in the year of our Lord pursuant to an act passed in the fifth year of the reign of his present Majesty, intituled "an Act" [*state the title of this act*], became liable to pay to the sum of and also the sum of for costs, time, and trouble, making altogether the sum of which he has refused or neglected to pay for the space of two days and upwards subsequent to the making of such award; and whereas it appears to me that the recovery of such sum and warrant of distress and sale of the goods and chattels of the said will be attended with consequences ruinous, or in an especial manner injurious to the defaulter [*and his family, if any*], and I have therefore determined to withhold such warrant, and to commit the said to prison, pursuant to the said act: These are therefore to command you, the said constable of to apprehend the said and convey him to the said house of correction at aforesaid, and deliver him there to the keeper of the said house of correction; and these are also to command you, the keeper of the said house of correction, to receive him, the said into the said house of correction, and there keep him, without bail or mainprize, for the space of months, unless the said sum of so ordered to be paid as aforesaid shall be sooner satisfied, with all reasonable expenses.

Given under my hand and seal, at the day of .

The 7 Wm. 4, and 1 Vic. c. 67, s. 1. extends the time of making Complaints to Fourteen Days.] 7 Wm. 4 and 1 Vic. c. 67, s. 1. "Whereas an act was passed in the fifth year of the reign of his Majesty King George the Fourth, intituled 'An Act to consolidate and Amend the Laws relative to the Arbitration of Disputes between Masters and Workmen:' and whereas it is provided by the said act that all complaints under the same by any workman, for any cause except as to bad materials, shall be made within six days after such cause of complaint shall arise; but the said period of six days has been found too short for the purpose thereby intended: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present parliament assembled, and by the authority of the same, that the same be extended to fourteen days."

By sect. 2, Justices having Jurisdiction, where party complained of resides, to have Jurisdiction over the matters of the said Act.] Sect 2. "And whereas it is enacted by the said act, that various differences under the same shall be subject, as therein mentioned, to the adjudication of any justice of the

(5) *Postmaster-General.*[1]
(6) *By the Public Health Act*, 1848.[2]

peace, or magistrate of any county, riding, division, stewartry, barony, city, burgh, town, or place, within which the parties reside: and whereas many cases have arisen where no justice of the peace or magistrate could be found who has jurisdiction where both the parties differing as aforesaid reside; in consequence whereof it has been doubted whether the above beneficial enactment can in such cases take effect: and for the remedy thereof it is necessary that the jurisdiction and powers which are by the said act conferred on the justices or magistrates of the district where both parties reside, shall in future be exercised by the justices or magistrates of the district where the party complained against resides: Be it enacted, that in the place of the justices or magistrates of the district where both parties reside, the justices or magistrates of the district where the parties complained against reside, shall have the said jurisdiction and powers: and whatever acts and duties are by the said act required to be done by the first-mentioned justices or magistrates, or any one of them, shall be done by the last-mentioned justices or magistrates, or by any one of them; and the said act shall in all respects be construed as if the words, 'where the party complained against resides,' had been originally inserted in the third section of the said act, instead of the words, 'within which the parties reside.'"

By 8 & 9 Vic. c. 77, s. 3, An Act relating to the Manufacture of Hosiery, provides that if Work not produced on Reference, it must be deemed to be properly executed.] 8 & 9 Vic. c. 77, s. 3. "Provided always and be it enacted, that where the subject of dispute relates to the alleged improper or imperfect execution of any work delivered to a manufacturer or his agent, such piece of work shall be produced in order to adjudication; or if not produced, shall be deemed and taken to have been sufficiently and properly executed."

[1] *By 1 & 2 Vic. c. 98, s. 16, Disputes between Postmaster-General and Railway Companies as to the Conveyance of Mails, &c. are to be settled by Arbitration.*] 1 & 2 Vic. c. 98, s. 16, enacts, "that in all cases in which the postmaster-general and any company of proprietors of any railway shall not be able to agree on the amount of remuneration or compensation to be paid by the postmaster-general to such company of proprietors for any services performed or to be performed by them as hereinbefore mentioned, the same shall be referred to the award of two persons, one to be named by the postmaster-general, and the other by such company; and if such two persons cannot agree on the amount of such remuneration or compensation, then to the umpirage of some third person, to be appointed by such two first-named persons previously to their entering upon the inquiry; and the said award or umpirage, as the case may be, shall be binding and conclusive on the said parties, and their respective successors and assigns."

By sect. 18, Limits the Time for the Appointment of Arbitrators.] Sect. 18. "And be it enacted, that in all references to be made under the authority of this act, the postmaster-general, or the railway company, as the case may be, shall nominate his or their arbitrator within fourteen days after notice from the other party, or in default it shall be lawful for the arbitrator appointed by the party giving notice to name the other arbitrator; and such arbitrators shall proceed forthwith in the reference, and make their award thereon within twenty-eight days after their appointment, or otherwise the matter shall be left to be determined by the umpire; and if such umpire shall refuse or neglect to proceed and make his award for the space of twenty-eight days after the matter shall have been referred to him, then a new umpire shall be appointed by the two first-named arbitrators, who shall in like manner proceed and make his award within twenty-eight days, or in default be superseded, and so *toties quoties.*"

[2] 11 & 12 Vic. c. 63, s. 123, enacts "that in case of dispute as to the amount of any compensation to be made under the provisions of this act (except where the mode of determining the same is specially provided for), and in case of any matter which by this act is authorised or directed to be settled by arbitration; then, unless both parties concur in the appointment of a single arbitrator, each party on the request of the other shall appoint an arbitrator, to whom the matter shall be referred; and every such appointment when made on the behalf of the Local Board of Health shall (in the case of a non-corporate district) be under their seal and the hands of any five or more of their number, or under the common seal in case of a corporate district, and on the behalf of any other party under his hand, or if such party be a corporation aggregate under the common seal thereof; and such appointment shall be delivered to the arbitrators, and shall be deemed a submission to arbitration by the parties making the same:

"And after the making of any such appointment the same shall not be revoked without the consent of both parties, nor shall the death of either party operate as a revocation:

By other Party to act for both.] "And if for the space of fourteen days after any such matter shall have arisen, and notice in writing by one party (who has himself duly appointed an arbitrator) to the other party, stating the matter to be referred, and accompanied by a copy of such appointment, the party to whom notice is given fail to

(7) *By the Metropolitan Sewers Act*, 1848.[1]

appoint an arbitrator, the arbitrator appointed by the party giving the notice shall be deemed to be appointed by, and shall act on behalf of both parties:

Award to be Binding.] "And the award of any arbitrator or arbitrators appointed in pursuance of this act shall be binding, final, and conclusive upon all persons, and to all intents and purposes whatsoever."

Proceedings on Death of one of several Arbitrators.] Sect. 124 enacts, "that if before the determination of any matter so referred any arbitrator die, or refuse, or become incapable to act, the party by whom such arbitrator was appointed may appoint, in writing, another person in his stead; and if he fail so to do for the space of seven days after notice in writing from the other party in that behalf, the remaining arbitrator may proceed *ex-parte;* and every arbitrator so appointed shall have the same power and authorities as were vested in the arbitrator in whose stead the appointment is made.

Proceedings on Death of single Arbitrator.] "And in case a single arbitrator die, or become incapable to act, before the making of his award, or fail to make his award within twenty-one days after his appointment, or within such extended time (if any) as shall have been duly appointed by him for that purpose, the matters referred to him shall be again referred to arbitration under the provisions of this act, as if no former reference had been made."

If more than one Arbitrator, they are to appoint an Umpire before proceeding.] Sect. 125 enacts, "that in case there be more than one arbitrator, the arbitrators shall, before they enter upon the reference, appoint by writing under their hands an umpire, and if the person appointed to be umpire die, or become incapable to act, the arbitrators shall forthwith appoint another person in his stead.

In case Arbitrators refuse to appoint, Court of Quarter Sessions may appoint Umpire.] "And in case the arbitrators neglect or refuse to appoint an umpire for seven days after being requested so to do by any party to the arbitration, the court of general or quarter sessions shall, on the application of any such party, appoint an umpire.

Award of Umpire to be binding.] "And the award of the umpire shall be binding, final, and conclusive upon all persons, and to all intents and purposes whatsoever.

On Arbitrators failing to make Award in time, the Umpire is to make the Award.] "And in case the arbitrators fail to make their award within twenty-one days after the day on which the last of them was appointed, or within such extended time (if any) as shall have been duly appointed by them for that purpose, the matters referred shall be determined by the umpire; and the provisions of this act, with respect to the time for making an award, and with respect to extending to the same in the case of a single arbitrator, shall apply to an umpirage."

Award must be made within Three Months.] Sect. 126 enacts, "that the time for making an award under this act shall not be extended beyond the period of three months from the date of submission, or from the day on which the umpire shall have been appointed (as the case may be)."

Arbitrator may require Production of Documents.] By sect. 127, "that any arbitrator or arbitrators, or umpire, appointed by virtue of this act, may require the production of such documents in the possession or power of either party, as they or he may think necessary for determining the matters referred, and may examine the parties or their witnesses on oath.

Costs to be in the Discretion of the Arbitrator.] "And the costs of and consequent upon the reference, shall be in the discretion of the arbitrator or arbitrators, or of the umpire (in case the matters referred are determined by an umpire under the power hereinbefore contained in that behalf).

Submission may be made a Rule of Court.] "And any submission to arbitration under the provisions of this act may be made a rule of any of the superior courts, on the application of any party thereto."

Arbitrator to sign Declaration.] Sect. 128 enacts, "that before any arbitrator or umpire shall enter upon any such reference as aforesaid, he shall make and subscribe the following declaration before a justice of the peace; (that is to say,)

'I, A. B., do solemnly and sincerely declare that I will faithfully and honestly, and to the best of my skill and ability, hear and determine the matters referred to me under the Public Health Act, 1848. A. B.'

"And such declaration shall be annexed to the award when made; and if any arbitrator or umpire shall wilfully act contrary to such declaration, he shall be guilty of a misdemeanour."

Compensation in case of Damage by Local Board to be made out of the General or District Rate, and in case of Dispute to be settled by Arbitration, if more than 20l.] Sect. 144 enacts, "that full compensation shall be made out of the general or special district rates to be levied under this act, to all persons sustaining any damage by reason of the exercise of any of the powers of this act; and in case of dispute as to amount, the same shall be settled by arbitration in the manner provided by this act; or (if the compensation claimed do not exceed the sum of twenty pounds) the same may be ascertained by and recovered before justices in a summary manner."

[1] 11 & 12 Vic. c. 112, s. 70, enacts, "that in case of dispute as to the amount of any compensation to be made under the provisions of this act (except where the mode of determining the same is specially provided for), and in case of any matter which by

(8) *By Companies Clauses Consolidation Act*, 1845.[1]

this act is authorised or directed to be settled by arbitration, then, unless both parties concur in the appointment of a single arbitrator, each party, on the request of the other, shall appoint an arbitrator, to whom the matter shall be referred; and every such appointment, when made on the behalf of the commissions, shall be under their seal, and on the behalf of any other party under his hand, or if such party be a corporation aggregate under the common seal thereof; and such appointment shall be delivered to the arbitrators, and shall be deemed a submission to arbitration by the parties making the same; and after the making of any such appointment the same shall not be revoked without the consent of both parties, nor shall the death of either party, nor the determination of the commission, operate as a revocation; and if for the space of fourteen days after any such matter shall have arisen, and notice in writing by one party who has duly appointed an arbitrator to the other party, stating the matter to be referred, and accompanied by a copy of such appointment, the party to whom notice is given fail to appoint an arbitrator, the arbitrator appointed by the party giving the notice shall be deemed to be appointed by and shall act on behalf of both parties; and the award of any arbitrator or arbitrators appointed in pursuance of this act shall be binding, final, and conclusive upon all persons, and to all intents and purposes whatever."

Proceedings in case of Death of Arbitrator, and Proceedings in case of single Arbitrator.] Sect. 71 enacts, "that if, before the determination of any matter so referred, any arbitrator die, or refuse, or become incapable to act, the party by whom such arbitrator was appointed may appoint in writing another person in his stead; and if he fail so to do for the space of seven days after notice in writing from the other party in that behalf, the remaining arbitrator may proceed *ex-parte*; and every arbitrator so appointed shall have the same powers and authorities as were vested in the arbitrators in whose stead the appointment is made; and in case a single arbitrator die, or refuse or become incapable to act, before the making of his award, or fail to make his award within twenty-one days after his appointment, or within such extended time (if any) as shall have been duly appointed by him for that purpose, the matters referred to him shall be again referred to arbitration under the provisions of this act, as if no former reference had been made."

Umpire, how Appointed.] Sect. 72 enacts, "that in case there be more than one arbitrator, the arbitrators shall, before they enter upon the reference, appoint, by writing under their hands, an umpire; and if the person appointed die, or refuse, or become incapable to act, the arbitrators shall forthwith appoint another person in his stead; and in case the arbitrators neglect or refuse to appoint an umpire for seven days after being requested so to do by any party to the arbitration, the court of general or quarter sessions shall, on the application of any such party, appoint an umpire; and the award of the umpire shall be binding, final, and conclusive upon all persons, and to all intents and purposes whatsoever; and in case the arbitrators fail to make their award within twenty-one days after the day on which the last of them was appointed, within such extended time (if any) as shall have been duly appointed by them for that purpose, the matters referred shall be determined by the umpire; and the provisions of this act with respect to the time for making an award, and with respect to extending the same, in the case of a single arbitrator, shall apply to an umpirage."

Time for making the Award.] Sect. 73 enacts, "that the time for making an award under this act shall not be extended beyond the period of three months from the date of the submission, or from the day on which the umpire shall have been appointed (as the case may be).

Arbitrator may require Production of Books, &c. Costs to be in Discretion of Arbitrator. Submission may be made a Rule of Court.] Sect. 74 enacts, "that the arbitrator or arbitrators, or umpire, appointed by virtue of this act, may require the production of such documents in the possession or power of either party as they or he may think necessary for determining the matters referred, and may examine the parties or their witnesses on oath; and the costs of and consequent upon the reference shall be in the discretion of the arbitrator or arbitrators, or of the umpire (in case the matters referred are determined by an umpire, under the power hereinbefore contained in that behalf); and any submission to arbitration under the provisions of this act may be made a rule of any of the superior courts, on the application of any party thereto."

Arbitrator to sign Declaration.] Sect. 75 enacts, "that before any arbitrator or umpire shall enter upon any such reference as aforesaid, he shall make and subscribe the following declaration before a justice of the peace; (that is to say,)

'I, A. B., do solemnly and sincerely declare, that I will faithfully and honestly, and to the best of my skill and ability, hear and determine the matters referred to me under the provisions of the act passed in the year of the reign of Queen Victoria, intituled [*here insert the title of this act*]. A. B.'

"And such declaration shall be annexed to the award, when made; and if any arbitrator or umpire shall wilfully act contrary to such declaration he shall be guilty of a misdemeanour."

[1] *By the Companies Clauses Consolidation Act*, 8 & 9 *Vic. c.* 16, *s.* 128, *when Parties cannot concur, each to appoint an Arbitrator,*

(9) *By Lands Clauses Consolidation Act*, 1845.[1]

such Appointment not revocable by either Party, nor by his Death. If one Party fail to appoint within Fourteen Days after Request, the other Party may appoint for both; and if the other Party have appointed an Arbitrator, such Arbitrator may act for both.] 8 & 9 Vic. c. 16, s. 128. "When any dispute authorised or directed by this or the special act, or any act incorporated therewith, to be settled by arbitration, shall have arisen, then, unless both parties shall concur in the appointment of a single arbitrator, each party, on the request of the other party, shall, by writing under his hand, nominate and appoint an arbitrator, to whom such dispute shall be referred; and after any such appointment shall have been made, neither party shall have power to revoke the same without the consent of the other; nor shall the death of either party operate as such revocation; and if for the space of fourteen days after any such dispute shall have arisen, and after a request in writing shall have been served by the one party on the other party to appoint an arbitrator, such last-mentioned party fail to appoint such arbitrator, then, upon such failure, the party making the request, and having himself appointed an arbitrator, may appoint such arbitrator to act on behalf of both parties; and such arbitrator may proceed to hear and determine the matters which shall be in dispute, and in such case the award or determination of such single arbitrator shall be final."

By sect. 129, *if Arbitrator refuse to act, or die, the Party appointing may appoint another; and if he fail to do so, after seven days' notice, the other Arbitrator may proceed* ex-parte. *Substituted Arbitrator to have same Powers as original.*] Sect. 129. "If, before the matters so referred shall be determined, any arbitrator appointed by either party die, or become incapable or refuse, or for seven days neglect to act as arbitrator, the party by whom such arbitrator was appointed may nominate and appoint in writing some other person to act in his place; and if for the space of seven days after notice in writing from the other party for that purpose he fail to do so, the remaining or other arbitrator may proceed *ex-parte*; and every arbitrator so to be substituted as aforesaid shall have the same powers and authorities as were vested in the former arbitrator at the time of such his death, refusal, or disability as aforesaid."

By sect. 130, *when more than one Arbitrator appointed before Proceeding, they must appoint an Umpire; and on his Death or refusal to act they may appoint another.*] Sect. 130. "Where more than one arbitrator shall have been appointed, arbitrators shall, before they enter upon the matters referred to them, nominate and appoint by writing under their hands an umpire to decide on any such matters on which they shall differ; and if such umpire shall die, or refuse, or for seven days neglect to act, they shall forthwith after such death, refusal, or neglect, appoint another umpire in his place; and the decision of any such umpire on the matters so referred to him shall be final."

By sect. 131, *if Arbitrators fail to appoint Umpire, or he refuse to act, Board of Trade may appoint one of a Railway Company to be one of the Parties.*] Sect. 131. "If in either of the cases aforesaid the said arbitrators shall refuse, or shall, for seven days after request of either party to such arbitration, neglect to appoint an umpire, it shall be lawful for the Board of Trade, if they think fit, in any case in which a railway company shall be one party to the arbitration, on the application of either party to such arbitration to appoint an umpire; and the decision of such umpire on the matters on which the arbitrators shall differ shall be final."

By sect. 132, *Powers of the Arbitrators, &c. to call for Papers and examine Witnesses.*] Sect. 132. "The said arbitrators or their umpire may call for the production of any documents in the possession or power of either party, which they or he may think necessary for determining the question in dispute, and may examine the parties or their witnesses on oath, and administer the oaths necessary for that purpose."

By sect. 133, *Costs to be in the discretion of the Arbitrators.*] Sect. 133. "Except where by this or the special act, or any acts incorporated therewith, it shall be otherwise provided, the costs of and attending every such arbitration to be determined by the arbitrators shall be in the discretion of the arbitrators, or their umpire, as the case may be."

By sect. 134, *Submission may be made a Rule of Court.*] Sect. 134. "The submission to any such arbitration may be made a rule of any of the superior courts on the application of either of the parties."

[1] *The Lands Clauses Consolidation Act*, 1845," 8 *Vic. c.* 18, *enacts, with respect to the purchase and taking of Lands otherwise than by Agreement, if the Compensation claimed or offered exceed Fifty Pounds, by sect.* 23, *that Compensation may be settled by Arbitration or by a Jury, at option of Party claiming.*] 8 Vic. c. 18, s. 23. "If the party claiming compensation desire to have the same settled by arbitration, and signify such desire, by notice in writing, to the promoters of the undertaking before they have issued their warrant to the sheriff to summon a jury in respect of such lands, under the provisions hereinafter contained, stating in such notice the nature of the interest in respect of which such party claims compensation, and the amount of the compensation so claimed, the same shall be so settled accordingly; but unless the party claiming compensation shall as aforesaid signify his desire to have the question of such compensation settled by arbitration, or if, when the matter shall have been referred to arbitration, the arbitrators or their umpire shall for three months have

failed to make their or his award, or if no final award shall be made, the question of such compensation shall be settled by the verdict of a jury, as hereinafter provided." 7 Ex. 5; 21 L. J. Ex. 247; 17 L. J. Q. B. 362.

By sect. 25, *if both Parties do not concur in the Appointment of a single Arbitrator, each Party, on the request of the other, shall appoint an Arbitrator in the Mode herein provided.*] Sect. 25. "When any question of disputed compensation by this or the special act, or any act incorporated therewith, authorised or required to be settled by arbitration, shall have arisen, then, unless both parties shall concur in the appointment of a single arbitrator, each party, on the request of the other party, shall nominate and appoint an arbitrator, to whom such dispute shall be referred; and every appointment of an arbitrator shall be made on the part of the promoters of the undertaking under the hands of the said promoters, or any two of them, or of their secretary or clerk, and on the part of any other party under the hand of such party, or if such party be a corporation aggregate under the common seal of such corporation; and such appointment shall be delivered to the arbitrator, and shall be deemed a submission to arbitration on the part of the party by whom the same shall be made; and after any such appointment shall have been made neither party shall have power to revoke the same without the consent of the other, nor shall the death of either party operate as a revocation; and if for the space of fourteen days after any such dispute shall have arisen, and after a request in writing, in which shall be stated the matter so required to be referred to arbitration, shall have been served by the one party on the other party to appoint an arbitrator, such last-mentioned party fail to appoint such arbitrator, then upon such failure the party making the request, and having himself appointed an arbitrator, may appoint such arbitrator to act on behalf of both parties, and such arbitrator may proceed to hear and determine the matters which shall be in dispute, and in such case the award or determination of such single arbitrator shall be final." 7 D. & L. 36; 18 L. J. Q. B. 333; 5 Ex. 796; 20 L. J. Ex. 31.

By sect. 26, *Provisions are made for the case of the Arbitrator dying or becoming incapable to act.*] Sect. 26. "If, before the matters so referred shall be determined, any arbitrator appointed by either party die, or become incapable, the party by whom such arbitrator was appointed may nominate and appoint in writing some other person to act in his place, and if, for the space of seven days after notice in writing from the other party for that purpose, he fail to do so, the remaining or other arbitrator may proceed *ex-parte*; and every arbitrator so to be substituted as aforesaid shall have the same powers and authorities as were vested in the former arbitrator at the time of such his death or disability as aforesaid."

By sect. 27, *where more than one Arbitrator appointed, they must appoint Umpire before proceeding, and if he die they must appoint another.*] Sect. 27. "Where more than one arbitrator shall have been appointed, such arbitrators shall, before they enter upon the matters referred to them, nominate and appoint, by writing under their hands, an umpire to decide on any such matters on which they shall differ, or which shall be referred to him under the provisions of this or the special act; and if such umpire shall die, or become incapable to act, they shall forthwith, after such death or incapacity, appoint another umpire in his place, and the decision of every such umpire on the matters so referred to him shall be final."

By sect. 28, *if Arbitrators do not appoint Umpire, the Board of Trade may, where a Railway Company is one of the Parties.*] Sect. 28. "If in either of the cases aforesaid the said arbitrators shall refuse, or shall, for seven days after request of either party to such arbitration, neglect to appoint an umpire, the Board of Trade, in any case in which a railway company shall be one party to the arbitration, and two justices in any other case, shall, on the application of either party to such arbitration, appoint an umpire, and the decision of such umpire on the matters on which the arbitrators shall differ, or which shall be referred to him under this or the special act, shall be final." *See* 3 Ex. Rep. 728; 12 Q. B. 562; 17 L. J. Q. B. 362; 21 L. J. M. C. 52.

By sect. 29, *if single Arbitrator die, or become incapable, matter to begin* de novo.] Sect. 29. "If, when a single arbitrator shall have been appointed, such arbitrator shall die or become incapable to act before he shall have made his award, the matters referred to him shall be determined by arbitration under the provisions of this or the special act, in the same manner as if such arbitrator had not been appointed."

By sect. 30, *if either Arbitrator refuse to act, the other may proceed* ex-parte.] Sect. 30. "If where more than one arbitrator shall have been appointed, either of the arbitrators refuse, or for seven days neglect to act, the other arbitrator may proceed *ex-parte*, and the decision of such other arbitrator shall be as effectual as if he had been the single arbitrator appointed by both parties."

By sect. 31, *if Arbitrators do not make their Award within Twenty-one Days, or the extended time, the matter to go to the Umpire.*] Sect. 31. "If where more than one arbitrator shall have been appointed, and where neither of them shall refuse or neglect to act as aforesaid, such arbitrators shall fail to make their award within twenty-one days after the day on which the last of such arbitrators shall have been appointed, or within such extended time (if any) as shall have been appointed for that purpose by both such arbitrators under their hands, the matters referred to them shall be determined by the umpire to be appointed as aforesaid." *See* 12 Q. B. 562; 17 L. J. Q. B. 362.

By sect. 32, *Arbitrators may call for Documents and examine Witnesses.*] Sect. 32. "The said arbitrators or their umpire may

call for the production of any documents in the possession or power of either party which they or he may think necessary for determining the question in dispute, and may examine the parties or their witnesses on oath, and administer the oaths necessary for that purpose."

Declaration to be made by Arbitrator or Umpire; acting contrary to which is a Misdemeanour.] By sect. 33. "Before any arbitrator or umpire shall enter into the consideration of any matters referred to him, he shall, in the presence of a justice, make and subscribe the following declaration; (that is to say,)

'I, A. B., do solemnly and sincerely declare that I will faithfully and honestly, and to the best of my skill and ability, hear and determine the matters referred to me under the provisions of the act [*naming the special act*]. A. B.'

'Made and subscribed in
the presence of

And such declaration shall be annexed to the award when made; and if any arbitrator or umpire, having made such declaration, shall wilfully act contrary thereto, he shall be guilty of a misdemeanour."

By sect. 34, *Costs of Arbitration to be borne by Promoters unless Sum awarded be the same, or less than that offered, but* aliter *each Party to pay their own Costs.*] Sect. 34. "All the costs of any such arbitration, and incident thereto, to be settled by the arbitrators, shall be borne by the promoters of the undertaking, unless the arbitrators shall award the same, or a less sum than shall have been offered by the promoters of the undertaking, in which case each party shall bear his own costs incident to the arbitration, and the costs of the arbitrators shall be borne by the parties in equal proportions." 5 Ex. R. 214; 18 L. J. Q. B. 89; 16 Jur. 640.

By sect. 35, *Promoters to take Award and give Copy to other Party, and allow Original to be examined.*] Sect. 35. "The arbitrators shall deliver their award in writing to the promoters of the undertaking, and the said promoters shall retain the same, and shall forthwith on demand, at their own expense, furnish a copy thereof to the other party to the arbitration, and shall at all times, on demand, produce the said award, and allow the same to be inspected or examined by such party, or any person appointed by him for that purpose." 15 Q. B. 1043; 20 L. J. Q. B. 145.

By sect. 36, *Submission may be made a Rule of Court.*] Sect. 36. "The submission to any such arbitration may be made a rule of any of the superior courts, on the application of either of the parties." 23 L. J. Ex. 254; 9 Ex. 395.

By sect. 37, *Award not void for Error in Form.*] Sect. 37. "No award made with respect to any question referred to arbitration under the provisions of this or the special act shall be set aside for irregularity or error in matter of form."

By sect. 63, *in estimating Purchase-money or Compensation, not only Value of Land purchased to be considered, but Damages for injuriously affecting other Land of the Owner.*] Sect. 63. "In estimating the purchase-money or compensation to be paid by the promoters of the undertaking in any of the cases aforesaid, regard shall be had by the justices, arbitrators, or surveyors, as the case may be, not only to the value of the land to be purchased or taken by the promoters of the undertaking, but also to the damage (if any) to be sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of such owner, or otherwise injuriously affecting such other lands by the exercise of the powers of this or the special act, or any act incorporated therewith."

By sect. 64, *where Compensation to absent Party has been determined by a Surveyor, the Party may have the same submitted to Arbitration.*] Sect. 64. "When the compensation payable in respect of any lands, or any interest therein, shall have been ascertained by the valuation of a surveyor, and deposited in the bank under the provisions herein contained, by reason that the owner of or party entitled to convey such lands, or such interests therein as aforesaid, could not be found, or was absent from the kingdom, if such owner or party shall be dissatisfied with such valuation, it shall be lawful for him, before he shall have applied to the Court of Chancery for payment or investment of the monies so deposited under the provisions herein contained, by notice in writing to the promoters of the undertaking, to require the question of such compensation to be submitted to arbitration, and thereupon the same shall be so submitted accordingly, in the same manner as in other cases of disputed compensation hereinbefore authorised or required to be submitted to arbitration."

By sect. 65, *Question to be submitted is, whether the Sum deposited is sufficient.*] Sect. 65. "The question to be submitted to the arbitrators in the case last aforesaid shall be, whether the said sum so deposited as aforesaid by the promoters of the undertaking was a sufficient sum, or whether any and what further sum ought to be paid or deposited by them."

By sect. 66, *if further Sum awarded, Promoters to pay or deposit the same within Fourteen Days.*] Sect. 66. "If the arbitrators shall award that a further sum ought to be paid or deposited by the promoters of the undertaking, they shall pay or deposit, as the case may require, such further sum within fourteen days after the making of such award, or in default thereof the same may be enforced by attachment, or recovered with costs of action or suit in any of the superior courts."

By sect. 67, *if Sum deposited be sufficient, Costs in discretion of Arbitrators; if not, to be paid by Promoters.*] Sect. 67. "If the arbitrators shall determine that the sum so deposited was sufficient, the costs of and incident to such arbitration to be determined by the arbitrators shall be in the

(10) *Under Railway Clauses Consolidation Act*, 1845.[1]

discretion of the arbitrator; but if the arbitrators shall determine that a further sum ought to be paid or deposited by the promoters of the undertaking, all the costs of and incident to the arbitration shall be borne by the promoters of the undertaking."

By sect. 68, *if any one entitled to Compensation claim over* 50*l. his claim may be settled by Arbitration or a Jury, at his option.*] Sect. 68. "If any party shall be entitled to any compensation in respect of any lands, or of any interest therein, which shall have been taken for or injuriously affected by the execution of the works, and for which the promoters of the undertaking shall not have made satisfaction under the provisions of this or the special act, or any act incorporated therewith, and if the compensation claimed in such case shall exceed the sum of fifty pounds, such party may have the same settled either by arbitration or by the verdict of a jury, as he shall think fit; and if such party desire to have the same settled by arbitration, it shall be lawful for him to give notice in writing to the promoters of the undertaking of such his desire, stating in such notice the nature of the interest in such lands in respect of which he claims compensation, and the amount of the compensation so claimed thereon; and unless the promoters of the undertaking be willing to pay the amount of compensation so claimed, and shall enter into a written agreement for that purpose within twenty-one days after the receipt of any such notice from any party so entitled, the same shall be settled by arbitration in the manner herein provided; or if the party so entitled as aforesaid desire to have such question of compensation settled by jury, it shall be lawful for him to give notice in writing of such his desire to the promoters of the undertaking, stating such particulars as aforesaid, and unless the promoters of the undertaking be willing to pay the amount of compensation so claimed, and enter into a written agreement for that purpose, they shall, within twenty-one days after the receipt of such notice, issue their warrant to the sheriff to summon a jury for settling the same in the manner herein provided, and in default thereof they shall be liable to pay to the party so entitled as aforesaid the amount of compensation so claimed, and the same may be recovered by him, with costs, by action in any of the superior courts."

By sect. 125, *how Value of such Lands to be estimated.*] Sect. 125. "In estimating the compensation to be given for any such last-mentioned lands, or any estate or interest in the same, or for any mesne profits thereof, the jury, or arbitrators, or justices, as the case may be, shall assess the same according to what they shall find to have been the value of such lands, estate, or interest and profits at the time such lands were entered upon by the promoters of the undertaking, and without regard to any improvements or works made in the said lands by the promoters of the undertaking, and as though the works had not been constructed."

By sect. 130, *Differences with Persons entitled to Pre-emption as to Price to be settled by Arbitration.*] Sect. 130. "If any person entitled to such pre-emption be desirous of purchasing any such lands, and such person and the promoters of the undertaking do not agree as to the price thereof, then such price shall be ascertained by arbitration, and the costs of such arbitration shall be in the discretion of the arbitrators."

[1] *By Railway Clauses Consolidation Act*, 8 *Vic. c.* 20, *s.* 126, *where Questions are to be determined by Arbitration, if both Parties do not concur in the appointment of a single Arbitrator, each Party, at the request of the others, shall appoint an Arbitrator in the manner herein provided: such appointment to be deemed a Submission, and not to be revocable even by death.*] 8 Vic. c. 20, s. 126. "When any dispute authorised or directed by this or the special act, or any act incorporated therewith, to be settled by arbitration, shall have arisen, then, unless both parties shall concur in the appointment of a single arbitrator, each party, on the request of the other party, shall nominate and appoint an arbitrator, to whom such dispute shall be referred: and every appointment of an arbitrator shall be made on the part of the company, under the hand of the secretary, or any two of the directors of the company, and on the part of any other party under the hand of such party, or if such party be a corporation aggregate under the common seal of such corporation, and such appointment shall be delivered to the arbitrators, and shall be deemed a submission to arbitration on the part of the party by whom the same shall be made; and after any such appointment shall have been made neither party shall have power to revoke the same without the consent of the other, nor shall the death of either party operate as a revocation; and if for the space of fourteen days after any such dispute shall have arisen, and after a request in writing, in which shall be stated the matter so required to be referred to arbitration, shall have been served by the one party on the other party to appoint an arbitrator, such last-mentioned party fail to appoint such arbitrator, then, upon such failure, the party making the request, and having himself appointed an arbitrator, may appoint such arbitrator to act on behalf of both parties, and such arbitrator may proceed to hear and determine the matters which shall be in dispute; and in such case the award or determination of such single arbitrator shall be final."

By sect. 127, *if Arbitrator die, or become incapable, Party appointing may appoint another: if he fail to do so after seven days, the other Arbitrator may proceed* ex parte.] Sect. 127. "If, before the matters so referred

(B) *Manner of and of making Submission a Rule of Court.*
(*a*) *When there is a Cause in Court.*[1]

shall be determined, any arbitrator appointed by either party die, or become incapable to act, the party by whom such arbitrator was appointed may nominate and appoint, in writing, some other person to act in his place, and if for the space of seven days after notice in writing from the other party for that purpose he fail to do so, the remaining or other arbitrator may proceed *ex-parte;* and every arbitrator so to be substituted as aforesaid shall have the same powers and authorities as were vested in the former arbitrator at the time of such his death or incapacity as aforesaid."

By sect. 128, *Appointment of Umpire is provided for.*] Sect. 128. "Where more than one arbitrator shall have been appointed, such arbitrators shall, before they enter upon the matters referred to them, nominate and appoint, by writing under their hands, an umpire to decide on any such matters on which they shall differ, or which shall be referred to him under this or the special act; and if such umpire shall die, or become incapable to act, they shall forthwith, after such death or incapacity, appoint another umpire in his place; and the decision of every such umpire on the matters so referred to him shall be final."

By sect. 129, *Board of Trade* empowered to appoint any Umpire in case of Arbitrators neglecting to do so.*] Sect. 129. "If in either of the cases aforesaid the said arbitrators shall refuse, or shall, for seven days after request of either party to such arbitration, neglect to appoint an umpire, the Board of Trade shall, on the application of either party to such arbitration, appoint an umpire; and the decision of such umpire on the matters on which the arbitrators shall differ, or which shall be referred to him under this or the special act, shall be final."

By sect. 130, *in case of Death of single Arbitrator the matter to begin* de novo.] Sect. 130. "If, where a single arbitrator shall have been appointed, such arbitrator die or become incapable to act before he shall have made his award, the matters referred to him shall be determined by arbitration, under the provisions of this or the special act, in the same manner as if such arbitrator had not been appointed."

By sect. 131, *if either Arbitrator refuse to act, the other to proceed* ex-parte. Sect. 131. "If, where more than one arbitrator shall have been appointed, either of the arbitrators refuse, or for seven days neglect to act, the other arbitrator may proceed *ex-parte*, and the decision of such other arbitrator shall be as effectual as if he had been the single arbitrator appointed by both parties."

By sect. 132, *if Arbitrators fail to make their Award within Twenty one Days, the matter to go to the Umpire.*] Sect. 132. "If, where more than one arbitrator shall have been appointed, and where neither of them shall refuse or neglect to act as aforesaid, such arbitrators shall fail to make their award within twenty-one days after the day on which the last of such arbitrators shall have been appointed, or within such extended time (if any) as shall have been appointed for that purpose by both such arbitrators under their hands, the matter referred to them shall be determined by the umpire to be appointed as aforesaid."

By sect. 133, *Power for Arbitrators to call for Books, &c.*] Sect. 133. "The said arbitrators, or their umpire, may call for the production of any documents in the possession or power of either party which they or he may think necessary for determining the question in dispute, and may examine the parties or their witnesses on oath, and administer the oaths necessary for that purpose."

By sect. 134, *Arbitrator and Umpire to make Declaration.*] Sect. 134. "Before any arbitrator or umpire shall enter into the consideration of any matters referred to him, he shall, in the presence of a justice, make and subscribe the following declaration; (that is to say,)

'I, A. B., do solemnly and sincerely declare, that I will faithfully and honestly, and to the best of my skill and ability, hear and determine the matters referred to me, under the provisions of the act [*naming the special act*]. A. B.'

'Made and subscribed in
the presence of'

And such declaration shall be annexed to the award when made; and if any arbitrator or umpire, having made such declaration, shall wilfully act contrary thereto, he shall be guilty of a misdemeanour."

By sect. 135, *Costs to be in the Discretion of Arbitrators.*] Sect. 135. "Except where by this, or the special act, or any act incorporated therewith, it shall be otherwise provided, the costs of and attending every such arbitration to be determined by the arbitrators shall be in the discretion of the arbitrators."

By sect. 136, *Submission may be made a Rule of Court.*] Sect. 136. "The submission to any such arbitration may be made a rule of any of the superior courts, on the application of either of the parties."

By sect. 137, *The Award not to be set aside.*] Sect. 137. "No award made with respect to any question referred to arbitration, under the provisions of this or the special act, shall be set aside for irregularity or error in matter of form."

[1] When a cause is pending, the submis-

* The powers of the Board of Trade, as to railways, have been transferred to the Commissioners of Railways, by the 9 & 10 Vic. c. 105, s. 2.

(*b*) *When there is no Cause in Court.*

Merchants and others may agree that their submission to arbitration may be made rules of court.

The 9 & 10 Wm. 3, c. 15, s. 1, enacts that "it shall and may be lawful for all merchants and traders, and others, desiring to end any controversy, suit, or quarrel, for which there is no other remedy but by personal action or suit in equity, by arbitration, to agree that their submission of their suit to the award or umpirage of any person or persons should be made a rule of any of his Majesty's courts of record which the parties shall choose, and to insert such their agreement in their submission, or the condition of the bond or promise, whereby they oblige themselves respectively to submit to the award or umpirage of any person or persons, which agreement being so made and inserted in their submission or promise, or condition of their respective bonds, shall or may, upon producing an affidavit thereof made by the witnesses thereunto, or any one of them, in the court of which the same is agreed to be made a rule, and reading and filing the said affidavit in court, be entered of record in such court, and a rule shall thereupon be made by the said Court, that the parties shall submit to and finally be concluded by the arbitrators or umpire pursuant to such submission; and in cases of disobedience to such arbitration or umpirage, the party neglecting or refusing to perform and execute the same, or any part thereof, shall be subject to all the penalties of contemning a rule of court when he is a suitor or defendant in such court, and the Court on motion shall issue process accordingly, which process shall not be stopped or delayed in its execution by any order, rule, command, or process of any other court, either of law or equity, unless it shall be made appear on oath to such Court that the arbitrators or umpire misbehaved themselves, and that such award, arbitration, or umpirage was procured by corruption or other undue means."[1]

ANSELL v. EVANS, 7 T. R. 1; S. P. DICKMAN v. HUTHERD, Prac. Reg. 44.

But a verbal agreement by the parties to refer all matters in difference to arbitration cannot be made a rule of court.[2]

This was an application under the statute of 9 & 10 Wm. 3, c. 15, to make a parol submission a rule of court; but

Per Cur. That statute does not empower us so to do, for it directs the consent of the parties to make the reference a rule of court, to be inserted in their submission. Rule refused.

And now every submis-

By C. L. P. Act, 1854, 17 & 18 Vic. c. 125, s. 17, "every agreement or submission to arbitration by consent, whether by deed or instrument in writing not under seal, may be made a rule of any one of the superior courts of law or equity at Westminster, on the application of any party thereto, unless such

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sion, by which is meant the agreement conferring on the arbitrator his binding authority, is either by rule of court or judge's order before the trial, or by order of Nisi Prius at the trial. As to the effect of an order of Nisi Prius referring the cause and all matters in difference, see *R. v. Hardy*, 19 L. J. Q. B. 196. The sheriff, under the Writ of Trial Act, has no power to allow a verdict to be taken, subject to a reference. *Wilson v. Thorpe*, 6 Mee. & W. 721. *Harrison v. Greenwood*, 3 D. & L. 356. The order of Nisi Prius referring a cause may be made a rule of court. *Millington v. Claridge*, 3 C. B. 609. *Harrison v. Smith*, 1 D. & L. 876. So also may a judge's order, notwithstanding one of the parties revoke the authority of the arbitrator. *Aston v. George*, 1 Ch. 200; 2 B. & A. 395. And when, by judge's order in the Exchequer, it was made a part of the order that it might be made a rule of court of the Q. B., there is no objection to its being so made. *Milstead v. Craufield*, 9 Dowl. C. P. 124.

[1] The intent of this statute was to put submissions, where no cause was depending in court, on the same footing with those where there was a cause depending. It is confined to disputes where no action has been commenced. Where a cause is pending the case rests on the common law. *Lucas v. Wilson*, 2 Burr. 702. *Pedley v. Westmacott*, 3 East, 603. The statute does not apply to criminal matters. *Watson v. M'Cullum*, 8 T. R. 520. *R. v. Bardell*, 5 Ad. & E. 619.

[2] And this would still be law, as the 17 & 18 Vic. c. 125, s. 17, only extends to agreements in writing.

If there be no cause in court, the submission cannot be by order or rule, but as in the principal case, by bond or mutual

sion in writing may be made a rule of court, unless it contain prohibitory words.[1]

agreement or submission contain words purporting that the parties intend that it should not be made a rule of court; and if in any such agreement or submission it is provided that the same shall or may be made a rule of one in particular of such superior courts, it may be made a rule of that court only; and if when there is no such provision a case be stated in the award for the opinion of one of the superior courts, and such court be specified in the award, and the document authorising the reference have not, before the publication of the award to the parties, been made a rule of court, such document may be made a rule only of the court specified in the award; and when in any case the document authorising the reference is or has been made a rule or order of any one of such superior courts, no other of such courts shall have any jurisdiction to entertain any motion respecting the arbitration or award."

(C) *Construction of.*

BUTLER v. WIGGE, 1 Saund. 65; S. C. 2 Keb. 204.

In construing a submission, the obvious intention of the parties should be the only guide, and insensible words may be rejected or transposed.[2]

The submission was by deed, reciting that each of the parties was bound to the other in a sum of 100*l.*, and by the same deed they covenanted that "if each of them should stand the award of A. B., then the obligation of him who performed the award should be void, and that of him who did not should be in full force;" and it was objected, that this submission was void, because it imported that each of them was bound for the performance of the award by the other. This construction was rejected as absurd and nonsensical, and contrary to the plain meaning of the parties; and it was held, that the words "if each of them shall stand," &c. should be taken in the same sense as if the submission had been expressed thus: "that the one was bound to the other, and the other to him, that each should stand to the award; if not, his obligation to be in full force."

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agreement (*Samways v. Eldfly*, 2 Mod. 74. *Spooner v. Payne*, 16 L. J. C. P. 225); and a covenant to perform the award will be enforced, although it be not so expressly stated in the submission. *Lupart v. Welson*, 11 Mod. 170. Though the submission may be in writing not under seal, it is generally by bond, with mutual covenants. Cald. 16. A submission endorsed, but not signed on the arbitration-bond, has been held sufficient. *Carter v. Mansbridge*, Barnes, 55. Each party usually executes a bond to the other in a certain penalty, subject to the condition of his abiding by the award. Russell on Awards, 53. *Greig v. Talbot*, 2 B. & C. 179. *Hayes v. Hayes*, Cro. Car. 433. *Winter v. White*, 1 B. & P. 350. The submission should distinctly specify the matters submitted. In a general reference, the words "all matters in difference;" or, in a cause, "all matters in difference in the cause," or the "cause," may be adopted. *Charleton v. Spencer*, 3 Q. B. 693. *Re Warner and others*, 2 D. & L. 148. A stipulation that the death of either party shall not operate as a revocation is better to be inserted. The submission must be mutual. *Richards v. Bassett*, 10 B. & C. 657.

[1] A covenant by indenture, that any differences which may thereafter arise shall be referred, is a submission which, when such differences do arise, can be made a rule of court. *Parkes v. Smith*, 15 Q. B. 297; 19 L. J. Q. B. 405. And so may an order of reference of an inferior court of record made by consent of the parties as an agreement. *Harlow v. Winstanley*, 1 P. R. 425; 15 Jur. 426; 19 L. J. Q. B. 430.

If the time of making the award has been enlarged, and the award made within such enlarged time, it is necessary to make the enlargement a rule of court before moving to enforce it, though not before moving to set it aside (*Re Welsh*, 1 Dowl. N. S. 331); and this may be done on the same motion by which the submission is made a rule of court. *Smith v. Blake*, 8 Dowl. 132. The motion must be made on the original submission, and where it is in the hands of the opposite party the court will grant a rule calling upon him to produce it. *Lord Boston v. Mesham*, 8 Dowl. P. C. 867; 8 Dowl. 132. Where the original has been lost, the court will make a verified copy a rule of court. *Short v. Frank*, 3 Jur. 341; 1 Str. 526. *Parker v. Back*, 17 C. B. 512. *Hill v. Townshend*, 3 Taunt. 45. *Bottomley v. Buckley*, 4 D. & L. 157. *Re Plews*, 6 Q. B. 848 n. As to the mode of making a submission a rule of court, see Arch. P. 1572.

[2] A general submission of the parties includes all matters up to that time (10 Mod. 204); but the award of a release to the time of the award is good (*Hooper v.*

TATTERSALL (Administrator) v. GROOTE, 2 B. & P. 131.

A covenant had been entered into between A. and B. in consideration of a sum of money paid by the one to the other to enter into partnership, and in case of any dispute, doubt, or question, to submit the decision of it to arbitration. It appeared that the copartnership had been subsequently dissolved by consent, and that as the party who had advanced the consideration had conceived himself entitled to a return of the money, the present action had been brought to oblige all disputes touching the same to be submitted to arbitration.

A covenant in a deed of partnership in case of dissolution to refer all matters relating thereto to arbitration, does not include the question whether the consideration given by one partner to the other on entering into partnership should be refunded.

Per Cur. This case is not within the covenant, which directs that all matters relating to the copartnership shall be referred to arbitration. The subject of the present dispute is the original consideration of entering into the copartnership. The covenant to refer matters to arbitration in point of consideration, is sustained by the payment of 420*l.*; and yet, by virtue of that very covenant, it is made a matter of dispute whether the 420*l.* ought to have been paid or not. Courts of equity, it is true, will interfere in cases where fraud has been practised; but then they treat the articles as a nullity in consequence of the fraud. The arbitrator cannot, therefore, settle the present question.

(D) *Amendment of.*

DRAKE v. BROWN, 2 C., M. & R. 270.

By Judge's order a cause was referred. The question submitted to the arbitrator's determination being, whether a sum of money which had been paid by the plaintiff into the hands of the defendant, for the purpose of being paid over to the estate of an intestate, but which payment over had been subsequently countermanded by the plaintiff, was, in fact, due from the plaintiff to the estate of the intestate or not.

An order of reference will not be varied upon suggestion by one party of subsequently discovered matter.[1]

The Court refused to grant a rule *nisi* for varying the order, by introducing a fresh term into the reference, in consequence of information which one of the parties, an administratrix, had obtained since the hearing at chambers.

GRIMSTONE v. BELL, 4 Taunt. 254; S. P. EVANS v. SENOR, 5 Taunt. 662.

This cause was referred by order of Nisi Prius, and the submission, drawn up in the usual terms, contained, amongst others, that of filing no bill in equity. It appeared to be highly necessary to the defendant that a bill should be filed in order to obtain a discovery of certain facts material to his defence. A motion was made to amend the order of Nisi Prius by striking out the words which prohibited any bill in equity being brought.

The terms of a submission were amended by the erasement of a condition to file no bill in equity, where

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Pierce, 12 Mod. 117; Comb. 418); and a submission of all matters in difference includes all matters jointly or severally between the parties. *Athelston v. Moon*, 2 Comb. 547. So a reference of all matters in difference between "the parties in the cause" extends to matters other than in the cause. *Malcolm v. Fullarton*, 2 T. R. 645. *Smith v. Muller*, 3 id. 624. In a submission the words "may" and "shall" are imperative. *Adney v. Crump*, 1 C. & M. 355; 3 Tyr. 270.

[1] A clerical error may be amended. *Price v. James*, 2 Dowl. P. C. 435. But when there is a *material* mistake, even though made by the officer of the court, no amendment can be made. *Pearman v. Carter*, 2 Ca. 29. *Rawbue v. King*, 5 Moore, 167. *Alder v. Savill*, 5 Taunt. 453. And the court will not amend an order of reference drawn up by one of the parties on an affidavit that an error was made by him in copying a document attached by consent to the order of reference. *Wynn v. Nicholson*, 8 L. J. C. P. 231; 7 C. B. 819. But where the arbitrator awarded a larger sum than that mentioned in the order of reference, and there appeared to be a mistake in the order as to the sum, *semble*, that the court would amend the order. *Annan v. Job*, 10 Jur. 926. If the order of reference is improperly obtained, application should be made to set it aside. *Sarkitt v. Owen*, 2 Ch. R. 39.

the bill was essential to the justice of the case.[1]

Per Cur. The application must be allowed. Besides, this is not the same sort of bill in equity which the rule of court contemplated; by which was meant a bill filed to postpone the payment of a debt, or for other purposes of vexatious delay. Rule absolute. *See* 3 Taunt. 379; 2 Ves. jun. 543. *Wright v. Fairfield*, 2 B. & Adol. 727. *Braddick v. Thompson*, 8 East, 344.

(E) *Effect of.*

ANON. 7 Mod. 38; S. C. 2 Lord Raym. 789.

A submission does not suspend proceedings.

Per Cur. A submission of matters to reference is no stay of proceedings, if it is not particularly agreed on. *See* 2 Tidd. 819; and 6 C. B. (N. S.) 326; *post*, 464.

KILL v. HOLLISTER, 1 Wils. 129; S. P. THOMPSON v. CHARNOCK, 8 T. R. 139.

Nor does an agreement to refer, if dispute should arise, prevent the parties from suing at law.

In an action upon a policy of insurance, it appeared that a clause was inserted that, in case of any loss or dispute about the policy, it should be referred to arbitration; and the plaintiff averred in the declaration that there had been no reference. Upon the trial the point was reserved for the opinion of the Court, whether this action could be supported before a reference had been made.

Per Cur. If there had been a reference made, pending, or determined, it might have been a bar, but the agreement of the parties cannot oust the Court of its jurisdiction; and as no reference has been, nor any pending, the action is well brought. Judgment for plaintiff.

HARRIS v. REYNOLDS, 7 Q. B. 71; 9 Jur. 808; 14 L. J. Q. B. 241.

Nor an agreement to refer after the disputes have arisen.

Assumpsit for goods sold and delivered, and accounts stated.

Plea. That the plaintiff and defendant had referred the matters in dispute to arbitration, that a reasonable time for making the award had not yet elapsed, and that the said matters were still under consideration of the arbitrator.

Held, that the plea was no answer to the action.[2]

LIVINGSTON v. RALLI, 24 L. J. Q. B. 269; 1 Jur. N. S. 594.

But an action will lie on the branch of an agreement to refer, notwithstanding such agreement cannot be pleaded in bar to an action on the original contract.

Declaration on a contract for the sale of a cargo of wheat, the contract stipulating, that should any difference arise as to the contract, the same should be left to the arbitration of two London cornfactors, or of an umpire in case of difference.

Averment. That a difference arose, but that the defendant refused to concur in referring the said difference, and wrongly prevented the same from being referred.

Plea. That the difference was concerning a claim and demand for damages alleged to be payable by the defendant, by reason of the cargo being deficient in quantity, and that no other difference arose, whereupon defendant refused, &c.

Demurrer. It was contended on the argument, on the authority of the judgment of *Lord Eldon, C. J.*, in *Tattersall v. Groote*,[3] that no action would

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[1] And where the words "on the usual terms" were omitted in a Nisi Prius order, they were inserted, although reference then being proceeded with. 30 L. J. C. P. 1.

[2] *See* also *Tattersall v. Groote*, 2 B. & P. 131. *Street v. Rigby*, 6 Ves. jun. 815. *Scott v. Avery*, 25 L. J. Ex. 308. *Lowndes v. Stamford and Warrington*, 18 Q. B. 425. *Williams v. London Commercial Exchange Co.* 10 Ex. 569. *Wood v. Copper-Miners' Co.* 25 L. J. C. P. 166. *Horton v. Sayer*, 29 L. J. Ex. 28.

[3] 2 B. & P. 131; *supra*, p. 463.

lie on the agreement to refer, as tending to exclude the jurisdiction of the courts.

Held, with great respect for the authority of Lord Eldon, that it is clear on principle that an action can be maintained for the breach of an agreement to refer. It is not against public policy; on the contrary, it is most reasonable and just that parties should be at liberty to insert in the contracts a stipulation to refer. *See* 8 Ex. R. 487; 22 L. J. Ex. 287.

And where parties to any deed or instrument have consented to refer, and one brings an action, it may be stayed by the Court.[2]

By C. L. P. Act, 17 & 18 Vic. c. 125, s. 11, "Whenever the parties to any deed or instrument *in writing*, to be hereafter made or executed, or any of them, shall agree that any then existing or future differences between them or any of them shall be referred to arbitration, and any one or more of the parties so agreeing, or any person or persons claiming [1] through or under him or them, shall nevertheless commence any action at law or suit in equity against the other party or parties, or any of them, or against any person or persons claiming through or under him or them in respect of the matters so agreed to be referred, or any of them, it shall be lawful for the Court in which the action or suit is brought, or a judge thereof, on application by the defendant or defendants, or any of them, after appearance and before plea or answer, upon being satisfied that no sufficient reason exists why such matters cannot be, or ought not to be, referred to arbitration according to such agreement as aforesaid, and that the defendant was at the time of the bringing of such action or suit, and still is, ready and willing to join and concur in all acts necessary and proper for causing such matters so to be decided by arbitration, to make a rule or order staying all proceedings in such action or suit, on such terms as to costs and otherwise as to such court or judge may seem fit: Provided always, that any such rule or order may at any time afterwards be discharged or varied as justice may require." See *Mason v. Hadden*, 6 C. B. 526.

STEERS v. LASHLEY, 1 Esp. 167.

Consenting to a reference does not prevent the party

In this case it was contended that a party by submitting a demand to arbitration, which is *malum prohibitum*, thereby waived the illegality; but,—

Per Lord Kenyon, C. J. "A party by referring an illegal transaction to

[1] The assignees of a bankrupt are not persons claiming through or under him within this act. *Fennell v. Walker*, 26 L. J. C. P. 9.

[2] Where a charter-party between the plaintiff on behalf of the shipowner, and the defendant as charterer, stipulated for the payment of a certain sum per ton per month for the hire of the vessel; and, further, that any difference of opinion between the parties, either in principle or detail, should be referred to arbitration; the plaintiff brought an action for the sum which appeared to be clearly due from the defendant for the hire of the vessel. The defendant resisted payment on the ground of a *bonâ fide* cross-claim to damages for a breach of the charter-party, by reason of the unseaworthiness of the vessel. The defendant had always been ready to refer the matter to arbitration, but the plaintiff had refused to do so; and insisted on his right to recover the claim for the hire of the vessel.

Held, that the defendant was entitled to stay the proceedings in the action under the above section, there being a *bonâ fide* difference of opinion between the parties in respect to a matter within the meaning of the agreement to refer; and that it was not necessary that the action should be brought in respect of the same matter of difference, if brought in respect of a matter within the agreement to refer. *Russell v. Pelligrini*, 2 E. & B. 1020; 26 L. J. Q. B. 75. But in an action on a charter-party against a surety for freight, the defendant was not allowed a reference under this section of a claim for compensation for breach of a warranty of the capacity of the vessel, that being a claim of which the principal, the charterer alone, could take advantage, and not the surety. And *quære*, whether the Court of Exchequer, notwithstanding *Russell v. Pelligrini*, *supra*, will allow a reference of a matter not available as a defence, or in reduction of damages in the same action, but only a ground of a cross-claim in another action? *Daunt & others v. Lazard*, 27 L. J. Ex. 399. And where, after an agreement to refer, one of the parties brought an action, the Court, in its discretion, refused to stay the plaintiff *bonâ fide*, alleging that the question raised was one of fraud. *Wallis v. Hirsch and others*, 26 L. J. C. P. 72. As to what is clearly within this section, see *Wickham v. Harding*, 28 L. J. Ex. 215.

from objecting to the legality of the demand.[1]

arbitration does not thereby divest himself of the power of impeaching its validity."

(F) *Revocation of.*

(*a*) *By Will of the Parties.*[2]

(*b*) *By Leave of the Court or Judge.*

No submission is revocable without the leave of the Court by which it may be made a rule of court.[2]

By 3 & 4 Wm. 4, c. 42, s. 39, it is enacted, "that the power and authority of any arbitrator or umpire appointed by or in pursuance of any rule of court or judge's order, or order of Nisi Prius, in any action now brought, or which shall hereafter be brought, or by or in pursuance of any submission to reference containing an agreement that such submission shall be made a rule of any of his Majesty's Courts of Record, shall not be revocable by any party to such reference without the leave of the court by which such rule or order shall be made, or which shall be mentioned in such submission, or by leave of a judge; and the arbitrator or umpire shall and may, and is hereby required to proceed with the reference, notwithstanding any such revocation, and to make such award, although the person making such revocation shall not afterwards attend the reference; and that the court, or any judge thereof, may from time to time enlarge the time for any such arbitrator making his award."

REX v. BARDELL, 1 Nev. & P. 74; S. P. REX v. SHILLIBEER, 5 Dowl. P. C. 238.

The 3 & 4 Wm. 4. c. 42, s. 39, applies only to civil matters, and not criminal; and therefore, where an indictment is referred the submission may be revoked.[3]

An indictment for a conspiracy at the sessions was removed by *certiorari* into this court. It was ordered by the Court, and with the consent of all parties, their counsel and attornies, that the jurors should be discharged from giving a verdict, subject to an award.

The order was made a rule of court. And the authority of the arbitrator subsequently being revoked, the question was, whether the submission to reference in the present case could be revoked since the passing of 3 & 4 Wm. 4, c. 42, s. 39, without leave of the Court.

Per Cur. This is not a case within the act. The act appears to us to apply to two specific kinds of submission of civil disputes, the one by order of Nisi Prius, and the other by agreement; and not to a submission of an indictment. This, therefore, was not an agreement intended by the act. *See* also

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[1] Nor is an agreement to refer the amount of damage of itself a waiver of the question of law as to the validity of the demand. *Oxenham v. Lemon*, 2 D. & R. 461. *Sed quære?*

[2] By the common law, the authority of the arbitrator might at any time before the award was made be revoked by the mere act of any party to the submission. *Rex v. Burridge*, 1 Str. 593. *Lowes v. Kermode*, 2 Moore, 30; 8 Taunt. 146. *Green v. Pole*, 6 Bing. 443: 4 M. & P. 198.

In order to deprive a party of his common-law right of revocation, the case must clearly be brought within the above statute. It has been held not to apply where the reference is not complete; as when two arbitrators, who are to appoint an umpire before they proceed, and such umpire has not been appointed. *Bright v. Durnell*, 4 Dowl. 756. Leave to revoke will not be granted *ex-parte*. *Clarke v. Stocken*, 5 Dowl. 32. And it must be applied for before the arbitrator has made his award. *Phipps v. Ingram*, 3 Dowl. 669. To induce the Court to permit a party to rescind his submission, strong ground must be laid before them. *James v. Attwood*, 7 Scott, 841; S. C. 9 Sim. 177. And as to where the Court will grant such leave, see *Faviell v. Eastern Counties Railway Company*, 2 Ex. 344. *Alder v. Park*, 5 Dowl. 16. *Scott v. Vansandeau*, 1 Q. B. 102.

In cases not within the act, although an award after notice of revocation would be invalid, yet, if there has been a mutual agreement, bond or covenant, to submit to arbitration, and abide by an award to be thereupon made, it is clear that upon proof that there was a debt or damages to a certain or ascertainable amount justly recoverable, and which probably would have been awarded, the same sum would probably be recovered from the party revoking, and his surety, in an action upon the contract of submission, assigning the revocation as a breach thereof; and probably upon stating the payment of costs and expenses occasioned by the revocation as special damages, these also would be recovered. *Warburton v. Storr*, 4 B. & C. 103; S. C. 6 D. & R. 213.

[3] Nor, it seems, would it apply to a submission by order in equity. Russ. on Awards, p. 154.

R. v. Hardry, 14 Q. B. 529; 19 L. J. Q. B. 196; 14 Jur. 649. *Woodcroft v. Jones*, 9 Dowl. 538.

(*c*) *By Death.*

Potts v. Ward, 1 Marsh. 366.

Where a cause is referred to arbitration, the death of one of the parties at any time before the award made is in general a revocation of the arbitrator's authority.

Two verdicts had been taken for the plaintiff, subject to a reference. The plaintiff died early on the morning of the day on which the arbitrator made his award. It was contended, that the arbitrator's award confirming the verdict should not be affected by the death, as the award related back to the time when these verdicts were taken.

Per Cur. The award must be viewed as a nullity. The death of one of the parties works a revocation of the arbitrator's authority. *See* 17 Ves. 241. *Bristow v. Binns*, 3 D. & R. 184. *Philpps v. Ingram*, 3 Dowl. 669. *Tyler v. Jones*, 3 B. & C. 144.

Toussaint v. Hartop, 7 Taunt. 571; S. C. 1 Moore, 287; S. P. Cooper v. Johnson, 2 B. & A. 394; S. C. 1 Chit. Rep. 187; S. P. Rhodes v. Haigh and another, 2 B. & C. 345; S. C. 3 D. & R. 608.

Although the reference is authorised by an order of Nisi Prius.

It was contended in this case upon the authority of *Bower v. Taylor*,[1] that the death of one of the parties to a submission of certain facts connected with a verdict which had been entered for one of them, subject to the result of such reference, before the award was made, did not affect its validity where the reference had been authorised by an order of Nisi Prius; and that a distinction existed between such a submission and a reference where the submission was merely an act of the parties.

Per Cur. We have considered the case before us, and examined the rule which is said to have been established in the case of *Bower v. Taylor*, and are of opinion that the judgment of this Court in the prior case of *Potts v. Ward*, 1 Marsh. 366, is correct, and that, therefore, the arbitrator's authority in the present case was revoked by the death of the defendant.

James v. Crane, 15 Mee. & W. 379; 3 D. & L. 661.

But not so when the arbitrator has to state a special case.

Cause referred by order of Nisi Prius, the arbitrator to state a special case. The parties were heard in October, 1845. On 10th January, 1846, the defendant died. On the 19th February, 1846, the special case was delivered by the arbitrator to the parties. On motion to set it aside in consequence of the death of the defendant,—

Per Cur. There is no ground for this application. Suppose this had been the case of a special verdict, the death of one of the parties before it was settled would have made no difference. A special case does not resemble an award. This is nothing more than to substitute the arbitrator in the place of the judge to settle the statement of facts. It is not a case in which the suit itself abates by the death.

Macdougall v. Robertson, 2 Y. & J. 11; S. C. (in Error), 4 Bing. 435; S. C. 1 M. & P. 147.

Nor when the parties have stipulated otherwise.[2]

The submission to arbitration contained a proviso that the submission should not vacate or expire through the death of either of the parties. One party having died and the other having revoked the arbitrator's authority,—

Per Cur. There can be no doubt, that where there is no express stipulation

[1] 3 D. & R. 610. *Bristow v. Binns*, 3 id. 184.

[2] *Smith v. Fielder*, 10 Bing. 306. *Clarke v. Crofts*, 4 id. 143; 12 Moore, 349. *Lewen v. Holbrook*, 11 Mee. & W. 110; 2 Dowl. N. S. 991. *Edwards v. Davis*, 23 L. J. Q. B. 278.

upon the subject the act or death of a party will revoke the authority given to an arbitrator, and render an award made after that revocation null and void. But the question here is, whether the parties cannot validly and effectively stipulate that the death of one or either shall not revoke it. This point seems to be now perfectly established.

(*d*) *By Marriage.*

SAMIN v. NORTON, 3 Keb. 9; S. C. W. Jones, 368.

The marriage of a *feme sole* is a revocation of the authority of an arbitrator.[1]

Per Cur. If a woman while *sole* submit to arbitration and marry before the making of the award, or before the expiration of the time for making it, the marriage is a revocation, because by that act all the personal property of the wife, and a permanent interest in her real property, which would be bound by the award, vests in the husband.

(*e*) *Bankruptcy or Insolvency.*

ANDREWS v. PALMER, 4 B. & A. 250.

The bankruptcy of the plaintiff intervening between a reference by order at Nisi Prius and award made, is not a revocation of the submission.

This cause had been referred by order of Nisi Prius, and after the reference, but before the making of the award, the plaintiff had become bankrupt. The award had been subsequently made in favour of the defendant, after which a commission had issued against the plaintiff. A motion was now made to set aside the award, upon the ground that the bankruptcy operated as a countermand of the submission.

Per Cur. It would not have put an end to the suit which the bankrupt had instituted;[2] it cannot therefore put an end to the arbitration founded upon that suit. Rule refused. *See* Com. Dig. Arbitration, D. 5; 1 Rol. 331, l. 45; Jon. 388. *Tayler v. Marling*, 2 Man. & G. 55. *Boorman v. Nash*, 9 B. & C. 145. *Hemsworth v. Brian*, 1 C. B. 131; 14 L. J. C. P. 134; 2 D. & L. 844. *Stwgis v. Lord Curson*, 21 L. J. Ex. 38. *Haswell v. Thorogood*, 7 B. & C. 705. *Gibson v. Carruthers*, 8 Mee. & W. 321. *Re Milnes*, 24 L. J. C. P. 29. But see *Marsh v. Wood*, 9 B. & C. 659, *contra.*

TAYLOR v. SHUTTLEWORTH, 8 Dowl. P. C. 281; S. C. 6 Bing. 277.

Nor of a defendant pending a reference, where a verdict has been taken for the plaintiff.

The Court, in this case, held that the bankruptcy of the defendant, four days before the date of the award, and the striking of a docket against him on the same day, of which the arbitrator had notice, pending the reference, did not operate as a revocation of the submission, where the bankruptcy was set up, and attempted to be taken advantage of, not by the assignees, but by the party himself; and also that the question was too grave in its nature, and important in its consequences, to be decided on motion.

(*f*) *Effect of.*

MILNE AND OTHERS, ASSIGNEES, ETC. v. GRATRIX, 7 East, 607; S. P. KING v. JOSEPH, 5 Taunt. 452.

If arbitrators make their award after notice of revocation, the

The differences between the plaintiff and defendant had been submitted to arbitration. Before the award was executed one of the parties executed a deed revoking the submission and the arbitrator's authority, but they nevertheless proceeded to make their award. The Court held that the arbitrators were not,

[1] *See* also *Charnley v. Winstanley*, 5 East, 266. *Marsh v. Wood*, 9 B. & C. 659, 661. So the intermarriage of one of several who have agreed to refer is a revocation as to the others. *See* Rol. Arbit. 331. In cases of this description, notice of the event to the arbitrator does not seem essential. Id.

[2] Whether taking the benefit of the Insolvent Act after submission to arbitration, and before award made, amounts to a revocation, the Court refused to decide on motion. *Hobbs v. Terrars*, Ex. 8 Dowl. P. C. 779. *Snook v. Hellyer*, 2 Chit. Rep. 43. *Andrews v. Palmer*, 4 B. & A. 250. But this would seem the same in principle as bankruptcy. Russ. on Awards, 162.

by the revocation, barred from proceeding, but that they might make their award; and that although the Court would not enforce an award so made (it not being a rule of court) by attachment, yet that where the submission was by deed an action of covenant would lie, in case either party refused obedience to the arbitrator's directions.

party revoking cannot be attached for disobedience, although he is liable to an action on the covenant.[1]

KING v. JOSEPH, 5 Taunt. 452.

Per Cur. If there is a penalty in a covenant to perform an award, and the party revoke the authority of the arbitrator, the penalty is not thereby revoked, but the person revoking is answerable for the amount in an action of covenant. *See* also *Warburton v. Storr*, 4 B. & C. 103.

And the right to the penalty is not affected by the revocation.

III. OF THE ARBITRATORS.

(A) *Who may be.*[2]

(B) *Power of Judge or adverse Party to Appoint.*[3]

MATTHEW v. OLLERTON, 4 Mod. 226; S. C. Comb. 218; S. P. OWDY v. GIBBONS, Comb. 100.

In debt on an award. After a verdict for the plaintiff a motion was made in arrest of judgment, on the ground that the matter in difference was referred to the plaintiff himself, who made an award. But,—

Semb. that a reference to one of the claimants himself is valid.

Per Cur. Serjeant Hard's case is conclusive against the application; for in that case the serjeant took a horse from the Archbishop of Canterbury's bailiff for a deodand, and the archbishop brought his action; and on its coming to a trial, the serjeant, by rule of court, referred it to the archbishop to set the price

[1] *Curtis v. Potts*, 3 M. & S. 145. *Marsh v. Bulteel*, 5 B. & A. 507; 1 D. & R. 106. *Hall v. Rouse*, 4 Mee. & W. 24; 6 Dowl. P. C. 656. The law on this subject is of much less importance since the 3 & 4 Wm. 4, c. 42, s. 39, takes away the power of revocation without the leave of the Court.

[2] An arbitrator being elected by the parties, any individual may be appointed (Com. Dig. Arbit. B.); except persons of non-sane memory, or infants, or a person who is not *sui juris*. Id. It is no objection to an award that the arbitrator is a married woman. *Duchess of Suffolk's case*, 8 Edw. 4, 1. But *see* Bac. Arb. D. *Huntig v. Ralling*, 8 Dowl. 879. But if the arbitrator has a secret interest or a bad feeling towards one, he is not a fit person to be an arbitrator. *Earle v. Stocker*, 2 Vern. 251; Collins, *Parl. Cas.* 257. The objection as to interest only applies to *secret* interest, for if the interest be known to the parties before they submit the award will be good. *Johnston v. Cheape*, 5 Dowl. 247. *Drew v. Drew*, cited Russ. 108. *Morgan v. Birnie*, 9 Bing. 672. *Owdy v. Gibbons*, Comb. 100. *Elliott v. South Devon Railway Co.* 2 De Gex & S. 171.

[3] *Power of a Judge to appoint Arbitrator or Umpire in certain cases.*] By 17 & 18 Vic. c. 125, s. 12, "if, in any case of arbitration, the document authorising the reference provide that the reference shall be to a single arbitrator, and all the parties do not, after differences have arisen, concur in the appointment of an arbitrator; or if any appointed arbitrator refuse to act, or become incapable of acting, or die, and the terms of such document do not show that it was intended that such vacancy should not be supplied, and the parties do not concur in appointing a new one; or if, where the parties or two arbitrators are at liberty to appoint an umpire,* or third arbitrator, such parties or arbitrators do not appoint an umpire or third arbitrator; or if any appointed umpire or third arbitrator refuse to act, or become incapable of acting, or die, and the terms of the document authorising the reference do not show that it was intended that such a vacancy should not be supplied, and the parties or arbitrators respectively do not appoint a new one; then in every such instance any party may serve the remaining parties or the arbitrators, as the case may be, with a written notice to appoint an arbitrator, umpire, or third arbitrator respectively; and if within seven clear days after such notice shall have been served no arbitrator, umpire, or third arbitrator be appointed, it shall be lawful for any judge of any of the superior courts of law or equity at Westminster, upon summons to be taken out by the party having served such notice as aforesaid, to appoint an arbitrator, umpire, or third arbitrator, as the case may be, and such arbitrator, umpire, and third arbitrator

* An umpire may be appointed under this section, though the submission was made before the act came into operation. *Re Lord*, 24 L. J. Ch. 145.

of the horse, which was done accordingly, and the serjeant afterwards moved the Court to set aside the award for the reasons now offered, but it was denied by Lord Holt, C. J. See *Hunter v. Bennison*, Hard. 43; Rol. Arbit. A. 2. *Earle v. Stocker*, 2 Vern. 251.

STEWARD v. WILLIAMSON, 5 Bing. 415.

Partiality in an arbitrator is a ground of revocation.[1]

The plaintiff and defendant mutually entered into bonds to submit to arbitration a certain claim of the plaintiff on a charter-party for the hire of a ship. The umpire chosen by the arbitrators evincing partiality towards the defendant, the plaintiff, before the award was made, revoked his authority, and afterwards brought an action on the charter-party, and recovered a verdict for 1500*l.*, and sued out execution thereon. The umpire, notwithstanding the revocation, made an award in favour of the defendant, who afterwards commenced an action against the plaintiff on the arbitration-bond; but, by reason of the plaintiff's being resident in Scotland, was unable to serve him with process. On motion to order the execution issued at the suit of the plaintiff in the action upon the charter-party to be stayed,—

Per Cur. The conduct of the umpire was highly improper; and, under the circumstances, we cannot say that the plaintiff was guilty of a contempt of the order of the Court in revoking the power he had previously delegated, when he found that it was about to be made an improper use of. If a party has reasonable grounds to believe that the arbitrators are acting improperly, he may revoke the authority at any time before the award is made.

(B) *Power of, regulated by Terms of Submission.*

BELL v. BELSON, 2 Chit. 157; S. P. MOORE v. SURRY, 8 Mod. 212.

The arbitrators have no power to award the payment of their own expenses, unless authorised so to do by the submission.[2]

A reference had been made of all matters in dispute, but nothing was stated relative to the costs of the reference; and the arbitrators awarded their own expenses, to be paid by one of the parties. The Court were clearly of opinion that arbitrators could not award their own expenses, unless expressly provided for by the terms of the submission.

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respectively shall have the like power to act in the reference, and make an award, as if he had been appointed by consent of all parties."

When matter referred to two Arbitrators, if one Party after notice refuse to appoint, other Party may appoint Arbitrator to act alone.] By C. L. P. Act, 1854, s. 13, "when the reference is or is intended to be to two arbitrators, one appointed by each party, it shall be lawful for either party in the case of the death, refusal to act, or incapacity of any arbitrator appointed by him, to substitute a new arbitrator, unless the document authorising the reference show that it was intended that the vacancy should not be supplied; and if on such a reference one party fail to appoint an arbitrator, either originally or by way of substitution as aforesaid, for seven clear days after the other party shall have appointed an arbitrator, and shall have served the party so failing to appoint with notice in writing to make the appointment, the party who has appointed an arbitrator may appoint such arbitrator to act as sole arbitrator in the reference, and an award made by him shall be binding on both parties, as if the appointment had been by consent: provided, however, that the court or a judge may revoke such appointment, on such terms as shall seem just."

[1] The Courts will not interfere on the ground of misconduct of the arbitrator on mere suspicion. *Crossley v. Clay*, 5 C. B. 581. But if he have used strong expressions against either party (*Burton v. Knight*, 2 Vern. 515. *Ward's case*, 2 Atkins. 396. *Chicot v. Lequesne*, 2 Ves. 315); or have taken money from one of the parties before award made (*Shephard v. Brand*, Ca. Tem. Hard. 53; Bac. Ab. Arb. K); or purchased an interest in the subject-matter (*Blennerhasset v. Day*, 2 B. & B. 104), the award will be set aside.

[2] *See* also *George v. Lousley*, 8 East, 13; neither can an action be maintained for them unless there is an express promise. *Virany v. Warne*, 4 Esp. 47. *Hardres v. Prowd*, Sty. 465. *Veitch v. Russell*, 3 Q. B. 928. But he may sue if there is such a promise. *Hoggins v. Gordon*, 3 Q. B. 466. The courts will not enforce a party to pay a sum awarded by an arbitrator for his costs. *Laing v. Todd*, 13 C. B. 276. Nor can an arbitrator award money to be paid to himself which he is to apply to the settlement of some of the

(*a*) *May state Special Case*[1] *under Compulsory Reference, or when otherwise directed.*

WOOD v. HOTHAM, 5 Mee. & W. 674.

If the arbitrator decline to state a special case, when not imperative the Court will not interfere.[2]

Under an order of reference at Nisi Prius, the arbitrator was to be at liberty to raise any point of law, for the opinion of the Court, at the request of either of the parties. The reference was conducted before him; and in the course of it a point of law was suggested, and he was requested to state it to the Court, but declined, and made an absolute award.

On motion to set it aside, on the ground that the clause was a compulsory and not an enabling one, the Court refused the application. *See* also *Miller v. Shuttleworth*, 7 C. B. 105. *Jay v. Byles*, 3 M. & S. 86.

(*b*) *May regulate Proceedings in Reference.*

TILLAM v. COPP, 5 C. B. 211.

Arbitrator has full power to regulate proceedings on the reference.[3]

In this case, the Court refused to set aside an award, on the ground that the arbitrator had declined to permit a stranger to be present for the purpose of assisting the defendant's attorney with practical hints for the conduct of the

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matters in dispute. *In re Mackay*, 2 Ad. & E. 356. It would seem, however, that the amount of the arbitrator's fee may be referred to the master. *Miller v. Robe*, 3 Taunt. 461. And any application calling upon him to refund an exorbitant fee must be made in a reasonable time. *Brasier v. Briant*, 2 Dowl. P. C. 757.

[1] *Arbitrator may state his Award in the form of a Special Case for the Opinion of the Court, and Judgment may be entered accordingly.*] By C. L. P. Act, 17 & 18 Vic. c. 125, s. 5, "it shall be lawful for the arbitrator, upon any compulsory reference under this act, or upon any reference by consent of the parties where the submission is or may be made a rule or order of any of the superior courts of law or equity at Westminster, if he shall think fit, and if it is not provided to the contrary, to state his award as to the whole or any part thereof, in the form of a special case for the opinion of the Court; and when an action is referred, judgment, if so ordered, may be entered according to the opinion of the Court. The decision of the Court upon a special case, stated under this section, 29 L. J. Q. B. 189.

How the Case to be Entitled.] By R. M. V. 1854, form 14 (which applies where a special case is stated under the above enactment), "in the special case, the arbitrator must state whether the arbitration is under a compulsory reference under the act, or whether it is upon a reference by warrant of the parties where the submission has been or is to be made a rule or order of one of the superior courts of law or equity at Westminster. In the former case the award must be entitled in the court and cause, and the rule or order of the court must be set forth. In the latter case, the terms of the reference relating to the submission being made a rule of court must be set forth."

[2] But if the submission be imperative that he *shall* state a case, the award will be bad if he fail to do so. *Bradbee v. Christ's Hospital*, 2 Dowl. N. S. 164; 5 Scott, N. R. 79; 4 Man. & G. 715. *Scott v. Vansandeau*, 6 Q. B. 237. In stating a case for the opinion of the Court, the arbitrator should himself infer the facts from the evidence, and merely state such facts; he should not set out the evidence in order that the Court should infer the facts. *Jephson v. Hawkins*, 2 Scott, N. R. 605; 2 Man. & G. 366. *Ferguson v. Norman*, 4 Bing. N. C. 52.

Where an arbitrator had power to decide on the admissibility of evidence as a judge at Nisi Prius might, and to reserve points of law for the decision of the Court, the arbitrator made a special statement affecting the admissibility of certain depositions in evidence, and awarded that the verdict should be reduced to 1358*l.* if the Court should be of opinion that the depositions of A. and B. were admissible; to 1165*l.* if the Court should think that the depositions of A. only were admissible; and to 579*l.* if the Court should think neither of the depositions admissible: it was held that the award was good. *Scott v. Vansandeau*, 6 Q. B. 237. The arbitrator may give a hypothetical finding, providing for the different views which the Court may take; but when he decides the case himself, subject to the opinion of the Court, he should provide for the event of the Court differing from him, otherwise all the litigation becomes useless. *Peters v. Anderson*, 1 Marsh. 238. *France v. White*, 8 Dowl. 53. *Waller v. Lacey*, 1 M. D. G. 54. *Arnold v. Mayor of Poole*, 4 id. 860. *Bradbee v. Christ's Hospital*, 4 id. 714.

[3] If the cause be referred at Nisi Prius, the usual course is for one of the parties to get an appointment in writing from the arbitrator to proceed; to make a copy of the order of Nisi Prius and appointment, and serve it on the opposite attorney. *Whatley v. Morland*, 2 Dowl. 249; Arch. P. 1058. If the cause be referred by rule of court, draw up the rule; or if by judge's order, draw up the order; get an appointment from the arbitrator, and serve a copy of the rule or order and appointment as above directed. Give notice of attending by counsel, if intended to do so. The Court might set aside an award if notice

defence, and stated that the arbitrator has a general discretion as to the mode of conducting the inquiry before him.

(*c*) *May make and rescind Appointments.*

FETHERSTONE v. COOPER, 9 Ves. 67.

Arbitrator may make appointments.[1]

Per Cur. It is no ground to set aside an award that the solicitor takes upon him to say he cannot attend at the time the arbitrators appoint. He must attend if they make a reasonable appointment.

(*d*) *May swear and examine Witnesses.*[2]

HODSOLL v. WISE, 4 Mee. & W. 536; S. C. 7 Dowl. P. C. 15, by name of HODSON v. WILDE.

An order of Nisi Prius, that witnesses be sworn before a judge or commissioner, does not exclude the arbitrator from administering an oath under the 3 & 4 Wm. 4, c. 42.

Cause was referred, at Nisi Prius, to a barrister; and it was directed by the order of reference that the parties to the suit (if the arbitrator should think fit), and their respective witnesses, should be examined upon oath, to be taken before me (the judge at Nisi Prius), or some other judge of the Court of Exchequer, or before a commissioner appointed to take affidavits in the said court. An objection was made before the arbitrator, that this clause took away his power of swearing the witnesses; but he, being of a contrary opinion, administered the oath to them, and a motion was made by W. to set aside his award.

Per Cur. The form of the order of reference does not oust the arbitrator of the authority given to him by statute of swearing the witnesses. It is said that the parties, by their agreement, have excluded his authority; but there are no negative words to indicate such an exclusion; and the language of the statute 3 & 4 Wm. 4, c. 42, s. 11, is, that when in any rule or order of reference it shall be ordered that the witnesses upon such reference shall be examined upon oath, it shall be lawful for the arbitrator, and he is thereby authorised and required, to administer an oath to such witnesses. We think that this stipulation is cumulative and not exclusive. It gives to a judge or a commissioner the jurisdiction which the statute gives to the arbitrator; and the witnesses may equally be sworn by either. *See* also *James v. Attwood*, 5 Bing. N. C. 628.

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of the meetings or of attendance by counsel were not duly given, unless such objections were waived. *Oswald v. Earl Grey*, 24 L. J. Q. B. 69. *Hobbs v. Ferrars*, 8 Dowl. 779. *Regnall v. Gale*, 3 Scott, N. R. 108. *Whatley v. Morland*, 2 Dowl. 249. But see *R. v. Morphett*, 2 D. & L. 967. The mode of proceeding on a reference is as near as may be the same as in a cause at Nisi Prius, though circumstances may arise which will justify an arbitrator adopting a different course, such as excluding the parties, &c. from the hearing. *Hewlett v. Laycock*, 2 C. & P. 574. *Matson v. Trower*, 1 R. & M. 17. All of several joint-arbitrators should attend the reference, and the evidence should be taken in their joint presence. *Re Plews*, 6 Q. B. 845. *Dobson v. Groves*, 6 id. 637. *Bates v. Townley*, 19 L. J. Ex. 396. *Peterson v. Ayre*, 23 L. J. C. P. 129. *Re Marsh*, 16 L. J. Q. B. 330. *Dalling v. Matchet*, Willes, 215. Or the Court may set the award aside. Joint-arbitrators should agree together before signing the award. *Little v. Newton*, 2 Scott, N. R. 519. *Re Templeman v. Reed*, 9 Dowl. 962. One of them cannot delegate his authority to another. *Little v. Newton, supra.*

[1] He may also rescind appointments. *Eastham v. Tyler*, Q. B. Court R. 136. It lies entirely with him to appoint a time and place for the meetings.

[2] *By 3 & 4 Wm. 4, c. 42, s. 41, when Submission can be made a Rule of Court, Arbitrator has power to examine Witnesses on oath.*] By that act it is provided, "that when in any rule or order of reference, or in any submission to arbitration containing an agreement that the submission shall be made a rule of court, it shall be ordered or agreed that the witnesses upon such reference shall be examined upon oath, it shall be lawful for the arbitrator or umpire, or any one arbitrator, and he or they are hereby authorised and required to administer an oath to such witnesses, or to take their affirmation in cases where affirmation is allowed by law instead of oath; and if upon such oath or affirmation any person making the same shall wilfully and corruptly give any false evidence, every person so offending shall be deemed and taken to be guilty of perjury, and shall be prosecuted and punished accordingly." And now,

By 14 & 15 Vic. c. 99, s. 16, every Arbitrator may administer an Oath.] By 14 & 15 Vic. c. 99, s. 16, "every arbitrator having authority to hear, receive, and examine evidence, is empowered to administer an oath to all such witnesses as are legally called before him."

In the Matter of Hick and others, 8 Taunt. 694.

A rule *nisi* to set aside an award was obtained on the ground that the arbitrators had privately examined one of the parties at a meeting for the purpose of taking instructions for the award, without informing the other party of their intention to hold a meeting, which was supported by an affidavit made by the arbitrators verifying that fact.

A private examination in the absence of one of the parties is a ground for setting aside an award.[1]

Per Cur. It would be unjust to allow a party to be examined in the absence of the opposite party. Here the examination was contrary to the rules prescribed by law for taking such evidence, it being conducted at a meeting at which all the parties concerned had not notice to attend. Rule absolute.

Spence v. Stuart, 3 East, 89.

It appeared that the defendant in this cause attended an arbitrator to be examined under a rule of court, and that a detainer had been lodged in the sheriff's office against him early on the following morning, before it could be ascertained whether he intended to return home or not Upon an application to cancel the bail-bond which had been given, and to render the plaintiff's attorney liable to the payment of the costs of the application, the Court held that the defendant was clearly exempt from bailable process, *eundo morando et redeundo;* and as it did not appear that he had been guilty of any negligence in not availing himself of his privilege *redeundo* within a reasonable time, that they must grant the application with costs. See *Hetley's case*, cited Com. Dig. Privilege (from arrest); and 8 T. R. 536; Dick. 780; 3 Ves. 350; 2 Ves. & B. 395.

The privilege exempting a witness attending a cause from arrest applies to a reference.[2]

(*e*) *Arbitrator may call for Documents.*

Arbukle v. Price, 4 Dowl. P. C. 174.

A defendant submitted all matters in difference to arbitration, and the arbitrators required him, in pursuance of a power given to them for that purpose, to produce certain books and papers; and an attachment moved for against him for not producing them was refused, on the ground that they did not come within the meaning of the submission.

Arbitrator may call for documents, and an attachment will lie for non-compliance.[3]

Per Cur. By submitting to the arbitrator all matters in difference, the defendant has submitted to the discretion of the arbitrator the question, what are the matters in difference? and he must be concluded by his opinion.

(*f*) *When he may proceed* Ex-parte.

Hetley v. Hetley, cited Kyd. 100.

On a trial at Nisi Prius, it appeared that the demand of the plaintiff arose on a long and intricate account, which in almost every article was impeached by the defendant, who also set up a counter-demand of the same nature by way of

In cases of great delay by one party, arbitrator may proceed *ex-parte*.[4]

[1] The evidence should always be taken in the presence of the arbitrators and of the parties, or of some one attending on their behalf. *Re Plews*, 6 Q. B. 637. *Bignell v. Gale*, 3 Scott, N. R. 108; 9 Dowl. 631. *Atkinson v. Abraham*, 1 B. & P. 175. It is always usual to swear the witnesses, but if no objection be made to the oath not being administered, though the order of reference makes it obligatory on the arbitrator to swear them, it will not invalidate the award. *Ridout v. Pye*, 1 B. & P. 91. *Biggs v. Hansell*, 16 C. & B. 562. Where the order stated that the arbitrator should be at liberty to examine on oath, it was held to be discretionary with the arbitrator whether he would so examine. *Smith v. Goff*, 14 Mee. & W. 264; 3 D. & L. 47. Whilst a witness is under examination the arbitrator may (if he think fit) exclude other persons who are to be examined before him. *Hewlett v. Laycock*, 2 Car. & P. 574. But it is not usual to exclude the parties themselves; nor is he bound to view premises in dispute. 9 W. R. 274.

[2] And the Court will allow a liberal latitude to persons *bonâ fide* attending. *Randall v. Gurney*, 1 Ch. 679; 3 B. & A. 252. *See* Arrest.

[3] A provision is usually inserted in orders of reference that the parties shall produce before the arbitrator all books, papers, &c. relating to the matters in dispute. In references under the Lands Clauses Consolidation Act, 1845, the Railway Clauses Consolidation Act, 1845, and similar statutes, the arbitrator is expressly empowered to call for books, papers, &c.

[4] But an arbitrator should not proceed

set-off; it was referred by consent; and the plaintiff neglecting to carry in his vouchers to the arbitrator, before the time limited for making the award, the time was on several occasions enlarged, till at length the defendant, after upwards of six months' delay on the part of the plaintiff, made an application to the Court on an affidavit, stating these circumstances, for a rule to show cause why the plaintiff should not carry in his vouchers within a certain day, and why the time should not be further enlarged, or why, on the plaintiff's further default, the arbitrator should not be directed to proceed on hearing the defendant alone; the rule was granted without hesitation, and the plaintiff, instead of showing cause against it, peremptorily undertook to deliver in his vouchers within the time specified. *See* also *Scott v. Vansandeau*, 6 Q. B. 237. *Bignall v. Gale*, 9 Dowl. 631. *Re Morphett*, 2 D. & L. 967.

(*g*) *Cannot delegate his Judicial Functions.*

Little v. Newton, 2 Scott, N. R. 509; 2 Man. & G. 351.

An arbitrator cannot delegate his authority.[1]

A cause and all matters in difference were referred to the decision of two merchants and a legal arbitrator; the arbitrators met, and two of them agreed upon the merits to find in favour of the plaintiff: but the lay-arbitrators agreed to leave a point of law which had arisen to the decision of the barrister. The legal arbitrator decided the point in favour of the plaintiff, and executed the award at Birmingham, in accordance with his own views. On the next day the award was executed in London by one of the lay-arbitrators, also in favour of the plaintiff.

Held, that the award was bad, as being a decision by one arbitrator pursuant to a power delegated to him by the other arbitrators, they having no authority so to delegate. *See* also *Johnson v. Latham*, 1 P. R. 348; 19 L. J. Q. B. 329.

(*h*) *May adopt Opinion of others.*

Emery v. Wase, 5 Ves. 8; 8 id. 504.

But an arbitrator may adopt the opinion of another.[2]

In this case it was objected to the award that the arbitrator had not exercised his own judgment as to the valuation of some timber, but had referred it to another.

Lord Alvanley, M. R., said: "That alone is not sufficient to prove the award bad, for a man may make use of the judgment of another upon whom he can depend, and the valuation of that person is his if he choose to adopt it."

(*i*) *Duration of Authority.*

Brooke v. Mitchell, 6 Mee. & W. 473.

After award has been pub-

In this case the arbitrators, having differed, appointed an umpire, who, on

ex-parte if there be a reasonable excuse for a party's not attending. *Gladwin v. Chilcote*, 9 Dowl. 550. When a party has attempted to revoke, and refuses to attend, the arbitrator may proceed *ex-parte*. *Harcourt v. Ramsbottom*, 1 J. & W. 512. *See* also 3 & 4 Wm. 4, c. 42, s. 39, *ante*.

Before proceeding *ex-parte*, however, the arbitrator should give the party verbal or written notice that he will do so. The word *peremptory*, marked on the ordinary notice, will be sufficient. *Gladwin v. Chilcote*, *supra*. *Doddington v. Hudson*, 1 Bing. 384. *Scott v. Vansandeau*, 6 Q. B. 237.

[1] But where, pending a reference, the parties by a memorandum, to which the arbitrator was an assenting party, agreed that a particular portion of the account in dispute between them should be settled and adjusted by a third person, whose report was to be adopted by the arbitrator as conclusive evidence, it was held that this was not an improper delegation of authority by the arbitrator. *Sharp v. Nawell*, 6 C. B. 253. *See* also *Lingood v. Eade*, 2 Atk. 501.

[2] *See* also *Hopcroft v. Hickman*, 2 S. & G. 130. *Anderson v. Wallace*, 3 Clark & Fin. 26. He must not, however, adopt the opinion of another if he thinks it wrong. *Eads v. Williams*, 24 L. J. Ch. 531. On a matter of fact, the best way to obtain the assistance of a valuer or scientific person is to examine them as witnesses. *Dobson v. Groves*, 6 Q. B. 637. And an arbitrator may consult counsel as to the mode of framing his award. Id. *In re Hare*, 6 Bing. N. C. 158. So a lay-arbitrator may employ an attorney to prepare his award. *Fetherstone v. Cooper*, 9 Ves. 67. But a lay-arbitrator is not entitled to have an attorney to sit with him if one of the parties object. *Proctor v. Williamson*, 29 L. J. C. P. 157. And an arbitra-

the 11th July, 1839, made and executed his award in the presence of, and attested by, two witnesses. On the afternoon of the 12th the attornies for both parties received a letter from the umpire, stating that he was about to declare his award, and desiring them to attend at his office at half-past five o'clock on that evening. They accordingly did so, when he read over to them and declared his award. At ten o'clock, A.M., on the same day, the plaintiff had died. A rule was afterwards obtained to show cause why the award should not be set aside on the ground that it was not made and published in the lifetime of the plaintiff.

Published the arbitrator is *functus officio*.[1]

Sed per Cur. This award was sufficiently published in the lifetime of the plaintiff. It is only necessary that the act be complete, so far as the arbitrator is concerned, that he should have done some act by which he becomes *functus officio*. Here the instrument was complete as an award, and the umpire could make no alteration in it after he had declared his final mind.

(C) *Duties of.*

(*a*) *Must not take Money from Party, or purchase Claim in Dispute.*

SHEPHARD v. BRAND, Ca. Temp. Hard. 53; S. C. 2 Barnard, 463; S. C. Cunningham, 50.

An arbitrator, prior to making his award, should not receive money from either party.[2]

On a motion to set aside an award made on an order of reference to the three foremen of a special jury, two exceptions were taken: 1st. That the arbitrators had taken on themselves to give a particular sum for costs, which should have been left to the taxation of the master; and, 2dly. That they had also taken money of the plaintiff for their charges without any bill delivered, and prior to making their award.

Per Lord Hardwicke, C. J. "Arbitrators, who are judges to determine finally the differences between the parties, may, if they think fit, take on them to inquire of and give costs as well as damages, and this Court has no power to take notice of it, any otherwise than if they are excessive; as on evidence of some undue practice. As to the second point, where arbitrators (let their characters be otherwise never so unexceptionable) take money of one of the parties singly, whether for charges or anything else, before making their award, as this is a matter of so tender a nature that even the appearance of evil in it is to be avoided, and this practice may be of dangerous example, it is sufficient cause to set aside the award; for if this should be suffered, it will be hard to distinguish what is corruption."

(*b*) *Court will examine into propriety of his Conduct.*[3]

MORRIS v. SIR RICHARD REYNOLDS, 2 Ld. Raym. 857; S. C. Salk. 73.

And the Court will examine the conduct of the arbitrators.

It was moved that an award made by arbitrators chosen by the consent of the parties at Nisi Prius, and whose submission had been made a rule of court, might be set aside, on affidavit of the mismanagement of the arbitrators, and

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tor may delegate a person to do a ministerial act. *Thorp v. Cole*, 2 C., M. & R. 367; 4 Dowl. 437. *Warney v. Shelton*, 7 Beav. 455.

[1] So also if he do not make his award within the time limited or within the enlarged time. *Marks v. Marriott*, 1 Ld. Raym. 115. *Freeman v. Barnard*, id. 247; 1 Salk. 69. *Brown v. Vawser*, 4 East, 584; 6 id. 310. *Re Higham*, 9 Dowl. 203. *Re Morphett*, 2 D. & L. 967. Or in general, but not necessarily, by the appointment of an umpire (see *post*, Effect of Appointing an Umpire); or by a revocation of the submission, the authority of an arbitrator is determined. When once the authority is gone by his executing the award he cannot correct or alter it. If he do so, it will be the act of a mere stranger. *Henfree v. Bromley*, 6 East, 309. *Irvine v. Ernon*, 8 id. 54. *Ward v. Dean*, 3 B. & Adol. 234. *Hall v. Hinds*, 2 Man. & G. 847.

[2] Nor can an arbitrator purchase an interest in the rights on which he is to adjudicate. *Blennerhasset v. Day*, 2 Ball. & B. 104. Nor should he enter into any agreement, however *bonâ fide*, with one of the parties relating to the subject in dispute. *Chichester v. M'Intire*, 1 Dowl. N. S. 460.

[3] Hence if he were to use strong expressions against either party which may indicate a strong prejudice, the award may be set aside. *Barton v. Knight*, 2 Vern. 515. *Ward's case*, 2 Atk. 155, 396. *Chicot v. Lequesne*, 2 Ves. sen. 315.

that they refused to hear what the defendant could state, after they had heard the plaintiff.

Holt, C. J., warmly opposed this, as contrary to all practice that he had ever known, which was, that in such case the integrity of the arbitrators (whom the parties by consent have chosen to be their judges) shall never be arraigned, no more than the integrity of any other judge. But *Powel*, *Powis*, and *Gould*, *JJ.* said that it was abominable to give any countenance to such proceedings, and that therefore they ought to be punished, because they abused the office of a judge; and a rule was made that they should attend; and the examination was made in court by affidavit of all their proceedings, from which it appeared that they had been guilty of highly improper conduct.

(*c*) *Should hear all the Evidence.*

BEDINGTON v. SOUTHALL, 4 Price, 232.

It is incumbent on an arbitrator to examine a defendant's as well as plaintiff's witnesses, and in his presence, if required so to do, or the award will be set aside.[1]

In support of a rule to show cause why an award should not be set aside, the affidavit, after stating the cause of reference, alleged, that after several postponements at the request of the plaintiff, a witness of the defendant's was examined by the arbitrator, not in the presence of the defendant or his attorney; and it was agreed that he should attend again, and be examined, among others, as to certain items; and, further, that none of the plaintiff's were examined by the arbitrator in the presence of the defendant or his attorney, so that he had no opportunity of cross-examining them; and that the arbitrator made his award at the plaintiff's attorney's office, and awarded in his favour, when it should have been in favour of the defendant. On the part of the plaintiff an affidavit was made by the arbitrator and his attorney, negativing the statement in the defendant's in the most material parts.

Per Cur. It is not denied that one of the witnesses, meant to be examined on the part of the defendant, underwent a long examination on the part of the plaintiff in the defendant's absence; and it does not appear that he was ever again examined. Now, the arbitrator was bound to have appointed a day for the examination of the witness; but instead of that he finds his way to the office of the plaintiff's attorney, and there makes his award. The decision, therefore, was *ex-parte;* and however justly an arbitrator may decide without hearing all the evidence, it can never be satisfactory. But it certainly is not a sufficient ground for setting aside this award, since the affidavits are so very inconclusive and deficient. Had it been clear that the defendant's witnesses had not been examined in his presence, which the arbitrator was bound to do, it would have rendered the award nugatory.

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[1] The arbitrator should hear all the evidence which the parties may choose to lay before him (*Johnstone v. Cheape*, 5 Dowl. 247); though he may possibly have some discretion as to the quantity of evidence he will hear. *Nickalls v. Warren*, 6 Q. B. 615. An award will be rescinded where the arbitrator hears only one side. *Braddick v. Thompson*, 8 East, 344. *Phipps v. Ingram*, 3 Dowl. 669. *Sharpe v. Bickerdyke*, id. 102. And where an arbitrator refuses to examine witnesses or to receive evidence, the Court will sometimes set aside the award. *Hewlett v. Laycock*, 2 Car. & P. 574. *Samuel v. Cooper*, 1 Har. & W. 80. *Peterson v. Ayre*, 23 L. J. C. P. 129. But where the arbitrator refuses to examine a witness because he thinks him inadmissible, the Court will not interfere. *Campbell v. Twemlow*, 1 Price, 81. *Scales v. East London Water-works Co.* 1 Hodges, 91. The arbitrator is the judge of the admissibility of the evidence or of the competency of the witness. *Lloyd v. Archbowle*, 2 Taunt. 324. *Eastern Counties Railway Co. v. Robertson*, 6 Man. & G. 38. *Perriman v. Steggall*, 9 Bing. 669; 3 M. & S. 93; 2 Dowl. 726. And any mistake made by him in these respects is no ground for setting aside the award. *Perriman v. Steggall*, *supra*. *Huntig v. Ratting*, 8 Dowl. 879. *Hagger v. Baker*, 2 D. & L. 856. But when the arbitrators are selected on account of their skill, so that from their experience and judgment they are entrusted to decide, and they can *bonâ fide* say, "We know sufficient of the matter to decide properly without examining witnesses," it is no objection to the award that they examined no witnesses. *Johnstone v. Cheape*, 5 Dowl. 247. *Eads v. Williams*, 24 L. J. Ch. 531.

(*d*) *Should examine Witnesses in presence of both Parties.*

In re Plews, 6 Q. B. 845; 14 L. J. Q. B. 139.

Should examine witnesses in presence of both parties.[1]

A rule had been obtained to set aside an award, where the arbitrators had, by agreement between themselves, separately examined witnesses out of court in the absence of the parties; and it was sworn that the matter in dispute only amounted to a few shillings.

Per Cur. This is no doubt a small matter; but if we were to countenance such proceedings, the arbitrators in every case may say, "We will go and make our inquiries out of court, and decide on the information obtained."

(*e*) *Is bound by Rules of Evidence.*

Attorney-General v. Davison, 1 M'Clel. & Y. 160.

The rules of evidence observed in courts of law should govern the arbitrator in his reception or rejection of proof.[2]

By an act of parliament commissioners were appointed to investigate certain public accounts, and they were directed to take a prescribed oath, and were authorised to summon witnesses and to examine them on oath; and persons giving false testimony were subjected to the penalties for perjury. The commissioners examined witnesses and took down their depositions in writing, and afterwards communicated the effect of them to the party sought to be affected by the proceedings, but who had no opportunity of being present at the examination, or of cross-examining the witnesses.

Held, that in order to render depositions taken under any judicial proceedings evidence against a party, he must have had an opportunity to be present at the examination, and to cross-examine the witnesses.

Held, also, that arbitrators are bound by those rules of evidence which govern the courts of law.

(*f*) *But not by strict Rules of Practice.*

In re Badger, 2 B. & A. 691; *Semb.* S. P. Prentice v. Reed, 1 Taunt. 151.

An arbitrator is not bound by the strict rules of practice, but is to do justice between the parties according to the particular circumstances of each case. He may, therefore, award interest on an unliquidated account.

All matters in difference in a suit in Chancery, and all other matters in difference between the parties, were submitted to arbitration. The arbitrator in taking the unliquidated accounts between them had allowed interest on both sides, in consequence of which a motion was now made to set aside the award; it being contended that it was not the practice of either courts of law or equity to allow such interest. 2 Br. Ch. Cas. 2.

Per Cur. Although the award of an arbitrator who acts contrary to a general rule of law, founded on the immutable principles of justice, will be set aside, yet an arbitrator is not bound by a rule of practice, as in the present case of the allowance of interest on unliquidated accounts. The Court must, indeed, adhere to certain general rules of practice in order to avoid the consequent uncertainty and inconvenience that would otherwise accrue to the suitors of the court. But no mischief can arise from an arbitrator's deviating from such, as his judgment and decision only affect the particular case under his notice. In this view of the case, it is preferable that he should not be bound by the strict rules of practice, but be enabled to do justice according to the circumstances of the case before him. Unless, therefore, it can be shown that there is a clause in the present submission depriving the arbitrator of the power of allowing interest, the rule must be discharged. Rule discharged.

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[1] But the Court will not set aside the award on this ground if acquiescence on the part of the other party be shown. *Hamilton v. Rankin*, 19 L. J. Ch. 307.

[2] But if he *bonâ fide* decide wrongly, the Court will never review his decision (*Hagger v. Baker*, 14 Mee. & W. 9. *Perriman v. Steggall*, 9 Bing. 679. *Eastern Counties Railway Co. v. Robertson*, 6 Man. & G. 38. *Slowman v. Wiggins*, 6 C. B. 276. *Campbell v. Twemlow*, 1 Price, 81), either as to matters of law or fact.

(D) *Liabilities of.*

(*a*) *In respect of Fees.*

DOSSETT v. GINGELL, 2 Man. & G. 870.

No attachment will lie against an arbitrator for not returning excess of fees reduced by taxation.[1]

In this case it was held that the Court has no jurisdiction over the fees of arbitrations paid under protest upon taking up the award, but not specified in the award; or over a sum paid, under a similar protest, to an attorney for preparing the award; even in a case where the reference is in a pending cause and under a judge's order made a rule of court.

FEARNLAY v. BRANSON, 20 L. J. Q. B. 178.

But an action for money had and received will lie to recover back the excess, when the party has been obliged to pay it in order to obtain the award.[2]

This was an action brought in the Manchester County Court to recover the sum of 49*l.* 19*s.* 11*d.*, the particulars of the plaintiff's demand being for money paid by the plaintiff to the defendant for his fees and charges in and about a reference and arbitration. And on a special case stated by the judge of that court it appeared, that by agreement between C. & F. of the one part, and the plaintiff of the second part, certain disputes had been referred to the defendant on the part of C. & F., and one G. S., on the part of the plaintiff or their umpire, the costs of the reference and award in their discretion. The arbitrators appointed an umpire, W. J. T., who alone made the award, the arbitrators having differed. The defendant and G. S. sent in their charges to the umpire; and on the 30th day of July, 1849, the umpire informed the parties that the award was ready on payment of 379*l.* 10*s.* 9*d.*, which included a charge of 109*l.* 6*s.* for the services of the defendant. The plaintiff demurred to the amount, but as he could not obtain the award without he paid it, he subsequently did so. The umpire then paid to defendant the said 109*l.* 6*s.* On a rule to show cause why the award, so far as it related to a certain sum, should not be set aside, it was agreed that the charges of the arbitrators and umpire should be referred to the master for taxation, who taxed off 65*l.* 4*s.* from the charge of the defendant. Under these circumstances, the plaintiff brought his action in the Manchester County Court to recover 49*l.* 19*s.* 11*d.*, part of the 65*l.* 4*s.*

Per Cur. In this case the plaintiff has been compelled to pay a sum of money, which may now be considered unreasonable and extortionate, in order to take up the award which he could not obtain without making the payment. It has been decided in such cases that the Courts have no summary jurisdiction over an arbitrator to make him refund an overcharge. Will, then, an action lie? We are of opinion that, on the principles of law, such action is maintainable.

(*b*) *When a Stakeholder.*

TOPE v. HOCKIN, 7 B. & C. 101.

An arbitrator who pays over money without knowledge of bankruptcy, is not personally liable.[3]

An arbitrator, without knowledge of any previous act of bankruptcy, paid over money deposited in his hands to a party whom he decided to be entitled to it.

The Court held that the assignees could not recover it from the arbitrator, because it was clearly placed under his control for a special purpose; besides, in

[1] And the Court has no power to compel the arbitrator to submit his fees to the master; but if he consent, that course may be adopted (4 Ex. 839); though, as between adverse parties, they may be taxed as of course, and reduced if exorbitant. *Brasire v. Briant*, 2 Dowl. 600.

[2] *Qu.* Whether, if the award be set aside for a *gross mistake* of the arbitrator, all the money expended in taking up the award cannot be recovered back from the arbitrator as money had and received on the ground of failure of consideration? *Hall v. Hinds*, 2 Man. & G. 847. *In re Coombs*, 4 Ex. 839.

[3] It often happens when money, as a chattel, has been delivered to an arbitrator to abide the event, that in cases of bankruptcy nice questions arise as to the right to such deposit. In such case the arbitrator will do well to avail himself of the Interpleader Act, 1 & 2 Wm. 4. c. 58. In *Taylor v.*

this case, it was never mixed with his own money, but kept separate as a distinct fund, to answer that purpose. He was to derive no benefit. He afterwards applied it to the intended purpose, in part with the express assent, and in part under the authority of the bankrupt. He was therefore, as it appears to us, a mere channel of conveyance.

(*c*) *To an Action for Misconduct.*

WILLS v. MACCORMICK, 2 Wils. 148.

An action may be maintained against an arbitrator for making a corrupt award.[1]

Debt upon an award. Plea, *Nil debit.* Partiality of the arbitrator was attempted to be put in evidence for the defence.

Per Cur. This cannot be done. The remedy is in equity; or at law by action against the arbitrators if they have been corrupt.

IV. OF THE UMPIRE.

(A) *How and when Appointed.*

(*a*) *Arbitrators may Appoint.*

BATES v. COOKE, 9 B. & C. 407.

Arbitrators may nominate the umpire in the first instance.[2]

It appeared in evidence, that, as soon as the arbitrators were appointed, and before they had inquired into the matters referred to them, or differed in opinion, they appointed an umpire.

Per Cur. That is a very fair mode of making the appointment, in case it should be necessary to have his interference, and we do not think that any legal objection can be made to it.

Provisions in the C. L. P. Act, 1854, as to appointment of umpire, when no power to appoint in the submission.

By the C. L. P. Act, 1854, s. 14, "when the reference is to two arbitrators, and the terms of the document authorising it do not show that it was intended that there should not be an umpire, or provide otherwise for the appointment of an umpire, the two arbitrators may appoint an umpire at any time within the period during which they have power to make an award, unless they be called upon by notice as aforesaid to make the appointment sooner."

FORD v. JONES, 3 B. & Adol. 248; S. P. IN RE CASSELL, 9 B. & C. 624; S. C. 4 M. & R. 555; S. P. YOUNG v. MILLER, 3 B. & C. 407; S. C. 5 D. & R. 263.

(*b*) *But not by casting Lots.*

But an umpire cannot be appointed by casting lots.[3]

The arbitrators each named a party as umpire, and decided the selection by lot. On motion to set aside the award,—

Per Cur. The appointment of the umpire should be a matter of choice, and

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Marling, 2 Man. & G. 55, the Court ordered that the arbitrator, after deducting taxed costs, should pay the residue into court, and be discharged. *See* also *Gunton v. Nurse*, 5 Moore, 259; *Cooper v. Sheppard*, 3 C. B. 266; *Adams v. Broughton*, 2 Str. 1078.

[1] *See* also *Morris v. Reynolds*, 2 Lord Raym. 857; and the misconduct of an arbitrator under the Lands Clauses Consolidation Act, 1845; the Railways Clauses Consolidation Act, 1845; and the Metropolitan Sewers Act, 1848, is a misdemeanour by those statutes, and a *mandamus* will lie to compel an arbitrator to assess costs under the Lands Clauses Consolidation Act, 1845. *The Queen v. Birom*, 17 Q. B. 969.

[2] When a general power is given to the arbitrators in the submission to appoint an umpire, they may do so at any time before the time limited for the umpire to make his umpirage. *Harding v. Watts*, 15 East, 556. *Swailes v. Wright*, 3 M. & S. 559. *Re Hick*, 8 Taunt. 694. *Re Johnson*, 14 L. J. Q. B. 63. When it is a term of the submission that the arbitrators are to appoint before they enter on the consideration of the matters referred, enlarging the time before appointing does not invalidate the appointment. *Cadliffe v. Walters*, 2 M. & Rob. 232. *Re Hick*, 8 Taunt. 694. An appointment of an umpire by several arbitrators should be made by all being present at the same time, such appointment being a judicial act. *Re Lord*, 26 L. J. Q. B. 34. As to when the arbitrators cannot agree on the appointment, *see* C. L. P. Act, 1854, s. 12, *ante*, p. 469.

[3] Unless by consent of the parties, and then only if they know the mode in which he was chosen. *In re Tunno*, 5 B. & Adol. 488; 2 Nev. & M. 328. *In re Grecnwood*, 9 Ad. & E. 699; 1 Per. & D. 461. If the parties submit to be examined by an umpire they thereby recognise his authority. 1 R. & M. 17.

not of chance. We therefore think that the appointment of the umpire in this case was bad, and that the rule for setting aside the award should be made absolute.

ROUTLEDGE v. THORNTON, 4 Taunt. 704.

The appointment of an umpire need not be stamped.

Per Cur. The appointment of an umpire by two arbitrators, made in writing upon paper not stamped, is valid and effectual; such instruments are not mentioned in any of the stamp acts.

(B) *Effect of appointing an Umpire.*

(*a*) *Office of Arbitrators not determined by.*

CASE against DARE, T. Jones, 167; S. C. 2 Show. 164; S. P. DONOVAN v. MASCHALL, 1 Mod. 274; S. C. 2 Keb. 714; 1 Lev. 302; 2 Raym. 205; S. P. SMAILES v. WRIGHT, 3 M. & S. 559.

The office of arbitrator is not determined by the appointment of an umpire; hence an umpirage made prior to the expiration of the time limited for the arbitrators making their award, is defeasible in the event of the arbitrators subsequently executing their authority within time.

Debt on bond, with condition to perform the award of J. S. and J. N., so that they make it before or on the 1st day of July; and if they make no award, the umpirage of J. D., so that he make it on or before the 2d day of July. The defendant pleaded no arbitrement or umpirage. The plaintiff replied that the arbitrators made none, but that the umpire made his umpirage on the 1st day of July, that the defendant should pay a sum of money to the plaintiff, and that the parties should give mutual releases of all matters unto the day of umpirage, and assigned as a breach nonpayment of the money. On demurrer an exception was taken for the defendant; 1st. That the umpirage was made before the time allotted to him for the submission; for the arbitrators had all the 1st day of July to make their award; and this umpirage was made on the said 1st day.

Per Cur. The umpirage is valid; we do not think the reason given for the decision in the cases cited for the defendant to be of any force. It has been said that the Court would have much difficulty (if the arbitrators and umpire had made several awards) to adjudge which of them should be good. In that respect, however, there can be no difficulty, for the award of the former must prevail if they make any; if not, that of the umpire: so that there can be no confusion in the concurrence of authority as to time; for the umpire had no concurrence absolutely, but only conditionally, if the arbitrators made no award within the time.

SPRIGENS v. NASH, 5 M. & S. 193.

And in such case it need not appear on the face of the umpirage that the arbitrators had disagreed.

This cause was referred to the arbitrement of two, and in case they disagreed to the umpirage of a third, so that the arbitrators made their award on or before the 1st of January; and the umpire, if they should differ, before the 23d of the same month. The umpire made his award before the time given to the arbitrators had expired. It was now urged, as an objection to the umpirage, that it did not state that the arbitrators had disagreed.

Per Cur. Were it necessary that an award should set forth the authority of the arbitrator or umpire, we should accede to the arguments of counsel that the umpirage should have alleged either that the time allowed to the arbitrators had expired, or that they had disagreed within the time; but it is sufficient, in drawing up an award, to state generally, that, by virtue of the submission, the arbitrator or umpire made his award. If indeed it had appeared upon the face of the award that there was no disagreement, the party would never be able to enforce the umpirage; but the objection is not that the umpire has negatived his authority, but only that he has omitted to state it affirmatively. We must, therefore, discharge the rule. Rule discharged.

OLIVER v. COLLINGS, 11 East, 367.

A regular appointment of

Certain arbitrators had elected an umpire; and upon a suggestion by one of the parties, before any award made, that he was an unfit person for the office,

on the ground of partiality, as he was on bad terms with the defendant; such arbitrators had agreed to name an indifferent person to supply his place, but could not agree as to a fresh appointment; and did not, in fact, substitute any other: in consequence of which the umpire objected to was called on by the plaintiff's attorney before his time was out, to proceed with his umpirage, and thereupon made his award, for nonperformance of which a motion was now made to make a rule absolute for an attachment against the defendant, but after the time was out for moving to set aside an award. It was contended that the award was a nullity, as it was a general rule that any power given to another may be revoked before execution.

an umpire, who *accepts* the appointment, cannot be revoked or affected by the subsequent dissent of the parties.[1]

Per Cur. We have lately held (in *Irvine v. Elnon*, 8 East, 54), that if an authority be once executed it cannot be executed again. The original nomination of the umpire by the arbitrators must be supported, and the award made in pursuance of it holden valid. Besides, the defendant should have applied in time to set aside the award upon the special circumstances of the case. Rule absolute.

By C. L. P. Act, 1854, s. 15, "in any case where an umpire shall have been appointed, it shall be lawful for him to enter on the reference in lieu of the arbitrators, if the latter shall have allowed their time, or their extended time, to expire without making an award, or shall have delivered to any party, or to the umpire, a notice in writing, stating that they cannot agree." *See* 3 Lev. 263; 1 Show. 76; Com. Dig. Ab. Arb. F.

(*b*) Umpire may proceed when arbitrators' time has elapsed, or they have given notice of disagreement.

(*c*) *Must Re-hear the Case.*

SALKELD v. SLATER, 12 Ad. & E. 767.

All matters in difference between the parties had been referred to two arbitrators, and if they disagreed, to an umpire. The arbitrators, after hearing the evidence, disagreed. The umpire held two meetings, attended by the arbitrators. He afterwards gave notice of a meeting, to be attended by all parties. At that meeting he was requested by one of the parties to hear evidence; but, as he had the notes of the evidence taken by the arbitrators he refused to hear evidence, except as to matter not in proof before the arbitrators. The objecting party protested against this course; but the umpire broke up the meeting, and made his award.

The umpire must re-hear the case.

A rule having been obtained to set aside the award, on the ground that the umpire had refused to hear witnesses, and had made his award on reading the written examinations, it was made absolute; and,—

Per Cur. It is important to have it understood that the umpire, as well as the arbitrators, ought to hear and see the witnesses. See *Whitmore v. Smith*, 29 L. J. Ex. 402.

FRITH v. HOWLETT, 19 L. J. Q. B. 169.

The parties to a written submission to reference agreed by parol that notes of the evidence should be taken in writing by a clerk, and signed by the arbi-

But *aliter* if there be an agreement that

[1] If, however, the umpire refuse to act the arbitrators may appoint another. *Reynolds v. Gray*, 1 Salk. 70; 1 Ld. Raym. 222. If they join with the umpire in the award it is merely surplusage. *Bates v. Cook*, 9 B. & C. 407 (*Beck v. Sargent*, 4 Taunt. 232); at least after their authority has expired. *Anon.* 1 Bulst. 184. The award cannot be made in part by the arbitrators and in part by the umpire. *Tollit v. Saunders*, 9 Price, 619. *Hetherington v. Robinson*, 7 Dowl. 192. When a time is limited for the award to be made by the arbitrators the authority of the umpire will commence from that period. Roll. Ab. Arb. p. 1. But if before that time the arbitrators disagree, and refuse to make an award, he may proceed at once, subject to his award being defeasible in the event of the arbitrators resuming their authority and making the award within the prescribed time. See *Case v. Dare*, *supra*. When no period is limited for the award of the arbitrators his authority commences from the disagreement of the arbitrators. Com. Dig. Arb. F. As to what is such a disagreement as entitles the umpire to proceed, see *Doddington v. Bailward*, 7 Dowl. 640. *Cudliffe v. Walters*, 2 M. & Rob. 232. *Tunno v. Bird*, 5 B. & Adol. 488. But generally "disagreement" means "non-agreement." *Doddington v. Bailward*, *supra*.

he shall decide on the evidence taken by the arbitrators.[1]

trators; and that, in case of their disagreeing, the umpire should be at liberty to make his award on the notes so taken, without examining the witnesses. The notes were so taken, and the arbitrators disagreed. The umpire having refused to examine any witnesses, though required to do so by one of the parties, and having made his award on reading the notes, the Court refused to set aside the award.

(C) *Rights and Powers of.*[2]

Trew v. Burton, 1 C. & M. 533.

Umpirage must be within limited time.[3]

Per Cur. It must appear that the umpirage was made within the limited time.

(D) *Duties of.*

Bean v. Newbury, 1 Lev. 139.

The duties of an umpire and arbitrator are strictly analogous.

It was admitted in this case, that where the submission is conditional the *ita quod* by construction relates as well to the umpire as to the arbitrators; and that he is equally bound with them to include every party submitting, and the matter submitted, to his award.

V. Of the Proceedings incident to a Reference.

(A) *Obtaining Appointment from Arbitrator.*[4]

(B) *Mode of conducting Reference.*[5]

(C) *Compelling Attendance of Witnesses.*

Court or judge may compel attendance of witnesses.[6]

By 3 & 4 Wm. 4, c. 42, s. 40, "when any reference shall have been made by any such *rule or order* as aforesaid, or by any submission containing such agreement as aforesaid, it shall be lawful for the court by which such rule or order shall be made, or which shall be mentioned in such agreement, or for any judge, by rule or order to be made for that purpose, to command the attendance and examination of any person to be named, or the production of any documents to be mentioned in such rule or order; and the disobedience to any such rule or order shall be deemed a contempt of court, if, in addition to the service of such rule or order, an appointment of the time and place of attendance, in obedience thereto, signed by one at least of the arbitrators, or by the umpire before whom the attendance is required, shall also be served, either together with or after the service of such rule or order: Provided always, that every person whose attendance shall be so required, shall be entitled to the like conduct-money and

[1] The objection, however, may be waived; though, to prevent the award being set aside on this account, clear proof of the waiver must be given (*Salkeld v. Slater, supra*); and the not insisting on the irregularity at the time of the making the award does not amount to a waiver. *Re Jenkins*, 1 Dowl. N. S. 276. *Tunno v. Bird*, 5 B. & Adol. 488. *Hall v. Lawrence*, 4 T. R. 589.

[2] He has the same powers and rights as the arbitrators, and must pursue the same regular course as if he were commencing a new reference. *Salkeld v. Slater, supra. Jenkins in Re*, 1 Dowl. N. S. 276. *Waltonshow v. Warshall*, 1 Har. & W. 209. *Matson v. Trower*, R. & M. 17. He should charge as costs of his umpirage the fees and charges due to the arbitrators. *Ellison v. Ackroyd*, 20 L. J. Q. B. 193.

[3] But the court or a judge can enlarge the time under 3 & 4 Wm. 4, c. 42, s. 39. *See* "Enlargement of Time," p. 483. Where there is no limit mentioned in the document of submission, three months is to be the limit by 17 & 18 Vic. c. 125, s. 15. *See post*, "Award when to be made," p. 507.

[4] See *ante*, p. 471 n. [5] Ibid. Arbitrators may consult others without the assent of the parties, provided they act on their own judgment. *Whitmore v Smith*, 29 L. J. Ex. 402. See *Proctor v. Williamson*, id. C. P. 157.

[6] The witness will not be subject to attachment unless the order of Nisi Prius has been regularly drawn up (*Curtis v. Bligh*, 3 Jur. 1152). The Court will grant a *habeas corpus* to bring up a prisoner for debt to be examined before an arbitrator. *Graham v. Glover*, 25 L. J. Q. B. 10. *Marsden v. Overbury*, 25 L. J. C. P. 200. So also where the witness is in custody on criminal process. *See* 16 & 17 Vic. c. 30, s. 9. The rule for granting an order for the attendance of a witness is absolute in the first instance. *Guarantee Society v. Levy*, 1 D. & L. 907. The above statute does not apply to courts of equity. *Hall v. Ellis*, 9 Sim. 530. Nor to the parties to the submission. *Arbuckle v. Price*, 4 Dowl. P. C. 174.

payment of expenses, and for loss of time, as for and upon attendance at any trial: Provided also, that the application made to such court or judge for any such rule or order shall set forth the county where such witness is residing at the time, or satisfy such court or judge that such person cannot be found: Provided also, that no person shall be compelled to produce, under any such rule or order, any writing or other document that he would not be compelled to produce at a trial, or to attend at more than two consecutive days, to be named in such order.

(D) *Enlargement of Time.*

MACDOUGALL v. ROBERTSON, 2 Y. & J. 11; S. C. 4 Bing. 435; S. C. 1 M. & P. 147; CURTIS v. POTTS, 3 M. & S. 145.

Prior to 17 & 18 Vic. c. 125, where a power to enlarge was given, but no time named, it meant a reasonable time.[1]

The submission was in these words: "The award to be made on or before the day of , or such day to which the submission shall be enlarged."

The Court held the right to enlarge the time gave a general authority, which must be exercised within a reasonable time. *See post*, p. 484.

TYLER v. JONES, 3 B. & C. 144; S. C. 4 D. & R. 740.

A right to make award after death of either party authorises the arbitrator to enlarge after that event.

A reference to arbitrators contained two provisoes: first, That the death of either of the parties before the making of the award should not be a revocation of their authority; and, secondly, giving them power to enlarge the time for making the award. It was holden, that the reference gave them incidentally the same power of enlarging the time after that event as before, and that an award made within such extended time was valid.

BURLEY v. STEPHENS, 1 Mee. & W. 156; 4 Dowl. 770.

A general power to enlarge is sufficiently exercised by appointing a subsequent day for meeting in the presence of both parties.[2]

An action was referred to arbitration by order of Nisi Prius, the award to be made before the 4th day of Easter Term, with power to the arbitrator to enlarge the time for making his award. The arbitrator made an award on the 27th June. On motion to set aside the award, it appeared that before the expiration of the period within which the award should have been made he appointed another meeting, to be held on a subsequent day, in the presence of the agents of both parties, who made no objection, and executed his award on that day.

Held, that the circumstances amounted to a due enlargement, as no special mode of effecting it was pointed out. *See* also *Hallett v. Hallett*, 5 Mee. & W. 25; 7 Dowl. 389.

BENWELL v. HINXMAN, 1 C., M. & R. 935; S. C. 3 Dowl. P. C. 500; S. C. 5 Tyr. 509.

The time after its expiration may be enlarged by consent of the parties.[3]

By an order of reference, all matters in difference in a cause were referred to an arbitrator, so as the award should be made on or before a certain day, or on or before such further or ulterior day as he should from time to time appoint and signify in writing under his hand, to be indorsed on the said order, and as

[1] But the arbitrator has no power, unless it is conferred upon him by the submission, either to enlarge the time (*Good v. Wilks*, cited Tidd's *Practice*, 827, 9th ed. Russell on Awards, 139, 2d ed.); or to limit the time for making the award (*Re Morphett*, 2 D. & L. 967). His power to enlarge must also be exercised during the period originally fixed for making the award. See *Good v. Wilks*, 2 Tidd, 827; Russ. Awards, 139.

[2] But when a special mode is pointed out in the submission, the terms must be strictly pursued (*Reid v. Fryatt*, 1 M. & S. 1. *Davis v. Vass*, 15 East, 97. *Payne v. Deakle*, 1 Taunt. 509); though an irregular enlargement is waived by a subsequent regular extension by consent (*Benwall v. Hinxman*, 1 C., M. & R. 935; 3 Dowl. 500); or by subsequent attendance, with full knowledge of the facts, before the arbitrator. *Hallett v. Hallett*, 5 Mee. & W. 25; 7 Dowl. 389. *Leggatt v. Finlay*, 6 Bing. 255; 3 M. & P. 629. *Bennett v. Watson*, 29 L. J. Ex. 357. When the arbitrator has power to enlarge, he is not limited to a single enlargement. *Payne v. Deakle*, *supra*. *Barrett v. Parry*, 4 Taunt. 658. *Leggatt v. Finlay*, *supra*.

[3] Where a cause is referred by judge's order, the time may be enlarged by consent by another order. 4 Ex. 641. 19 L. J. Ex. 95. In other cases the consent in writing will be sufficient (*Evans v. Thompson*, 5

the said court or a baron thereof might order. The arbitrator made an enlargement, but it was not confirmed by a judge's order; and afterwards two orders for an enlargement were made by a baron of the Court, with the consent of the parties: but these were not indorsed by the arbitrator. On motion to set aside the award,—

The Court held that no objection could be taken to the former irregularity.

MASON v. WALLIS, 10 B. & C. 107; S. C. 5 M. & R. 85.

But where the time is to be enlarged by order of the court or a judge, such order must be obtained; drawing up the rule merely incorporating original order will not suffice.

By submission to arbitration under a judge's order, the arbitrator had power to enlarge the time for making his award to such day as he should appoint, in writing under his hand, to be indorsed on the order, "as the Court of King's Bench, or a judge thereof, should order;" the arbitrator made several enlargements, but no order of the court, or of a judge, was obtained. On motion for an attachment,—

Per Cur. We cannot presume that there were judges' orders allowing of the enlargements, merely because the rule has been drawn up incorporating the original order and the enlargements. If there were any such orders produced to the Court at the time, the rule would appear on the face of it to be drawn up on reading them, as well as on reading the original order and the enlargements. The award was, therefore, made without any authority.

When no limit of time in document, three months to be the limit.

And court or judge may enlarge time from time to time.

And if no time mentioned in such enlargement, to be deemed to be for one month.

By 16 & 17 Vic. c. 125, s. 15, "the arbitrator, acting under any such document, or compulsory order of reference as aforesaid, or under any order referring the award back, shall make his award under his hand, and (unless such document or order respectively shall contain a different limit of time) within three months after he shall have been appointed, and shall have entered on the reference, or shall have been called upon to act by a notice in writing from any party; but the parties may, by consent in writing, enlarge[1] the term for making the award; and it shall be lawful for the superior court, of which such submission, document, or order, is or may be made a rule or order, or for any judge thereof, for good cause to be stated in the rule or order for enlargement, from time to time to enlarge the term for making the award; and if no period be stated for the enlargement in such consent or order for enlargement, it shall be deemed to be an enlargement for one month; and in any case where an umpire shall have been appointed, it shall be lawful for him to enter on the reference in lieu of the arbitrators, if the latter shall have allowed their time, or their extended time, to expire without making an award, or shall have delivered to any party or to the umpire a notice in writing, stating that they cannot agree." The court or a judge may, however, enlarge, although three months expired. *Watson v. Bennett*, 29 L. J. Ex. 357; 6 Jur. 637; 8 W. R. 612.[3]

EDWARDES v. DAVIES, 23 L. J. Q. B. 278.

The Court will however exercise a discretion as to enlarging.[2]

In this case the cause and all matters in difference between two partners were referred by order of Nisi Prius to an arbitrator, who was to make his

East, 189); unless the submission be by deed; in which case the consent must also be by deed (*Brown v. Goodman*, 3 T. R. 592. *Craig v. Talbot*, 3 B. & C. 185. *Rex v. Bingham*, 3 Y. & J. 101, 113); or by altering, re-executing, and restamping the arbitration-bonds. *Watkins v. Philpots*, M'Clel. & Y. 393. *Stephens v. Lowe*, 9 Bing. 32.

[1] By this enactment the 3 & 4 Wm. 4, c. 42, s. 39, is rendered useless. The act will apply whether the submission contain a power to enlarge or not (*Parberry v. Newnham*, 7 Mee. & W. 378; 9 Dowl. 288. *Leslie v. Richardson*, 6 C. B. 378; 6 D. & L. 91. *Edwardes v. Davies*, *supra*. *Lambert v. Hutchinson*, 2 Man. & G. 858; 6 Scott, N. R. 221); or if the arbitrator make his award after the time limited (*Leslie v. Richardson*, *supra*. See also *Parkes v. Smith*, 15 Q. B. 297; 20 L. J. Q. B. 345. *Brown v. Collier*, id. 426).

[2] It would seem that the only limit to the power of the Court to enlarge is its own discretion (*Parberry v. Newnham*, 7 Mee. & W. 378. *Leslie v. Richardson*, 6 C. B. 378; 6 D. & L. 91. *Bowen v. Williams*, 3 Ex. 93); and the Court has enlarged the time for an umpire to make his award, though the validity of his appointment was doubtful. *Johnson v. Collie*, 24 L. J. Q. B. 63.

[3] *Semb.* neither the 9th nor 15th ss. apply to orders of reference made by consent. *Bennett v. Watson*, *supra*.

award on or before the 24th of August, 1852, or on or before such ulterior day as he might indorse on the order. In case of the death of either party, the award was to be delivered to the personal representative. When the plaintiff was about to be examined before the arbitrator, an adjournment was agreed to with a view to a compromise, and the 24th of August passed without any enlargement of time by the arbitrator. The defendant afterwards refused to consent to any enlargement. In June, 1853, the plaintiff died. His executrix was desirous of proceeding in the reference, and applied to the Court to enlarge the time. The defendant opposed the enlargement, denied the power of the Court to enlarge the time, and charged in his affidavit that the plaintiff had received large sums of money on account of the partnership which he had not brought into account. The Court held that it had power to enlarge the time; but under the circumstances, in the exercise of its discretion, refused to grant the application.

ANDREWS v. EATON, 21 L. J. Ex. 110.

In this case the cause was referred to arbitration in 1846, after which, both parties having delayed proceeding with the reference, and the arbitrator having omitted to enlarge the time for making his award beyond Easter Term, 1850, the Court refused, under the 3 & 4 Wm. 4, c. 42, s. 39, to enlarge the time to Michaelmas Term, 1852, the defendant withholding his consent to such enlargement.

And the Court will not interfere to extend the time after long delay in proceeding with the reference.

BROWNE v. COLLYER, 20 L. J. Q. B. 426; 2 Pr. Rep. 470; 15 Jur. 881.

This was an application to enlarge the time, under the 3 & 4 Wm. 4, c. 42, s. 39. It appeared on the affidavits in support of the application that the cause had been referred by an order of Nisi Prius, and that the order of reference had been made a rule of court; the rule *nisi* was drawn up on reading the affidavits and order of Nisi Prius. It was objected to the rule that it should have been drawn up on reading the rule of court, making the order of reference a rule of court.

The rule *nisi* to enlarge need not be drawn up on reading the rule, making the order of reference a rule of court.[1]

Held, that it was not necessary that the rule *nisi* should be drawn up on reading the rule, making the order of reference a rule of court, and that enough appeared to give the Court jurisdiction to enlarge.

VI. OF THE AWARD.

(A) *By whom to be made.*

WADE v. DOWLING, 4 E. & B. 44; 23 L. J. Q. B. 302; 18 Jur. 728.

This was an action on an award.

Plea. No such award.

It appeared on the trial that the agreement to refer stated, "so as the award of the said arbitrators and umpire, or any two of them, be made in writing under their hands, ready to be delivered on," &c. The arbitrators agreed in every respect, except as to the costs, which it was agreed should be left to the decision of the umpire, who, when he had decided, should send the award to be executed by one of the arbitrators. The umpire signed the award in London, and sent it to one of the arbitrators in Bristol, by whom it was executed there. A verdict was entered for the plaintiff, leave being given to defendant to move

Joint-arbitrators must execute the award at the same time, and in presence of each other.[2]

[1] An *ex-parte* rule or order would be bad. *Clerke v. Stocken*, 2 Bing. N. C. 651; 5 Dowl. 32; 3 Scott, 90. And the Court will not grant a rule calling on the other party to consent to the arbitrator proceeding. 2 Dowl. 539.

[2] *See* also *Peterson v. Ayre*, 2 C. L. R. 722; 14 C. B. 665; 23 L. J. C. P. 129, 202. *Templeman v. Reed*, 9 Dowl. 962. And if the submission be to perform the award of the arbitrators and their umpire, an award executed by the arbitrators alone is bad. *Hetherington v. Robinson*, 7 Dowl. 192.

to enter a verdict for him, if the Court should be of opinion that the award was bad.

Held, that the award could not be sustained, that all the parties should be together, and do the act of execution of the award *simul et semel*.

(B) *When to be made.*

NEWGATE v. DEGELDER, 2 Keb. 10; S. C. 20; S. P. CURTIS v. POTTS, 3 M. & S. 145.

When no time limited, a convenient time is to be understood.[1]

Action of *assumpsit* on a submission to perform an award to be made by A. and B., *when their occasions would permit*. The Court agreed, that when the submission limits no time for the making of the award, that it shall be understood to be within a convenient time; and if in such case the party request them to adjudicate, and they do not, a revocation afterwards will be no breach of the condition.

REX v. COLBERT, Comb. 103. *Semb.* S. P. BEDAM v. CLERKSON, 1 Lord Raym. 123.

When time prescribed, award must be made within it.[2]

A bond undertaking to perform the award of A. and B., *ita quod* it be made *ante prim' prox' termini* (the next term being Hilary Term, which was discontinued), but before Hilary Term the arbitrators said that they could not make any award, but afterwards, the first day of Hilary Term, they were persuaded by the attorney that they had time till the first day of Easter Term, they accordingly made an award, but,—

Per Cur. It is not binding, for the authority of the arbitrators was determined.

Unless other limit stated in the document of submission, time to be three months.

By the 17 & 18 Vic. c. 125, s. 15, "the arbitrator acting under any such document or compulsory order of reference as aforesaid, or under any order referring the award back, shall make his award under his hand, and (unless such document or order respectively shall contain a different limit of time) within three months after he shall have been appointed, and shall have entered on the reference, or shall have been called upon to act, by a notice in writing from any party; but the parties may, by consent in writing, enlarge the term for making the award."[3]

TYERMAN v. SMITH, 25 L. J. Q. B. 359.

But if a party go on attending after the expiration of the time he cannot, when the award is made against him, set up that there was no consent in writing to enlarge.

This cause was referred by order of a judge under the C. L. P. Act, 1854, s. 6. The order was dated June 5, 1855. On the 3d July, 1855, the arbitrator entered on the reference. The plaintiff attended meetings till the 7th January, 1856. The award was made on the 7th February, 1856, in favour of the defendant. The time was not enlarged by the court or a judge, or the written consent of the parties, as required by the 15th section of the C. L. P. Act, 1854. On the 21st of April, 1856, the order of reference was made a rule of court. On the 14th May, 1856, the plaintiff's attorney attended the taxation, under protest that the award was bad, inasmuch as the arbitrator

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[1] But since 17 & 18 Vic. c. 125, *supra*, this can only hold with respect to a parol submission.

[2] And generally the award must be made within the originally appointed or enlarged time (*Marks v. Marriott*, 1 Ld. Raym. 115; id. 247. *Henfree v. Bromley*, 6 East, 310. *Re Higham*, 9 Dowl. 203. *Re Morphett*; see *ante*, p. 484); nor can it be made after the authority is determined by effluxion of time, or by appointment of an umpire. When a verdict is taken, subject to the certificate of an arbitrator as to the amount of damages, such certificate may be given after the assizes (*Salter v. Yeates*, 5 Dowl. 291. *Tomes v. Hawkes*, 10 Ad. & E. 32); and when given, it relates back to the time of verdict. *Cremer v. Churt*, 15 Mee. & W. 310.

[3] For the remainder of this section *see ante*, p. 484.

was *functus officio* when he made it. On the same day judgment was signed on the award by the defendant.

A rule *nisi* having been obtained to set aside the judgment on the above facts,—

Held, that the plaintiff, by his conduct, was estopped from urging there was no statutable award, as, by going on after the expiration of the time and attending the master, he thereby admitted his authority under the statute, and could not now turn round and say there was no consent in writing. *See* also *Rex v. Hill*, 7 Price, 636.

(C) *Contents of.*

(*a*) *Recitals.*

HARLOW v. READ, 1 C. B. 733; 3 D. & L. 203; 14 L. J. C. P. 239.

A mis-recital of the submission does not invalidate the award.[1]

A cause was referred to two persons to make an award, and in case they should differ, to an umpire. The award contained no statement that the arbitrators had differed, but recited that they had "considered the decision of the umpire." It appeared on affidavit that they had not consulted the umpire at all.

Held, that the award was not void in consequence of the mis-recital, but that the words were surplusage.

MATSON v. TROWER, 1 R. & M. 17. *Semb.* S. P. BOYD v. EMMERSON, 4 Nev. & M. 99; S. C. 2 Ad. & E. 184.

It may be in the form of an opinion.[2]

Arbitrators, disagreeing, appointed an umpire, who, after examining the parties, made his award in these terms, "I am of opinion that," &c.

Abbot, C. J., decided that the language of an award in framing it was immaterial, and, being in the form of opinion, did not invalidate it.

(*b*) *Must pursue Submission.*

HOOPER v. HOOPER, 1 M'Clel. & Y. 509.

An award larger than the submission cannot be sustained.[3]

Action on a right of way claimed for carriages. At the trial that was abandoned, and limited to a footway, subject to the award of a barrister, to whom it

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[1] *Price v. Popkin*, 10 Ad. & E. 143. *Toll v. Dawson*, 1 Vent. 184. *Adams v. Adams*, 2 Mod. 169. *Trew v. Burton*, 1 C. & M. 533. *Baker v. Hunter*, 16 Mee. & W. 672. Nor the omission to set out an enlargement (*George v. Lousley*, 8 East, 13. *Re Lloyd*, 6 D. & L. 531); though it is better to insert it. *Spence v. Eastern Counties Railway Co.* 7 Dowl. 697. *Davis v. Pratt*, 17 C. B. 183. It is also desirable, with the view of preventing further litigation, though not necessary for supporting the award, that the award should specify what the matters in difference are which were before the arbitrator. *Smith v. Hartley*, 10 C. B. 800. *King v. Bowen*, 8 Mee. & W. 625; 1 Dowl. N. S. 21. *Angus v. Bedford*, 11 Mee. & W. 69.

[2] No technical expressions or precise form of words are necessary in an award. *Eardly v. Steer*, 4 Dowl. 423. *Ferguson v. Norman*, 4 Bing. N. C. 52. *Whitehead v. Tattersall*, 1 Ad. & E. 491. *Grimm v. Fowler*, 29 L. J. Q. B. 189. It must, however, express a distinct adjudication; and a mere proposal, as, "I propose that B. shall pay to A. 10*l.* &c.," is not sufficiently decisive or explicit. *Lock v. Tullamy*, 5 B. & Adol. 600; 2 Nev. & M. 336. By empowering the arbitrator to certify instead of making a formal award the expense of the stamp is saved. *Salter v. Yeates*, 5 Dowl. 291. And where parties agree to abide by the opinion of counsel, no stamp is required to the opinion (*Boyd v. Emerson*, 2 Ad. & E. 184); nor to the certificate of an engineer. 24 L. J. C. P. 60; 15 C. B. 30.

[3] The award must pursue the submission in every material point, or the Court may set it aside. *Faviell v. Eastern Counties Railway Co.* 2 Ex. 344. *Hutchinson v. Blackwell*, 8 Bing. 331. *Stephens v. Lowe*, 2 M. & Scott, 44. *Hill v. Thorn*, 2 Mod. 309.

So an arbitrator cannot award a power to distrain, unless the submission authorises him (*Pascoe v. Pascoe*, 3 Bing. N. C. 898; 5 Scott, 117); nor can he direct a verdict to be entered up on a reference "of the subject-matter of an action, and the issues thereon" (*Hutchinson v. Blackwell, supra*); nor can he enter a *stet processus* without authority. *Leeming v. Fearnley*, 5 B. & Adol. 403. *See* also *Thorpe v. Eyre*, 1 Ad. & E. 926. His silence may negative a right. *Re Duke of Beaufort*, 29 L. J. C. P. 241.

was referred to settle all matters in difference between the parties, and to direct in what manner the road in question (if he should find for the plaintiff) should be enjoyed, &c. The arbitrator awarded that the plaintiff ought to be permitted, for himself and his servants on foot, and with his cattle and horses laden or unladen, either with crooks or in any other manner, or drawing in any cart or waggon or other carriage, or in any other manner, to go, return, pass, &c. On motion to set aside the award, on the ground that the arbitrator had exceeded his authority in awarding that the road in question should be used with cattle and horses drawing in any cart or waggon or other carriage, because the arbitrator was not empowered to impose any burden on the defendant to which he could not have been subjected by the verdict,—

The Court held, that the arbitrator had clearly exceeded his jurisdiction, and directed that the award should be set aside.

CRUMP v. ADNEY, 1 C. & M. 355.

And where a submission is limited by a proviso, the award must be accordingly.[1]

The submission to arbitration in this case was, that the arbitrator shall and may award the payment of an annuity to, &c., with a proviso for abatement in case of a deficiency of assets.

The Court held, upon a view of the context and circumstances, it was imperative on the arbitrator to insert such proviso in the award.

(*c*) *Must be Reasonable.*

LEE v. ELKINS, 12 Mod. 585.

An award to do a thing not in the power of the party is void.

Per Cur. An award that one of the parties shall do an act out of his power, as to deliver up a deed which is in the custody of the plaintiff, is void. *See* 1 Roll. Abr. 2.

THIRSBY v. HELBOT, 3 Mod. 272.

As, that the defendant shall be bound with sureties, as the plaintiff shall approve.[2]

Debt upon a bond for performance of an award, upon *nullum albitrium* pleaded, the plaintiff replied, and showed an award made, which, amongst other things, required "that the defendant should be bound with sureties, such as the plaintiff should approve, in the sum of 150*l.*, to be paid to him at such a time, and that they should seal mutual releases," and assigned a breach in not giving the bond. A verdict was obtained by the plaintiff. But the Court was of opinion that the award was void, because it appointed the party to enter into a bond "with such sureties as the plaintiff should like, and releases then to be mutually given." Now, if the plaintiff does not like the security given, then he is not to seal a release, and so it is but an award of one side.

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[1] But where, by agreement of reference, the arbitrator is to take a view previous to entering on the reference, and he takes such view, an omission to recite the fact is no objection to his award. *Coleridge, J., Spence v. Eastern Counties Railway Co.* 7 Dowl. P. C. 697. *See* 9 W. R. 274, as to viewing premises, not being obligatory.

[2] Or that he shall procure a stranger to be bound with him for the payment of a sum of money, for he cannot compel a stranger to be responsible for him; or that he shall procure the justices of the C. P. to sit, in order that he may levy a fine; or that he shall procure the lord of a manor to grant a copyhold, or a stranger to make a release or confirmation of an estate, or to pay a sum of money at a day which was past at the time of the award; but in this case he ought to pay the money, the payment being the essence of the award, and not the payment on a particular day; that he shall enter into an obligation to the other immediately after the award: for some time is necessary, yet perhaps, at the present day "immediately" would be construed within a reasonable time. An award, however, that the one party shall enfeoff the other in an acre of land, and immediately after deliver up the title-deeds, or enter into a bond and immediately after pay the money, would be good, because neither of them is impossible. *See* 21 Edw. 4, 38, 39; 19 id. 1; 18 id.; 21 id.; 4 id.; 17 id. 4, 5, 6; Rol. Abr. F. 1; Jenk. 136. It will be observed, that in this respect there is a marked distinction between the case of a bond and that of an award; for if a man binds himself to do a thing which it is not in his power to do, it is reckoned his own

(*d*) *Must be Mutual.*

Bacon v. Dubarry, 1 Ld. Raym. 246.

An award must not be only on one side; if it gives satisfaction to one party, it should discharge the other.[1]

An attorney, on behalf of his client, submitted by bond to perform an award. It directed that the attorney should pay to the other party 345*l.*, and that the attorney and the other party should give mutual releases; namely, that the other party should sign a release in discharge of the attorney, and the attorney to the other party:—*Held* to be an award only to one side. The attorney, it was said, submitted on behalf of his client, and nothing was awarded to his client, the release not being expressly awarded to the use of the latter, but to that of the attorney; and then the award being only that the attorney should pay the money, without saying on what account, it was not good without the releases; but it was admitted, that if the release had been to the use of the client instead of the attorney, the award would have been mutual, and therefore good. *See* 1 Saund. 236; 3 Vin. Ab. 70.

Russell v. Williams, 1 Lutw. 281.

Award that he should pay, &c. without saying for what, is bad.

In *assumpsit* the defendant pleaded an award by arbitrators that "he should pay to the plaintiff 17*l.*" On demurrer to the plea, it was contended that the award was void, for it is only on one side, because the money to be paid by the defendant is not awarded to be in satisfaction or discharge of anything, nor is anything awarded to be done to the defendant, or for his benefit. The Court assenting to this, gave judgment for the plaintiff.

Elliott v. Cheval, 1 Lutw. 541.

Though the recital may be used to show that it is mutual.[2]

An award recited that there had been considerable dealings between the plaintiff and the defendant; that the plaintiff had paid to the defendant all his demands, and that 40*l.* were due to the plaintiff, and then ordered that the defendant should pay the plaintiff the 40*l.* It was held, that the recital of the dealings between the parties, and of the payment by the plaintiff of all that was due on his part, implied that the payment of the 40*l.* by the defendant was intended to be in full satisfaction.

Hopper v. Hackett, 1 Lev. 133.

But an award to pay so much "for," &c. implies it to be in satisfaction.

An award recited that there were several differences between the plaintiff and defendant concerning a house, and divers elms, and arrears of rent; and that they, the arbitrators, to make a final end of all, awarded the defendant to pay the plaintiff 4*l.* for all the said arrears of rent. The defendant demurred, for that this was only an award of one part, and not of all differences; but the Court held the award sufficiently mutual, because the words "for the arrears" signi-

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folly, and he forfeits his bond by non-performance; but the duty of an arbitrator is to judge reasonably and impartially between the parties, and he departs from that principle when he orders any thing which is not physically or morally in the power of the parties to do. But it is no objection to the award that it is difficult for the party to perform it, from the accidental narrowness of his circumstances; as, if it be to pay 20*l.* when he possesses no property; or to give twenty tuns of wine when he has not one. And an award must not be inconsistent and repugnant (*Ames v. Milwood*, 8 Taunt. 637); but a liberal interpretation is now put upon these documents, and the courts will strive to sustain them, notwithstanding any apparent inconsistency or repugnancy. *Templeman v. Reed*, 9 Dowl. 962. *Stonehaven v. Farrar*, 9 Jur. 203. So also when the finding on particular issues makes an apparent incongruity. *Cooper v. Langdon*, 9 Mee. & W. 60; 1 Dowl. N. S. 392. *Maloney v. Stockley*, 4 Man. & G. 647. *Duke of Beaufort v. Welch*, 10 Ad. & E. 527.

[1] It was formerly an indispensable requisite that the award should be mutual (*see* 7 Hen. 6, 41; Br. Arbit. pl. 23; 8 Co. 98; Poph. 15, 16); or, in other words, that the thing awarded to be done should be a final discharge of all future claim by the party in whose favour the award is made against the other for the cause submitted.

[2] *Watmough v. Holgate*, 2 Vent. 221.

fied in "satisfaction of the arrears," and they were discharged thereby: and further, that, although the award recited other matters, yet they would intend that such matters were otherwise determined, or at least the award saying, "to make an end of all differences," should be taken to mean that the 4*l.* was in satisfaction of everything; the others not appearing, but by the recital of the award itself. See *Garrett v. Weed*, 1 Lev. 133. *Hawkins v. Colclough*, 1 Burr. 275.

HARRIS v. KNIPE, C. P. 1 Lev. 58.

And an award directing all suits to cease is mutual.

An award directed that all suits and controversies should cease, and although in all the subsequent parts of the adjudication nothing was well awarded, and it ordered that the one should pay to the other a certain sum, it was agreed by the Court that it was a good and mutual award as to the first party only. See *Cole's case*, Roll. Abr. 10.

(E) *Must be Certain and Intelligible.*

HAWKINS v. COLCLOUGH, 1 Burr. 274.

An award must be certain to a common intent.[1]

In an action of trespass for an assault, battery, and false imprisonment, brought by the plaintiff against the defendant, the defendant pleaded an award (made pending the action), and a tender of the sum awarded, to which the plaintiff demurred.

The award made was in these words: "Whereas there has been a suit at law between the parties that has run to a great expense on both sides, and it being left to me to make an end of it, I determine that they shall each of them pay their own charges at law, and that the defendant pay the plaintiff five shillings for his making the first breach in the law."

The plaintiff's counsel took two exceptions: 1st. The award is uncertain, because the submission is of several matters, and the award does not at all show which of them it means to determine. 1 Lord Raym. 246. *Bacon v. Dubarry.* And 2nd, that it was not final.

Per Cur. The question before us is, whether this is a good award. Awards are now considered with greater latitude, and less strictness, than formerly; and it is right they should, because they are made by judges of the parties' own choosing.

Awards must have these two properties: they must be certain and final. The certainty is to be estimated according to a common intent, and consistent with a fair and probable presumption.

In this case, the submission is in general terms; viz. of all actions, controversies, and suits between them; and it appears that this suit only was depending between the parties, and therefore there is no probable presumption of any other. As to its being final, it seems to be a reasonable and fair award.

TIPPING v. SMITH, 2 Str. 1024.

And if it be not certain to such intent in a material part it is bad.[2]

An award was made in this cause (reciting that the defendant had hurt the plaintiff), whereby it was awarded that the defendant should give security to pay the plaintiff an annual sum for life, and that all manner of proceedings (if any)

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[1] And if a man of ordinary understanding, upon reading over the award, can comprehend the full meaning and intention of the arbitrator, then it is sufficiently certain. *Cargey v. Aitcheson*, 2 B. & C. 170; 13 Price, 639; 2 D. & R. 222. And it is not necessary that the arbitrator should find in the very words of the issue; it is sufficient if he decide substantially the question in dispute. *Wykes v. Shipton*, 3 Nev. & M. 240.

[2] The award should be certain:—

1st. As to the amount awarded.

2d. In respect of what, and to whom to be paid.

3d. If the award direct an act to be done, it should state how.

4th. If it award the delivery up of property, it should specify what.

5th. As to the costs awarded.

1st. As to the amount awarded. The following are instances in which the courts have held awards to be bad, for uncertainty

depending at law should not be further prosecuted. On demurrer this award was held ill, being uncertain, and not final or mutual. It was uncertain, because it did not determine what sort of security should be given; it was not final, it saying only proceedings then depending (if any), so that if the plaintiff had brought no suit, he was at liberty so to do, or even to discontinue what was brought, and bring new ones. Judgment for the defendant. See also *Ferguson v. Norman*, 4 Bing. N.C. 52.

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in this respect: Award directing sums to be paid to the arbitrators and an attorney, without stating how much to each, or otherwise appropriating any specific sum. *Robinson v. Henderson*, 6 M. & S. 276. Award for one party to pay another the amount due for task-work, without finding how much was due (*Pope v. Brett*, 2 Saund. 292); or so much as the land is worth (*Titus v. Perkins*, Skin. 247); or so much for "arrears of rent," without stating the amount of such arrears. *Massey v. Aubry*, 3 Styles, 365. *See* also *Hewett v. Hewett*, 1 Q. B. 110. *Marshall v. Dresser*, 3 id. 878. But the Court held the award good where the arbitrator awarded a sum "with interest from the last settlement," when it appeared that the time of the last settlement was not disputed (*Plummer v. Lee*, 2 M. & W. 495; 5 Dowl. P.C. 755); so where an award directed a verdict to be entered, without stating the sum (*Cayme v. Wales*, 3 D. & R. 224); so, an award that "nothing is due to the plaintiff" (*Dickins v. Jarvis*, 5 B. & C. 528; 8 D. & R. 286); or, "no cause of action" (*Halleni v. Ellis*, 6 Bing. 225; 3 M. & P. 553); or, "for plaintiff as to the residue" (*R. v. Earl Dundonald*, 5 Dowl. P.C. 589); so, where the parties had agreed that, in case the arbitrator should think the plaintiff not entitled to recover in respect of some articles of iron machinery supplied to the defendant, the arbitrator was to allow the plaintiff the value of them, at the market price of pig-iron, as the defendant still kept them; the award directing the defendant to pay for them according to the present market price of pig-iron, was held good, and to have sufficiently ascertained the price; because, according to the agreement of the parties, the arbitrator was, in fact, merely to determine whether the defendant was to pay for them as machinery or as pig-iron. *Waddle v. Downman*, 12 M. & W. 562. *See* also *Beale v. Beale*, Roll. Ab. Arb. H. 14. *Perry v. Mitchell*, 2 D. & L. 457. *Hawkins v. Benton*, id. 465. *Wohleenberg v. Lageman*, 6 Taunt. 254.

2d. In respect of what and by whom to be paid. Award "to pay costs to the plaintiff, or one A. B.," is bad for uncertainty (*Furnis v. Hallom*, Barnes, 166); and when a cause and all matters in difference were referred, and the award, which did not purport to have been made "of and concerning the premises," merely directed that B. should pay to A. 167*l.* 6*s.* 2*d.*, without saying upon what account:—*Held* bad, as it did not show in respect of what the money was to be paid. *Crosbie v. Holmes*, 3 D. & L. 566; 15 L. J. Q. B. 125; 10 Jur. 139. Where, by their award, the arbitrators found that certain sums were due for principal and interest at the time of the reference, in respect of two different funds, and awarded that a gross sum should be paid, without apportioning it between the two funds to which it belonged:—*Held*, that the award was bad, for not distinguishing between the two funds in respect of which the parties were entitled to the money found to be due (*In re Morphett*, 2 D. & L. 967; 10 Jur. 546; 14 L. J. Q. B. 259). So, a direction in an award "that the costs of making the submission a rule of court shall be paid by the party disobeying the award, and obliging the same to be made a rule of court," was held to vitiate the whole award for uncertainty (*Williams v. Wilson*, 9 Ex. 90); and an award that so many pounds are due from A., B., and C., "some or one of them," and directing the amount to be paid by them, "some or one of them," is bad for uncertainty (*Rainforth v. Hamer*, 25 L. T. 247); an award that A. or B. shall do an act is void for uncertainty (*Lawrence v. Hodson*, 19 L. J. *See* also *Wood v. Duncan*, 7 Dowl. 91. *Lund v. Hudson*, 1 D. & L. 236. *Martin v. Burge*, 4 Ad. and E. 973). But in the following instances the courts have held the award good:—Where an award ordered that a defendant should do "one or other of two things," if either of the things was capable of being performed (*Simmonds v. Swaine*, 1 Taunt. 549); to an action of trespass — pleas, not guilty, and a justification: award, "that the defendant had not proved his plea, and that the verdict for plaintiff ought not to stand" (*Archer v. Owen*, 9 Dowl. 341). Where a question as to partnership dealings under a certain deed, and also certain other matters and accounts, were referred:—*Held*, that it was not uncertain, in omitting to award specifically on the partnership (*In re Warner*, 2 D. & L. 148; *see* also *Taylor v. Shuttleworth*, 8 Scott, 565; 6 Bing. N. C. 277); so, a direction for payment to be made to the plaintiff or his attorney is sufficient. *Hare v. Fleay*, 11 C. B. 472.

3d. If the award direct a thing to be done, it should show how. Thus, where an action for polluting the water of a watercourse was referred to an arbitrator, with power to him to regulate its future enjoyment:—*Held*, that an award directing a verdict to be entered for the plaintiff, and that defendant should at all times take all proper and reasonable precautions for preventing the water being rendered unfit for plaintiff's use; and in particular, that the water passing from the defendant's to plaintiff's premises should be passed through

CARGEY v. AITCHESON, 2 B. & C. 170; 3 D. & R. 433.

The maxim "*Id certum est quod certum reddi potest*," applies to awards.[1]

In this case, the arbitrators (*inter alia*) awarded that "five-eighth parts of the costs of several actions should be paid by the plaintiff, and three-eighths by the defendant."

Held, that this was sufficiently certain, as it would become so when taxed by the proper officer.

CARGEY v. AITCHESON, 2 B. & C. 170; S. C. 3 D. & R. 433.

And if possible the courts will presume an award to be certain.

The matters submitted to arbitration in this case were the value of certain stock and goods, which each of the parties had received into his custody from a certain farm, and what each should contribute towards a certain sum of 2500*l.* (according to agreement), which had been recovered by certain parties against the plaintiff. The arbitrators awarded that the said defendant should pay unto the said plaintiff the sum of 444*l.* On an action being brought upon the award, it was objected on demurrer that it was not in pursuance of the submission, as it was not competent for the arbitrators to get rid of the calculation by merely awarding that one party should pay a certain definite sum.

Per Cur. The plaintiff, Cargey, was originally liable to pay the entire sum of 2500*l.* The question submitted was, what proportion of 2500*l.* should be borne by the defendant; the award, therefore, by stating that the defendant shall pay 444*l.*, does in fact fix the proportion each shall pay; for the plaintiff must discharge the residue. After payment of 444*l.* and the execution of the mutual releases, which form part of the award, all discussions must end, and the award must, therefore, be viewed as certain, for the award imports that the arbitrators have taken into consideration the matters in difference; and they first award that all disputes shall cease, then that the defendant shall pay a certain sum, from which we were bound to infer that the arbitrators took into their consideration all those collateral facts, such as the value of the goods, stock, &c., and which, it is contended, they entirely keep out of view in calculating the proportional liability of the parties. We cannot presume, nothing appearing from

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filtering-lodges, made or to be made by defendant, so as to be thereby purified and cleansed for plaintiff's use, "so far as the same can be purified and cleansed by the ordinary and most approved process of filtering:—*Held*, that the description by reference only to "the ordinary and most approved process," was uncertain, and the award therefore bad (*Stonehaven v. Farrar*, 6 Q. B. 730; 9 Jur. 203. *Price v. Popkin*, 10 Ad. & E. 139; 2 Per. & D. 304: but *see Johnson v. Latham*, 19 L. J. Q. B. 329; 20 id. 236). So, if the award direct a party to give security, it must name the kind of security. *Tipping v. Smith*, 2 Str. 1024. *Samon's case*, 5 Rep. 77 b. *See* also *Simmons v. Swaine*, 1 Taunt. 548.

4th. If it award the delivery up of property, it should specify what. Thus, if the arbitrator order a party to deliver up "three boxes and several books," without identifying them, the award will be bad for uncertainty. *Cockson v. Ogle*, 1 Lutw. 550. *See* also *Bedam v. Clerkson*, 1 Ld. Raym. 123.

5th. As to the costs awarded. As in a superior court, the costs of any proceedings therein are taxed by a master. When an award gives costs of any such proceedings it need not calculate the amount (*Pedley v. Goddard*, 7 T. R. 73. *Cargey v. Aitcheson*, *supra;* but the arbitrator should assess the costs of proceedings in an inferior court, as there may be no proper officer to tax them. *Winter v. Garlick*, 1 Salk. 75. *Addison v. Gray*, 2 Wils. 293.

[1] And generally a *primâ facie* uncertainty in an award does not vitiate it, if it can be rendered certain, and the award may be bad or good according to the event. *Waddle v. Downman*, 12 Mee. & W. 562; 1 D. & L. 560. *Mays v. Cannel*, 24 L. J. C. P. 41. *Pedley v. Goddard*, 7 T. R. 73. *Hanson v. Liversedge*, 2 Vent. 242. *Fox v. Smith*, 2 Wils. 267. And if the arbitrator give the rule for calculating the amount of money to be paid, without stating the result of such calculation, the award is sufficiently certain on the principle "*id certum est quod certum reddi potest.*" *Higgins v. Willes*, 3 M. & R. 382. *Hopcraft v. Hickerin*, 2 Sim. & Stu. 130. And though the award do not fix the amount, yet if it refer to any instrument, by reference to which the sum may be readily computed, it is enough. *Thorp v. Cole*, 2 C., M. & R. 367; 4 Dowl. 457. *See* also *Plummer v. Lee*, 2 Mee. & W. 495. *Wohlenberg v. Lageman*, 6 Taunt. 251. *Rose v. Spark*, 1 Saund. 324, n. 2. *Thorp v. Cole*, 4 Dowl. 457. *Perry v. Mitchell*, 2 D. & L. 452.

the pleading to warrant it, they omitted anything, and must, therefore, conclude 444*l.* was the proportion which the defendant was to pay of 2500*l.*, taking all other matters into account. Judgment for plaintiff.

(*f*) *Must be Final.*

BRADFORD v. BRYAN, 7 Mod. 349; S. C. Willes, 268.

The award must be a final and conclusive settlement of all the matters referred, or it will be bad.[1]

In an action of debt on an arbitration-bond, on oyer the condition thereof appeared to be "to abide by the award of C. E. in all actions, suits, controversies, and demands, so as the said award be made and ready to be delivered to the parties before a certain day." The defendant pleaded no award; the plaintiff replied that there was an award made and ready to be delivered before the day set forth in the award; and that the arbitrators awarded "that all actions, suits, controversies, &c. before, &c. should cease for ever, and that before a specified day the defendant should pay to the plaintiff 14*l.* 16*s.* more in satisfaction for all tithes, and that the parties should by deed release to each other all demands," &c., and assigned for breach the non-payment of the 14*l.* 16*s.*; to which the defendant rejoined, that in the award there is an exception of all tithe-calves, and that the plaintiff should be at liberty to prosecute his right to the tithe-calves at law if he had any right thereto. On demurrer and joinder in demurrer,—

Per Cur. (*Fortescue Aland, J., absente.*) The rule as laid down in the books is, that when the submission is conditional, namely, with an *ita quod* an award be made of the premises, the award must be final as to all matters within the submission, of which the arbitrators have notice, and that it cannot be good in part and bad in part. So that it is now settled that the conditional words will make the award void, if it do not extend to and be final in all matters within the submission; and in the present case the arbitrators take notice of a difference subsisting between them for tithe of calves. The words in the submission in this case are, "so as the said award," and does not say, "of the premises." In our opinion this, no doubt, is a conditional award, and for that reason is entirely void. Judgment for defendant.

KNIGHT v. BURTON, 6 Mod. 231; S. C. 1 Salk. 76.

An award of a nonsuit is not final; but that a bill in Chancery shall be *dismissed*, is.[2]

It was objected to an award that it had directed that a suit between the parties in Chancery should be dismissed, which it was urged was ill, for an award ought to be final; and that a suit in Chancery might be dismissed upon payment of costs, so as the party might begin again. Indeed, if the dismissing be absolute, it is final; but if it be dismissed, as is frequently done there, without prejudice, the party may begin again; and therefore an award of dismissing

[1] *See* also *re Robson*, 1 B. & Adol. 723. *Randall v. Randall*, 7 East, 81. *Price v. Popkin*, 2 Per. & D. 304. *Hewett v. Hewett*, 1 Q. B. 110; 4 Per. & D. 598. *Re Marsh*, 16 L. J. Q. B. 330. *Wilkinson v. Page*, 1 Hare, 276. *Bheur v. Harradine*, 7 Ex. 269. *Wrightson v. Bywater*, 6 Dowl. 359. So also where all matters in difference are submitted, the arbitrator must decide upon all the matters brought before him. *Price v. Popkin*, 2 Per. & D. 304. *Stone v. Phillips*, 6 Dowl. 247. *Rees v. Waters*, 16 Mee. & W. 263. *Ingram v. Milnes*, 8 East, 445. *Pinkerton v. Caslon*, 2 B. & A. 704. *Duke of Beaufort v. Welsh*, 10 Ad. & E. 527. *Hancock v. Reid*, 21 L. J. Q. B. 78. And even if he do not decide on a matter, on the express ground that, in his opinion, it is not a matter in difference within the meaning of the submission, the Court will review his decision, and if they find it within the scope of the submission will set aside the award for not being final. *Samuel v. Cooper*, 2 Ad. & E. 752; 4 Nev. & M. 520. *Phipps v. Ingram*, 3 Dowl. 669.

[2] An award that "all suits between the parties shall cease" (*Squire v. Greville*, 6 Mod. 34; 1 Salk. 74), or that a cause should "be discontinued" (*Blanchard v. Lilly*, 9 East, 497), is good. Cro. Jac. 525; Rol. Arb. 1, 18, F. 7. When the cause in which there was a plea of set-off was referred together with *all matters in difference*, and the arbitrator directed a general verdict for the defendant, it was held not to be final, as it did not state how much the plaintiff was indebted to the defendant on the set-off

a suit in Chancery is uncertain and not final, but is like the awarding that one of the parties in a suit at law be nonsuited. But,—

Per Cur. It is true an award that one of the parties be nonsuited is void, for that is not final; but when an award is that a suit already commenced shall be dismissed, that must be understood that it shall be dismissed and cease for ever: that is a substantial dismissal and cessation, and not the shadow of one; as if the condition of a bond be to deliver up another bond by such a day, to be cancelled, and the obligee, before the day, puts the first bond in suit and obtains judgment thereupon, and on the day tenders it to be cancelled according to the letter of the condition of the second obligation, yet the penalty is forfeited. The word "dismissing" here is put in Latin (*dimittere*) which in English is to discharge, and to discharge a suit is to release it, and therefore final. *See* 19 Hen. 6, 36; 5 Hen. 7, 22; Fitzgib. 51 a, 526; Bro. 450; Roll. Arb. T. 15–17; 1 Barnard, K. B. 463.

PEDLEY v. GODDARD, 7 T. R. 73.

An award reserving a further judicial act to be done is not final, whether the act is to be done by himself or by another.[1]

An arbitrator awarded that there was due from the defendant to the plaintiff 147*l.* 3*s.* 3*d.* (in case the sum of 25*l.* 11*s.* thereafter mentioned was paid to the defendant) over and above the dividends thereinafter set forth, and that the defendant should pay the sum to the plaintiff on or before the 14th December, 1795, unless within twenty-one days he should exonerate himself by affidavit from certain costs, payments, and receipts, in which case he was only to pay the smaller sum.

Per Cur. The award is manifestly not final. It is inconclusive upon the most objectionable grounds. The arbitrator, instead of determining the dispute between these parties, has left one sum in dispute, to be decided by the person who of all others was least qualified to determine it.

PHILIPPS v. KNIGHTLY, Fitzgib. 167, 270; S. C. 2 Str. 903; 1 Barnard, 84.

But if the award be as final as the nature of the thing will admit, it is sufficient.

One Marshall, at the instigation of Knightly, brought a *qui tam* action against Philipps for himself; and Knightly, on behalf of Marshall, submitted by bond all matters in difference between the parties to arbitration. It was awarded that Knightly should execute a covenant to indemnify Philipps against all costs, damages, and expenses which might happen by means of any further proceedings in the *qui tam* action. An action on the submission-bond being

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(*Fenton v. Dimes*, Q. B., cited in *Williams v. Moulsdale*, 7 Mee. & W. 134), in which case the Court held that it would be otherwise if the cause alone had been referred; and where one of the parties admits the claim of the other, but seeks to reduce it by a set-off, an award, finding a sum due to one party or the other, without noticing the set-off, is sufficient. *Brown v. Croydon Canal Co.* 9 Ad. & E. 522; 1 Per. & D. 391. An award that the plaintiff has no cause of action *at present* is final. *Harding v. Forshaw*, 4 Dowl. 761. *Cockburn v. Newton*, 9 id. 676; 2 Man. & G. 899.

[1] *Miller v. De Burgh*, 4 Ex. 809. So also where an award ordered that the defendant should do certain work, and that the plaintiff should be at liberty to produce evidence before the arbitrator of its insufficiency at any time within two months, is bad. *Manser v. Heaver*, 3 B. & Adol. 295. So an award that a party shall execute a conveyance, to be settled by such counsel as the arbitrator might appoint, is bad. *Tandy v. Tandy*, 9 Dowl. 1044. *Goddard v. Mansfield*, 19 L. J. Q. B. 305; 1 Pr. Rep. 25. *Brown v. Watson*, 1 Scott, 386; 8 Dowl. 22. So an award to put premises in repair, to the satisfaction of A. B., is bad. *Tomlin v. Mayor of Fordwich*, 5 Ad. & E. 147. *Johnson v. Latham*, 19 L. J. Q. B. 329. *See* also *Glover v. Barrie*, 1 Salk. 71. *Ross v. Clifton*, 9 Dowl. 356. *Winch v. Saunders*, 2 Roll. 214. *Selby v. Russell*, 12 Mod. 139. When, however, the time and manner of executing general releases is not pointed out, the award is good. *Toby v. Lovibond*, 5 C. B. 770. *Freeman v. Bernard*, 12 Mod. 130. And a mere recommendation that something shall be done does not vitiate. *Price v. Hollis*, 1 M. & S. 105. So an award that one of the parties do pay a sum of money on a future day is good (*Squire v. Grevett*, 2 Ld. Raym. 961); or to give a bond or note payable at a future day. *Booth v. Garnett*, 2 Str. 1082. But see the judgment of *Maule, J.*, in *Brown v. Watson*, 1 Scott, 386; 8 Dowl. 22. *See* also *Ross v. Boards*, 8 Ad. & E. 290.

brought, and after "no award" pleaded by the defendant, this award being set forth in the replication, an objection was taken to it as not being final, not putting an end to the suit, but only giving a new action of covenant: it was indeed allowed by the judge, who supported this objection, that if a bond had been awarded to the plaintiff to indemnify him in the suit depending, that it would have been good, for there the arbitrators would have ascertained the penalty as the consequence of his not performing the award; and though by executing this bond he had satisfied the arbitration-bond, and the plaintiff's remedy was of course gone upon, that yet there subsisted as effectual a remedy on the bond awarded to be executed as there was upon the other. But in the present case, by the execution of the deed of covenant, the plaintiff's remedy on the arbitration-bond was gone, and there was only a remedy on the covenant left in its stead, which was a satisfaction in damages to be ascertained by a jury. But the other judges thought that the award was sufficiently final, and that at any rate it was not competent to the defendant to make this objection; the arbitrators had in this case done everything they possibly could do to render their award final; they could not have awarded that Marshall should discontinue the suit which he had brought on behalf of himself and the poor of the parish, for that would have been to divest an interest out of the poor which was vested in them by the commencement of the action, and there was no difference between the award to execute a bond or to execute a covenant: the remedy was by action in both cases.

(*g*) *Should not be Inconsistent with the Law.*

Morley v. Newman, 5 D. & R. 317.

An award that A. should not set up in trade within thirteen miles of B. is valid.[1]

Two partners, as surgeons, referred all matters in dispute between them, and the terms on which the partnership should be dissolved, to arbitration. The arbitrator having awarded that one of them should not act as such during the life of the other within thirteen miles of the place wherein they resided,—

It was holden that the award was good, inasmuch as the arbitrator had power to impose such condition.

Payne v. Massey, 9 Moore, 666.

So an award to pay interest not recoverable at law may be good.

The submission referred to arbitrators matters of fact as well as law, the award was silent as to the grounds on which the arbitrators made their award.

The Court refused to interfere, unless the principles on which they decided appeared on the face of the award itself, as it only appeared from the sum awarded that they had allowed interest which was not recoverable at law.

Cramp v. Symonds, 7 Moore, 434; S. C. 1 Bing. 104.

And in general, unless there be an illegality on the face of the award, the Court will not set it aside on the ground that it is against law.[2]

An action for fees due to plaintiff, who was a rector, derived from burials, received by the defendant the vicar, involved the question to whom they belonged. At the trial it was referred to a barrister, who awarded that there was nothing due from the defendant to the plaintiff, and that the plaintiff had no right of action. The plaintiff being dissatisfied with the award, applied for a

[1] The act directed by the arbitrators to be done must not be illegal (Bac. Ab. Arb. E.); hence, an award requiring the tenant to commit waste is bad. *Alder v. Savill*, 5 Taunt. 454. *Turner v. Swainson*, 1 Mee. & W. 572. *Wood v. Griffith*, 1 Swanst. 55. But it may be good for all that can be severed from the illegal part. *Doddington v. Bailward*, 7 Dowl. 640. Being against a mere rule of practice will not vitiate. *Re Budyer*, 2 B. & A. 691. *Berlington v. Southall*, 4 Price, 232. *See* also *Broadhurst v. Darlington*, 2 Dowl. 38. Arbitrators, by directing illegal act to be done, may be personally liable for the doing of it. 11 Mee. & W. 69; 2 Dowl. P. C. 735.

[2] *See* also *Tayler v. Marling*, 2 Scott, N. R. 383. *Phillips v. Higgins*, 20 L. J. Q. B. 357. But if the sum awarded appear on the face to have arisen out of an illegal transaction, the award will be bad *pro tanto*. *Aubert v. Maize*, 2 B. & P. 371. *Steers v. Lashley*, 6 T. R. 61.

rule to show cause why this award should not be set aside, on the ground that the arbitrator had decided against law.

Per Cur. An award cannot be set aside unless some objection be apparent on the face of it; it would, therefore, be too much to allow this award to be set aside on the application of one of the submittants, when the award is silent as to the principles on which the arbitrator has decided; it must be taken that he has determined according to the principles of law, since the question of the respective rights of the parties to the fees was left to the arbitrator, and he has awarded that there was nothing due from the defendant to the plaintiff, and that the latter had no cause of action.

(*h*) *Must be Entire.*[1]

WRIGHTSON v. BYWATER, 3 Mee. & W. 207.

Notwithstanding the general rule that an award must be entire, if the parties give an arbitrator express power to make one or more awards, he may do so.[2]

By an order of reference, a cause was referred to an arbitrator, who was to settle all matters in difference between the parties at law and in equity, and to order and determine what he should think fit to be done by either party respecting the matters in dispute; and the arbitrator was to be at liberty to make one or more awards at his discretion. At the time of this submission two equity suits were pending, in which the parties to the action were interested.

The arbitrator made an award disposing of the action, but not of the equity facts, and it was objected *inter alia* that the award was not final on that ground.

Sed per Cur. "When we find a clause that the arbitrator is to have power to make 'one or more awards at his discretion,' we cannot doubt but that the arbitrator might make a valid award on one entire subject of dispute. We therefore think that, in this case, the parties have given the *power* to the arbitrator to dispose of all matters, but have not made it a *condition* that all matters should be disposed of by him."

(*i*) *Should not require an Act to be done by a Stranger.*

TOMLIN v. MAYOR OF FORDWICH, 5 Ad. & E. 147; S. C. 6 Nev. & M. 594.

An award that premises are to be repaired to the satisfaction of a surveyor is bad.[3]

In covenant on an award, it appeared that certain differences as to the terms on which a lease should be renewed by a corporation to their lessee, and also as to the boundaries of property held under the lease, were referred to two arbitrators, who awarded that the corporation should put the premises in good tenantable repair to the satisfaction of one J. S., a builder, and should grant a

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[1] As a general rule the award must be one entire and complete instrument, and it cannot be made part one day and part another (Com. Dig. Arb. E. 16; Roll. Ab. Arb. H. 3, p. 250); and where a cause and all matters in difference between A. and B. were referred, and by a subsequent order C. was made a party thereto as if he had been an original party, and a cause between A. and C. and all matters in difference between A., B., and C. jointly and severally to the same arbitrator, who made two awards, one between A. and B. not mentioning C., and another between A. and C. not mentioning B.:—*Held*, that as there was no one award determining all the questions between all the parties both the awards were bad. *Winter v. Munton*, 2 Moore, 723. But where an arbitrator had power to certify on two cross-actions between the parties, and he executed and gave at the same time a separate certificate in each action on a separate piece of paper, it was held that the two certificates formed but one award. *Smith v. Reece*, 6 D & L. 520.

[2] And where the first award is not final, the arbitrator having power to make two awards, and in the first to state a case for the opinion of the Court, and assess damages contingently, but neither party was to enforce payment of any sum found due by the first award until the arbitrator had made his final award, the first award was held not to be final. *Wood v. Copper-Miner's Co.* 17 C. B. 561; 24 L. J. C. P. 34. *See* also *Dowse v. Coxe*, 3 Bing. 20.

[3] So an award that the party shall be bound with sureties for the performance of a particular act is void. *Coke v. Whorwood*, 2 Lev. 6. *Thirsby v. Helbot*, 3 Mod. 272;

lease of the premises at a certain rent, which should contain covenants to keep the premises (having been first repaired by the lessors as aforesaid) in good repair.

Per Cur. The award is bad. The arbitrators had no power to order a certain thing to be done to the satisfaction of some third person.

BEDAM v. CLERKSON, 1 Ld. Raym. 123; S. P. ADAMS v. STATHAM, 2 Lev. 235; S. C. 2 Show. 61.

An award should not order money to be paid by or to a stranger, unless it appear that it is for the benefit of a referring party.

In arguing this case, it was contended that the award was not good, it being to pay 28*l.* to W. who was a stranger, and they argued that it was invalid, unless it should appear that it was for the plaintiff's benefit, or to discharge money owing to him; but as nothing of this kind was shown, the Court was of opinion that the objection must prevail.

BIRD v. BIRD, 1 Salk. 74.

Though perhaps the Court will intend this if the contrary does not appear.[1]

In debt on a bond the defendant prayed oyer of the condition, which was for performing the award of J. S., and pleaded no award made. The plaintiff replied, setting forth the award; it directed that the plaintiff and defendant should pay a certain sum yearly to A. for the use of Mrs. B. their mother. It was objected that this was to award a thing to be done to a third person, who was a stranger to the submission, and consequently of a matter out of the power of the arbitrators.

Per Holt, C. J. "A general award of money to a stranger is good, for it shall be intended that the submittants were bound as trustees, or were liable to pay the same, and the payment shall be intended for their benefit, unless the contrary appear." See *Re Skeete*, *infra*, n.

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1 Show. 82. And where an award directed a sum of money to be paid by one of the parties to the submission to a stranger, the Court would not grant an attachment for non-payment at the instance of the stranger. *Williams, J., in re Skeete*, 7 Dowl. P. C. 618.

The award should not affect the interests or extend to any person who is not a party to the submission. Thus it was held in *Samon's case*, 5 Co. 77 b, 78 a, that where the submission is between two, and it is ordered by the award that one of them shall convey certain land to the other and his wife, this is void as to the wife, because she is a stranger to the reference. *See* also 10 Co. 131 a. b; Roll. Arb. B. 5; id. N. 9; 3 Leon. 62. So it is said that if the condition of a submission-bond be to stand to the award of A. and B., who award that one of the parties shall pay 20*s.* to a third person, this, Lord Coke states, is a null award, and the bond of no force, notwithstanding an opinion to the contrary, which, he says, is ill reported. So where it appeared that the plaintiff in the action then before the Court had formerly brought another suit in the King's Bench against the present defendant and one J. P., and that the plaintiff and this J. P. had submitted all manner of trespasses and actions between them two, and all other trespasses between the plaintiff and the present defendant, and the arbitrators awarded, that as well for the trespass done by the defendant as by J. P. there should be paid to the plaintiff 100*l.*, which J. P. had paid; this was held to be a void award, because the defendant was not a party to the submission. *See* Br. Arb. 44; Godb. 12, 13.

[1] An award made on a submission of differences between A. of the one part and B. and C. of the other, directed B. to pay to S., one of the arbitrators, a sum of money; and that immediately on the receipt thereof the said sum should be paid over by S. to A. In an action brought on the award, the plaintiff alleged that B., the defendant, had not paid the money either to S. or to himself.

Held, that the discretion to pay the money to S. did not vitiate the award, as he was to pay it over immediately to A., and therefore that it sufficiently appeared that the payment to S. was for A.'s benefit. *Wood v. Adcock*, 21 L. J. Ex. 204; 6 Ex. 814; in error, 7 Ex. 468. But the Court of Common Pleas thought it so doubtful as to whether they could intend a payment to a stranger to be for the benefit of a party when it did not appear on the award, that they refused in such a case to make an order under the 1 & 2 Vic. c. 110, s. 18, for payment of money directed by the award (*In re Laing*, 13 C. B. 276. *See* also *Dale v. Mottram*, 2 Barnard, 291. *Wood v. Thompson*, Roll. Ab. Arb. F. 11, p. 249. *Snook v. Hellyer*, 2 Chit. 43. *In re Mackay*, 2 Ad. & E. 356); and the correct rule would appear to be as laid down by *Parke, B.*, in *Wood v. Adcock*, *supra*, "that an award ordering and directing any party to pay money to a stranger is not good, unless it be for the benefit of one of the parties to the submission; and the *onus* of showing that it is for his benefit seems to be thrown on the party seeking to enforce the award."

Powell, J., was of opinion that it must be apparently for their benefit, and that it should not be so intended, unless it did appear; but in the principal case he held that it should be intended to be for their benefit, or rather that it appeared to be so, because the payment was to be for the use of the mother. See 5 Co. 77 b.; *infra*, 497, n.; 3 Cro. 4, 758; 1 Ro. 247, 259; 2 Lev. 235. This matter was afterwards referred to the counsel on both sides; so the Court gave no judgment. *See* 1 Com. Dig. Arbit. E. 7; 3 Leon. 62; 1 Keb. 127.

TURNER v. SWAINSON, 1 Mee. & W. 572.

An award that a stile and bridge shall be put upon the land of a third party is bad.[1]

An action of trespass was referred. And the arbitrator was to determine the cause and all matters in difference, and to say what was right to be done between the parties. He proceeded and made his award, in which he directed that the verdict, which had been entered for the plaintiff, should be set aside and a verdict entered for the defendant; that the plaintiff should remove all obstructions to the public way, and should put up a stile and long planks across a certain brook, for the better accommodation of the public in their use of that way. This was to be done on the soil of another person. On motion to set aside the award,—

Per Cur. The direction is not conditional, provided the consent of the owner and occupier of the land are obtained. This is the exercise of an additional power of the arbitrator, assumed by him beyond the submission. The arbitrator had no power to order something to be done on another person's land.

(*j*) *Concurrence of all the Arbitrators must appear.*

WHITE v. SHARP, 12 Mee. & W. 712.

Two may act if third refuse.[2]

A cause was referred to the arbitration of three persons, *the award of the three, or of any two of them, to be final.* The award purported on the face of it to be made by all three, but was executed by two only, the third having refused to sign:—*Held*, that the award was good as the award of the two, and that the misrecital might be rejected as surplusage.

(D) *Form of.*

(*a*) *By Parol.*

OATES v. BROMELL, 6 Mod. 160, 176; S. C. 1 Salk. 75; S. C. Holt, 82.

A parol award is good, and capable of delivery.[3]

Action of debt for non-performance of an award; the bond stated that it was made, and ready to be delivered to the parties, or such of them as should desire it by a certain day; no award was pleaded. The plaintiff set out a parol award,

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[1] *See* also *Alder v. Savill*, 5 Taunt. 454. *Angus v. Redford*, 11 Mee. & W. 69; 2 Dowl. N. S. 735. But such an award need not be invalid if it can be shown from the agreement of reference that there was an undertaking on the part of the party ordered to do the act to procure the consent of the owner of the land. *Nicholls v. Jones*, 6 Ex. 373. It would be well when an arbitrator orders anything affecting a stranger which *primâ facie* exceeds his authority, that he should state on the face of the award the facts which show that he is justified in so doing. *Harris v. Curnow*, 2 Chit. R. 594.

[2] But it would seem that such a contingency must be provided for in the submission (*Dalling v. Matchett*, Barnes, 57; Willes, 215); and where there is no positive refusal to act, two cannot make an award without first taking the opinion of the third (see *White v. Sharp*, *supra*. *Broog v. Perry*, 3 Bulst. 62); and the award should be made by all the arbitrators, executed at the same time, and in each other's presence. *Wade v. Dowling*, 23 L. J. Q. B. 302. *Stalworth v. Inns*, 15 Mee. & W. 466; 2 D. & L. 428. *See* also *Hill v. Langley*, 1 Vent. 50. *Little v. Newton*, 2 Scott, N. R. 509; 9 Dowl. 437. *Re Templeman*, id. 962. *Wright v. Graham*, 3 Ex. 131; 18 L. J. Ex. 29. *Goodman v. Sayers*, 2 J. & W. 249.

[3] It is, however, most unadvisable to make such an award. It is dependent on the accuracy of memory, and *quære* how far the courts would enforce it by attachment? *See* Russ. on Awards, 242; and 17 Ves. 232.

and averred that it was ready to be delivered to the parties. On demurrer it was contended that the words "ready to be delivered" necessarily imported that the award ought to have been in writing.

Per Cur. To make an award tenable, two distinct things should concur: first, the making; and, secondly, that it should be ready to be delivered. The question is, therefore, whether a parol award be properly deliverable.

On mature consideration we are of opinion, that a parol award is capable of delivery: viz. a declaration of it to the parties, or either of them, if they desire it, and that being so, as soon as the arbitrators have agreed on the award, it is ready to be delivered. *See* Barnes, 41; Ld. Raym. 115; 1 Bac. Abr. 148, 9; Cro. Jac. 541; 1 Salk. 69; 3 Vin. Abr. 126; Ld. Raym. 267.

(*b*) *By Deed.*

GATLIFFE v. DUNN, Barnes, 55.

An award made in pursuance of a submission, directing it to be indented, need not be indented.[1]

Arbitrators by the submission were directed to make their award in writing, indented under their hands and seals, &c. The arbitrators made an award in writing, but not indented. On a motion for an attachment for not performing the award, a rule was granted to show cause; but afterwards the Court said, the word indented is wholly immaterial, and is as ridiculous as if it had been said that the award should be made upon gilt paper. The Court of King's Bench will never suffer an award to be objected to for want of form, and this is a mere formal defect.

(*c*) *Stamp on.*[2]

(E) *Publication of.*[3]

BROOKE v. MITCHELL, 6 Mee. & W. 473.

Any act by which the arbi-

Per Cur. For the purpose of a sufficient publication, it is only necessary

[1] But where the award is directed to be in writing it must be so (*Everard v. Patterson*, 6 Taunt. 645); or under hand and *seal*, writing alone is not sufficient. *Henderson v. Williamson*, 1 Str. 116; 2 Roll. Rep. 243. And however informal the instrument may be, if it be in fact an award, the statute applies. *Carr v. Smith*, 5 Q. B. 128. *Goodyear v. Simpson*, 15 Mee. & W. 16. *Northampton Gas-Light Company v. Parnell*, 24 L. J. C. P. 60; S. C. 15 C. B. 630. But though the several parties to a submission have several rights and liabilities, the award will only require one stamp. *Goodson v. Forbes*, 6 Taunt. 171; 1 Marsh. 525. It is usual to make out the award on stamped paper for the party in whose favour it is made, and to give copies on unstamped paper to the others; but it may be stamped at any time on payment of the penalty, and according to the present practice, within six or eight weeks, without any penalty. Russell on Awards, p. 249. Unless the award be properly stamped it cannot be given in evidence, nor can it be enforced (*Hill v. Slocombe*, 9 Dowl. 339); but where no application has been made to enforce it, the Court will not set aside an award on the ground that it has not a proper stamp. *Preston v. Eastwood*, 7 T. R. 95. A certificate of an arbitrator does not require a stamp (*Salter v. Yeates*, 5 Dowl. 291); nor of an engineer, 24 L. J. C. P. 60; 15 C. B. 630. Awards under the special statutes relating to masters and workmen, friendly societies, and savings' banks, are exempted from stamp duty. So in Ireland, where the matter in dispute is under 20*l.* Sched. *post.* 23 & 24 Vic.

[2] By the 23 & 24 Vic. c. 8, s. 1, in schedule thereto, the following stamp duties are imposed upon an award in England and Ireland, and award or decreet arbitral in Scotland, viz:—

Where the amount or value of the matters in dispute shall not exceed £50				£0	2 6
And where it shall exceed £50 and not exceed £100				0	5 0
„	100	„	200	0	10 0
„	200	„	500	0	15 0
„	500	„	750	1	0 0
„	750	„	1000	1	5 0
„	1000 and also all other cases not above provided for			1	15 0

[3] This is generally required by the terms of the submission: strictly, it is accomplished the instant the arbitrator has made his final award. *Henfree v. Bromley*, 6 East, 309. *Macarthur v. Campbell*, 5 B. & Adol. 518. But if there be several arbitrators it will not be published till signed by all. *Little v. Newton*, 2 Man. & G. 351. As to what is a sufficient publication to the parties, *see post* p. 507. "Setting aside Award. (*c*) Within what time application to be made."

trator declares his final mind is a publication.

that the award should be complete as far as the arbitrator is concerned; that he should have done some act whereby he becomes *functus officio*, and has declared his final mind.

(F) *Delivery and Notice of.*

Brown v. Vawser, 4 East, 584.

If it be ready for delivery, though not actually delivered, it is sufficient.[1]

It was stipulated in the submission that the award should be delivered upon a particular day; and held *per Cur.*, "The award is complete, if it be in fact ready for delivery at that day, though no delivery should take place, and although any accident should afterwards occur to prevent the arbitrators from delivering it at all."

(G) *Execution of.*[2]

(H) *Award bad in part.*

Manser v. Heaver, 2 B. & A. 295.

The fact of an award being bad as to part will not necessarily invalidate the whole.[3]

An action for penning back a watercourse was referred, and the arbitrator directed that the verdict should stand for £——; and that the defendant should forthwith cleanse and scour the channel; after which, premising that disputes might arise whether it had been properly performed, he reserved liberty for the plaintiff to bring evidence before him as to that matter, and directed that, if brought before him within two months, the award should not be final, and he enlarged the time for making his further and final award for that period.

The Court held, that the latter part of the award was bad, but might be rejected, and the award stand as to the former part, which was final.

(I) *Construction of.*

Linnem v. Williamsom, Roll. Abr. 254, cited 2 Ld. Raym. 965.

If by manifest implication that appear which, if positively express-

The submission was of all controversies between the parties, and it was awarded, "that one should pay to the other 10*l.*, and should give to the first a general release." It was objected, that if he to whom the 10*l.* were to be paid refused to receive it, he was not bound to give the release, and the award for

[1] And, in general, the arbitrator's duty is merely to have the award ready to be delivered (see *Veale v. Warner*, 1 Saund. 327, b. n. *Joyce v. Haines*, Hard. 399. *Freeman v. Barnard*, 1 Ld. Raym. 247. *Marks v. Marriott*, 1 id. 114); but if the submission expressly direct that it be delivered to the parties by a certain day, it must be delivered on that day. *Parker v. Parker*, Cro-Eliz. 448. Delivering an award to the parties at a different day and place from those directed by the submission will not render it void. *Elborough v. Gates*, 2 Lev. 68. No notice is necessary unless the submission provide for it. *Hodsden v. Harridge*, 2 Saund. 62. *Fraunce's case*, 8 Rep. 92 b. *Brooke v. Mitchell*, 6 Mee. & W. 473.

[2] If the submission do not provide otherwise the arbitrator may make his award with such formalities as he pleases. Russ. on Awards, 242. *See* also *ante*, p. 499.

[3] *See* also *Stone v. Phillips*, 4 Bing. N. C. 37. *Barnardiston v. Fowler*, 10 Mod. 204; 3 Lev. 413. *Cooper v. Pierce*, 1 Ld. Raym. 116. It must, however, be final in itself, and perfectly distinct from the part which is bad. *Candler v. Fuller*, Willes, 62. *Fox v. Smith*, 2 Wils. 267. *Addison v. Gray*, 2 id. 293. *Ingram v. Milnes*, 8 East, 445. *Stone v. Phillips*, 6 Dowl. 249. *Ward v. Hall*, 9 id. 610. *Tomlin v. Mayor of Fordwick*, 5 Ad. & E. 147. *Re Marshall*, 3 Q. B. 878; 3 Gale & D. 253. *Rees v. Waters*, 16 Mee. & W. 263. *Doddington v. Bailward*, 7 Dowl. 640; 7 Scott, 733. *Kendrick v. Davies*, 5 Dowl. 693. *Nicholls v. Jones*, 20 L. J. Ex. 275; 6 id. 373. But when the objectionable part is so connected with the rest of the award that it cannot be severed, the whole award is bad. *Seacombe v. Babb*, 6 Mee. & W. 129. *Tandy v. Tandy*, 9 Dowl. 1044. *Moore v. Butlin*, 2 Nev. & P. 436. *Watkins v. Philpotts*, M'Clel. & Y. 393. *Jackson v. Clarke*, id. 200. *Bonner v. Liddell*, 1 B. & B. 80. *Harries v. Thomas*, 2 Mee. & W. 32. So a defect in the substance of the award will vitiate it. *Johnson v. Wilson*, Willes, 248. *Harris v. Curnow*, 2 Ch. R. 594. And if it appear that the decision of the arbitrator beyond his power has affected his determination as to the other matters, the whole will be set aside. *Marshall v. Dresser*, 3 Q. B. 878. *Rees v. Waters*, 16 Mee. & W. 263.

that reason was only good on one side, and therefore void; but the objection was overruled, and the award held to be good, because, when it is awarded that the one shall pay 10*l.* to the other, it is by necessary implication awarded that the other shall receive it in the same manner as if it had been awarded that the payment should be in satisfaction of all controversies between them, in which case it must be implied that the other should receive it in satisfaction.

ed, would render the award good, that is sufficient to support it.[1]

(K) *Alteration of.*[2]

(L) *Effect of.*

(*a*) *Is a Final Judgment at Law and in Equity.*[3]

(*b*) *May decide Title as between Parties.*

Doe d. Morris v. Rosser, 3 East, 15.

Where parties had referred an action of ejectment, the premises were awarded to one party. A subsequent ejectment was brought between the same parties, concerning the same lands, and the defendant wished at the trial to go into evidence of his title; but the judge refused to allow it.

An award will give a good title, on which to *maintain* ejectment.[4]

Per Cur. The evidence was properly rejected. There is no reason why the defendant should not preclude himself by his own agreement from disputing the title of the opposite party, and the consent of the parties that the award of the arbitrators should be conclusive, as far as concerns the right to the land, is sufficient to bind them in the action of ejectment.

(*c*) *Cannot transfer Land.*[5]

(*d*) *Cannot transfer Personal Property.*

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[1] Awards were anciently construed with the same strictness as judgments (Brownl. 92; Yelv. 98; Roll. Abr. 11, 15, 26; Cro. Jac. 149; Palm. 108; 3 Bulst. 16, 67; Hutt. 9), but it is now settled that they ought to be interpreted according to the intent of the parties, and the meaning of the words to be collected from the whole of the instrument taken collectively, and that every reasonable intendment should be made in support of the award. *Templeman v. Reed*, 9 Dowl. 962; *Stonehaven v. Farrar*, 9 Jur. 203; Bac. Ab. Arb. F. *Freeman v. Bernard*, 1 Salk. 69. Russ. on Awards, 448–674, 2d ed.

[2] After the award is once executed, the arbitrator cannot alter it any more than a mere stranger. *Brooke v. Mitchell*, 6 Mee. & W. 477. *Irvine v. Elnon*, 8 East, 54. *Henfree v. Bromley*, id. 6, 309. *Ward v. Dean*, 3 B. & Adol. 234. *Hall v. Hinds*, 2 Man. & G. 847. Nor can he, after it is once made, give any certificate for costs. *Greves v. Garton*, 15 Mee. & W. 186. It would seem, however, that a mistake in an immaterial part might be corrected. *Trew v. Burton*, 1 C. & M. 533, and that an amendment might be made by consent of both parties. *Ex parte Carston*, 7 D. & R. 774. The Court has no power to alter an award. *Hall v. Alderson*, 2 Bing. 476. *Wood v. Duncan*, 7 Dowl. 91. *Moore v. Batlin*, 7 Ad. & E. 595.

[3] A valid award or arbitrator's certificate is a conclusive and final judgment in the matters submitted, both at law and equity. It binds the rights of the parties for all time without appeal (3 Bing. N. C. 219; 1 M'Queen, H. L. 714, and cases cited. Russ. on Awards, 471 n. a.); but this only applies to matters in difference brought before the arbitrator. 4 T. R. 146; id. 147; 1 Dowl. P. C. 400. An order of reference contained a clause restraining either party from bringing or prosecuting any action or suit in any court concerning the premises referred:—*Held*, that the finding of the arbitrator was conclusive, and that the plaintiff could not afterwards move for judgment *non obstante veredicto*. *Britt v. Pushley*, 5 D. & L. 97; 1 Ex. 64; 16 L. J. Ex. 240.

[4] *See* 1 Roll. Ab. 242, E. 10; 1 Com. Dig. Arb. D. 3; 19 Hen. 6, 6 b.; 22 id. c. 46; 9 E. 444; 9 Co. 78; Roll. Arb. E. 2, e. K. 15; 8 East, 38; Adams, Eject. 82, 2d edit. *Trusloe v. Yewre*, Cro. Eliz. 223; 2 Leon. 104. But this is only as between parties, and it will not give title as against a stranger. *Thorpe v. Eyre*, 1 Ad. & E. 926.

[5] An arbitrator cannot by his award transfer the right to an interest in lands from one to another, whether the submission be by deed or not (Roll. Ab. Arb. A. *Marks v. Marriott*, 1 Ld. Raym. 114. *Henry v. Kirwan*, 9 Ir. C. L. Rep. 495); neither can he make partition of land between tenants-in-common by his award, for the land will not pass by it, but he must direct the parties to execute conveyances to each other of the allotted portions. *Johnson v. Wilson*, Willes, 248. *See* Cro. Eliz. 223; Kyd. on Arbitration, 61, 2d ed. An award made under an act of parliament, differing from an award under a private submission, often has the effect of transferring property of its own force, without any subsequent act of the parties. Russ. on Awards, 477.

HUNTER v. RICE, 15 East, 100.

Property in a chattel cannot be transferred by the mere force of an award.

All matters in difference between a landlord and tenant having been submitted to arbitration, it was awarded, amongst other things, that the latter should deliver up to the former a stack of hay upon the premises, at a certain price to be paid for it by the landlord. The tenant refused to accept the money tendered, and to deliver the hay, upon which the landlord brought an action of trover for it.

Per Cur. The action is not maintainable. The remedy lies upon the award or the submission. If the tenant had accepted the money tendered, such acceptance would have been a ratification of the award, and an assent on his part to the transfer of the property; without that it cannot be said to be transferred by the mere force of the award. *See* 1 Camp. 513 ; Russ. 477.

(M) *Consequences of no Award being made as to part.*[1]

(N) *What is a Performance or Breach of the Award.*[2]

(O) *Judgment and Verdict in pursuance of.*[3]

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[1] If an arbitrator determine all matters except one, which in his award he particularly excepts out of his decision, and states he has not decided, and give liberty to one of the parties to prosecute that matter if he please, the award will be bad *in toto*, for it will thus be appearing on its very face that he has not performed his duty of deciding every question. *Bradford v. Bryan*, Willes, 268. So where the arbitrators stated in their award that they had declined to arbitrate respecting a certain claim to an annuity, as they thought they were prevented from so doing by reason of a suit pending in Chancery concerning it, the Court held, that as the reason for not deciding was wholly untenable, the award was clearly defective in this respect, and therefore void altogether. *Bowes v. Fernie*, 4 Mylne & C. 150. See *Browne v. Deverell*, Dyer, 216 a.

But an award that one should release to the other all actions and debts, except bonds made for the performance of former awards, was held a good award, as amounting to an award that the bonds should stand in full force, and not an excepting them from decision. *Sallows v. Girling*, Cro. Jac. 277. So an award that all suits and actions should cease, and that all matters should be determined except concerning a certain bond which was to stand in full force, was held a sufficient determination concerning all the controversies, and no disclaimers to meddle with any. *Berry v. Penring*, Cro. Jac. 399.

[2] Where several things are ordered to be done by each party, the party seeking to compel performance of the award, either by action or by attachment, must have duly performed or tendered performance of all the conditions precedent and of acts concurrent on his part to be performed. Upon an award for payment of money at a particular time and place, the party who is to pay ought to come and tender the money at the time and place, even if the other party be not there to receive it. *Doyley v. Burton*, 1 Ld. Raym. 533. *Furser v. Prowd*, Cro. Jac. 423. And where no time or place is mentioned, the money awarded is payable on request. Where a defendant is ordered to pay the plaintiff on a specified day his costs of suit, to be taxed by the proper officer, it is incumbent upon the defendant to procure them to be taxed ready for payment on the day. *Candler v. Fuller*, Willes, 62. *Parsons v. Parsons*, Cro. Eliz. 211. An award directing all suits between A. and B. to cease, is not broken by A. prosecuting a suit against B. and others jointly. 10 Mod. 204. The Court has no power to order an award to be delivered up to be cancelled on payment of the amount awarded. *Symonds v. Milles*, 8 Taunt. 526. If any part of an award be bad, as being an excess of the arbitrator's authority, or bad for uncertainty or illegality, it is sufficient to perform that part of the award which is good; for example, an award of a release to the time of the award is well performed by giving a release to the time of the submission. So in all cases a substantial compliance with the terms of the award is sufficient, and as a reasonable construction will be given to the award if it can bear it, rather than one that is unreasonable, so the parties will be held to perform the award in a reasonable and possible manner, if the award admits of two constructions. Watson on Awards, 210, 211.

[3] Where a verdict has been taken, subject to an award, no rule for judgment is necessary. R. 9, H. T. 1853, r. 55. An arbitrator, unless a verdict be taken on the reference of a cause, or he be expressly authorised so to do, has no power to award that a verdict should be entered. *Hutchinson v. Blackwell*, 8 Bing. 331; S. C. 1 Dowl. P. C. 267. *Jackson v. Clarke*, M'Clel. & Y. 200. In one case, *Littledale, J.*, held that where an arbitrator, under a reference by agreement, awarded that a verdict should be entered for a sum certain; that this was equivalent to an award that the defendant should pay that sum, and granted an attachment for its non-payment (1 Dowl. P.

(P) *Remedies on.*
(*a*) *By Action.*
(1) *In what Cases,*[1]
(2) *Defence to.*[2]
(*b*) *By Attachment.*
(1) *In what Cases.*[3]
(2) *At whose Instance.*[4]
(3) *Against whom.*[5]

C. 489); but this opinion has been overruled. *Dowlon v. Brett*, 2 Ad. & E. 344. *Hayward v. Phillips*, 6 id. 119. See *Low v. Blackburn*, 14 C. B. 77. *Mays v. Cannel*, 24 L. J. C. P. 41. And if the unauthorised direction of a verdict can be separated from other parts of the award, it may be rejected as surplusage. 1 C. B. 128; 2 D. & L. 936. When a day certain is fixed in the award for the payment of the money, although judgment may be entered, yet if execution be taken out before that day, the Court will set the execution aside for irregularity. *Callard v. Paterson*, 4 Taunt. 319.

[1] If the submission cannot be made a rule of court, the only remedy is by action. But when it proceeds, the case may be by action or attachment, and sometimes by execution on the rule of court. Where the arbitration was under a rule of court or judge's order of reference, the remedy is by attachment, or sometimes by action. If a verdict was taken at Nisi Prius, the remedy may be by entering up judgment and issuing execution. The action may be on the deed or agreement between the parties for performance of the award. 2 Saund. 626. An action of debt lies against an executor or administrator (3 & 4 Wm. 4, c. 42, s. 14) in such a case. *See* Precedents, B. & J. 39–42.

[2] The defendant in the action may demur if there is any defect in the award on the face of the declaration (*Fisher v. Pimbley*, 11 East, 188); or if there has been an excess of authority, or if there is uncertainty, &c. which objections are not apparent *ex facie*, the defendant may plead such matter. *Carpey v. Aitcheson*, 2 B. & C. 170; 3 D. & R. 433. *Perry v. Mitchell*, 12 Mee. & W. 792. *King v. Bowen*, 8 id. 625; 1 Dowl. N. S. 21. *Dresser v. Stansfield*, 14 Mee. & W. 822. *Williams v. Wilson*, 9 Ex. 90. *Armitage v. Coates*, 4 id. 641. *Adcock v. Wood*, 2 L., M. & P. 501. Where the defendant set out his award in the plea, and demurred to the declaration, it was held that he should not have demurred but have allowed the plaintiff to traverse or demur to the plea. *Sim v. Edmonds*, 15 C. B. 240.

[3] Where the submission has been made a rule of court an attachment may be obtained against a party wilfully disobeying the award. The attachment will, however, be refused if the party has done all in his power to obey it (*Dodington v. Bailward*, 7 Dowl. 640); or if there are conditions precedent to be discharged by the opposite party. (*Standly v. Hemmington*, 6 Taunt. 56. *Doe d. Clark v. Stilwell*, 8 Ad. & E. 648; 3 Nev. & P. 701. *Davies v. Pratt*, 17 C. B. 183); or if the award is of doubtful validity (*Tattersall v. Parkinson*, 2 Ex. 342); or if a set-off has arisen since the award (*Rees v. Rees*, 25 L. J. Q. B. 352); or if the award does not directly order the party to pay the money. *Re Seaward*, 7 Dowl. 318. *Baker v. Cotterill*, 7 D. & L. 20. See *Donlan v. Brett*, 4 Nev. & M. 854. *Graham v. D'Arcy*, 6 C. B. 537; 6 D. & L. 305. *Lees v. Hartley*, 8 Dowl. 883. The Court has refused an attachment for not paying interest due after the award (*Churcher v. Stringer*, 2 B. & Adol. 777); and for not paying money on a Sunday. *Hobdell v. Miller*, 2 Scott, N. R. 163. And if an action on the award is pending the Court will not grant an attachment. *Badley v. Loveday*, 1 B. & P. 81 (see *Baker v. Wells*, 9 Dowl. 323. *Mondell v. Tyrrell*, 9 Mee. & W. 217. *R. v. Hemsworth*, 3 C. B. 745); but an attachment may be made absolute on terms as to discontinuing the action. *Paull v. Paull*, 2 Dowl. 340. So an attachment has been set aside on terms, an action having been afterwards brought. *Earl of Lonsdale v. Whinnay*, 3 id. 268; 1 C., M. & R. 591.

[4] An attachment will not be granted on the application of a stranger to the award (*Re Skeete*, 7 Dowl. 618. *Dunn v. West*, 10 C. B. 420. *Brearey v. Kemp*, 24 L. J. Q. B. 310. *Lloyd v. Mansell*, 22 id. 110); or if it be the executor of a party who applies (*R. v. Maffey*, 1 Dowl. 538 : *see* 17 Taunt. 578); yet it has been granted when a married woman applied, and though the money had been paid to her husband. *Wynne v. Wynne*, 4 Man. & G. 253; 1 Dowl. N. S. 723. An attachment may be granted against a party out of the jurisdiction (*Hopcraft v. Fermor*, 1 Moore, 424; 1 Bing. 268); or against one of several parties. *Richmond v. Parkinson*, 3 Dowl. 703.

[5] The Court will refuse an attachment against a peer or member of the House of Commons (*Walker v. Earl Grosvenor*, 7 T. R. 171. *Catmur v. Knatchbull*, 7 id. 448); also against the executor or administrator of the party entering into the reference. *Newton v. Walker*, Willes, 315. An attachment does not lie against a corporation for non-performance of an award. *Guildford v. Mills*, 2 Keb. 1. *Anon.* T. Raym. 152. Grant on Corp. 284, 5. If any process of contempt can issue when a corporation is in default, it must be against the individual members of the corporation. *London v. Lynn*, 1 H. Black. 209.

(4) *Submission must be made a Rule of Court.*[1]
(5) *Service of Rule, Demand of Performance.*[2]
(6) *What may be shown for Cause.*[3]

[1] Before the attachment can be applied for the submission must be made a rule of court, together with any enlargements of time. See *Re Doddington*, 7 Scott, 733; 7 Dowl. 648. *Coates v. Tonge Burial Board*, 5 H. & N. 523; 29 L. J. Ex. 293. In Equity, *see* 6 Jur. N. S. 1282; 2 Gifford, 272.

[2] The party must then be served with a copy of the rule, of the award, and of the *allocatur*, if there is one, and the originals must be shown to the party at the time of service, not by delivering them, but so that the party may be able to read them. *Lloyd v. Harris*, 8 C. B. 63. Personal service of the above documents is in general indispensable (*Richmond v. Parkinson*, 3 Dowl. 703. *Re Lowe*, 4 B. & Adol. 412), unless actual knowledge can be fixed on the party. *Re Bower*, 1 B. & C. 264. *Smith v. Troup*, 7 C. B. 757. *Hawkins v. Benton*, 2 D. & L. 465. Over and above service as above stated there must be a distinct demand made upon the party to pay the money, or performance of the specific thing ordered by the award. *Swinfen v. Swinfen*, 18 C. B. 405. The demand is sufficient if made by one of several parties entitled to the performance. *Baily v. Curling*, 20 L. J. Q. B. 235. *Drew v. Woolcock*, 24 id. 22); or if made by a person showing a letter of attorney from the party. *Laugher v. Laugher*, 1 Dowl. 284. *Ex-parte Fortescue*, 2 Dowl. 448. *King v. Packwood*, id. 570. The party's attorney may, however, demand costs awarded without a letter of attorney. *Imann v. Hill*, 4 Mee. & W. 7. So he may demand a sum expressly payable to the party "or his attorney." *Hare v. Fleay*, 2 L., M. & P. 393. A power of attorney to demand execution of a deed has been dispensed with. *Reg. v. Grayson*, 2 Smith, 61. *Tebbutt v. Ambler*, 2 Dowl. N. S. 677. The exact thing should be demanded, and if part of the award is void, the demand should be confined accordingly (*Strutt v. Rogers*, 7 Taunt. 213. *Poyner v. Hatton*, 7 Mee. & W. 211. *Tattersall v. Parkinson*, 2 Ex. 342. *Re Earl of Cardigan*, 22 L. J. Q. B. 83); and if a chattel is demanded, it should be identified by any marks it bears. *Hemsworth v. Brian*, 1 C. B. 131; 2 D. & L. 844.

An affidavit must be produced in support of the application setting forth the above requisites. If there be no cause in court the affidavit need not be entitled, or may be entitled "in the matter of A. B. and C. D." *Anon.* 1 Smith, 358. *Whitehead v. Firth*, 12 East, 166. *Re Houghton*, 32 M. & P. 452. If there is a cause in court it is in general so entitled. *Doe v. Stilwell*, 6 Dowl. 305. The original award is usually annexed to the affidavit. *Davis v. Potter*, 21 L. J. Q. B. 134. Any delay should be accounted for; conditions precedent should be stated to have been performed; enlargements to have been duly made, &c. The affidavit need not state the execution of the award within the time limited, if this otherwise appear *ex facie*. *Higgins v. Street*, 25 L. J. Ex. 285.

Form of Affidavit of Execution of Submission.

In the Q. B. [C. P., *or* Exch. of P.]
I, W. P., of make oath and say, that in I was present, and then saw C. D. duly execute the agreement hereunto annexed, marked A.; and that the said C. D. did in my presence subscribe his name thereto, and that the name C. D. at the foot thereof is the proper handwriting of the said C. D.; and the name P. W. subscribed thereto as the witness thereof is my own handwriting.

Form of Affidavit of Execution of Award.

—— that I did, in see A. A. of sign and publish his award, exhibited to me at the time of swearing this my affidavit, and marked A.; and that the name A. A. subscribed thereto is the proper handwriting of the said A. A.; and the name P. A. subscribed thereto, as a witness attesting the execution of the said award, is my own handwriting.

Form of Affidavit verifying a Copy of Award.

—— that I, on received from D. A., the attorney for the above-named C. D., a copy of the award made by A. A., with the matter above-mentioned, and which said copy of the said award is hereto annexed, marked A., and which said award was taken up, and is now in the possession of the said D. A., or such attorney aforesaid, or of the said C. D., as I verily believe.

Form of Affidavit of due Enlargement.

—— that the time for making the said award was on duly enlarged to by the writing under the hand of the said A. A., endorsed on the said and that the name A. A. subscribed thereto is the proper handwriting of the said A. A.; and I further say that the said award was made and published in and within the enlarged time for making and publishing the same.

Counsel with the above affidavit moves for a rule for an attachment for the non-performance of the award. The rule is *nisi* only (*Thorpe v. Billigsly*, 2 Chit. Rep. 57. *Daniel v. Beedle*, 2 Scott, N. R. 155; 1 Man. & G. 960), and it seems should be drawn up on reading the rule making the submission a rule of court. *Brown v. Collyer*, 20 L. J. Q. B. 426.

[3] The other party may show cause by alleging a defect on the face of the award, even though the time for setting it aside has elapsed (*Pedley v. Goddard*, 7 T. R. 73); but matter extrinsic is not allowed to be shown as cause (see *Wright v. Graham*, 3 Ex. 131. *Re Masters v. Butler*, 13 Q. B. 341. *Smith*

(*c*) *By Execution.*

(1) *Under 1 & 2 Vic. c. 110.*[1]

(2) *Where a Verdict has been taken.*[2]

(*d*) *Enforcing Possession of Lands under Award.*[3]

v. Troup, 7 C. B. 757), the proper course in such a case being to set aside the award. *Davis v. Pratt*, 17 C. B. 183. There are, however, exceptions to this rule. *Lord v. Lord*, 5 E. & B. 404. Corruption in the arbitrator cannot be shown as cause, but is ground for setting aside the award (*Brazier v. Briant*, 3 Bing. 167); nor can an irregularity in making an enlargement (*Barton v. Ranson*, 6 Dowl. 384); nor a cross-demand (*Smith v. Johnson*, 15 East, 213); nor a misrecital in the award. *Paull v. Paull*, 2 Dowl. 340; 2 C. & M. 235. If the affidavits used in moving for the rule *nisi* are defective, a second application on amended affidavits is seldom allowed (*Re Butler*, 13 Q. B. 341), and the party showing cause may take the objection, and will be allowed to enter into the merits, so as to ask that the rule be discharged with costs. *Re Chamberlain*, 8 Dowl. 686. If the pleadings in the cause are referred to, they should be annexed to the affidavit. *Rowe v. Sawyer*, 7 id. 691.

If no cause is shown the rule will be absolute, as a matter of course, on an affidavit of service of the rule *nisi*. The affidavit must show personal service, and not merely service on the wife (*Mason v. Muggeridge*, 18 C. B. 642), unless it is alleged the husband received the rule. *Rolle v. Williams*, 6 Ex. 508. The affidavit is entitled like the rule *nisi*. *Re Houghton*, 2 M. & P. 542.

When the rule is made absolute, it must be drawn up, and the attachment will issue. Imprisonment under the attachment for contempt is no satisfaction of the award. *R. v. Hemsworth*, 3 C. B. 745.

[1] To obtain execution a rule of court must be obtained, and made absolute for the payment of the money specified in the award, though it is not necessary that the award itself order the payment. *Baker v. Cottrill*, 7 D. & L. 20. Such a rule will in general be obtainable where an attachment will lie for non-payment (*Creswick v. Harrison*, 1 L., M. & P. 721. *Re Laing*, 13 C. B. 276), and therefore not if the award is of doubtful validity. *Mackenzie v. Sligo, &c. Railway Co.* 9 C. B. 251. A copy of the rule of court and of the award must be served personally, and a demand made for payment, and the affidavit necessary is in general the same as in case of attachment. It seems the rule for payment of the money will be granted before the time for setting aside the award has elapsed. *Hare v. Fleay*, 2 L., M. & P. 392. The rule is *nisi* only. *Winwood v. Hoult*, 3 D. & L. 85; 14 Mee. & W. 197. It may be moved on the last day of term (*Leble v. Carrell*, 24 L. J. Q. B. 48), and may be made returnable at chambers. *Drew v. Woolcock*, id. 22. The rule does not state that the party obtaining it foregoes the remedy by attachment. *Burton v. Mendizabel*, 1 Dowl. N. S. 336. If the defendant reside in the country, it will not in general be made returnable sooner than six days. *Arthur v. Marshall*, 2 D. & L. 376; 13 M. & Rob. 465. The rule *nisi* must in general be personally served. *Jordan v. Berwick*, 1 Dowl. N. S. 271. *Winwood v. Holt*, 3 D. & L. 85. Cause is shown as in case of attachment (*ante*, p. 504). The rule being made absolute, execution may issue. 1 & 2 Vic. c. 110, s. 18. *See* Rules and Motions.

[2] When at Nisi Prius a verdict is taken subject to a reference, the party in whose favour the arbitrator decides by his award or certificate may enter up judgment, and thereafter issue execution as usual. *R. v. Gore*, 8 Dowl. 103. For this purpose the party takes the award or certificate to the associate, who either himself enters the verdict in the *postea*, or gives out the record when the *postea* is entered by the party. The *postea* is then taken to the master when the costs are taxed, judgment signed, and execution issued as after a verdict in ordinary cases. No leave of the court is necessary to sign judgment. *Lee v. Lingard*, 1 East, 401. But if any time is specified by the award for payment, judgment should not be signed before. *Callard v. Paterson*, 4 Taunt. 319. When, however, the award is lost (*Hill v. Townshend*, 3 Saund. 45), leave must be obtained to authorise judgment on a copy properly verified by affidavit. *Platt v. Hall*, 2 Mee. & W. 391. If the verdict was to be subject to a certificate, judgment may be signed as of the date of trial, as the certificate relates back to that time. *Cromer v. Chart*, 15 Mee. & W. 310; 3 D. & L. 672. When the party died after the verdict at the trial, but before the award, the two terms for signing judgment under 17 Car. 2, were held to count from the date when the award was made. *Heathcote v. Wing*, 11 Ex. 355.

[3] By the 17 & 18 Vict. c. 125, s. 16, when any award made on any such submission, document (*i. e. such as may be made a rule of court*), or order of reference as aforesaid, directs that possession of any lands or tenements capable of being the subject of an action of ejectment shall be delivered to any party, either forthwith or at any future time, or that any such party is entitled to the possession of any such lands or tenements, it shall be lawful for the court of which the document authorising the reference is or is made a rule or order, to order any party to the reference who shall be in the possession of any such lands and tenements, or any person in possession of the same, claiming under or put in possession by him since the making of the document authorising the reference, to deliver possession of the same to the party entitled thereto, pursuant to the award; and such rule or order to deliver possession

(*f*) *By Mandamus.*[1]

(Q) *Referring back Matters to Arbitrator.*

(*a*) *In what Cases.*

By 17 & 18 Vic., c. 125, sect. 8, "in any case where reference shall be made to arbitration as aforesaid, the court or a judge shall have power at any time, and from time to time, to remit the matters referred, or any or either of them, to the re-consideration and re-determination of the said arbitrator, upon such terms as to costs and otherwise as to the said court or judge may seem proper."[2]

(*b*) *When Application to be made.*[3]

(*c*) *Proceedings on Reference back.*[4]

(*d*) *Time for making Amended Award.*[5]

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shall have the effect of a judgment in ejectment against every such party or person named in it, and execution may issue, and possession shall be delivered by the sheriff as on a judgment in ejectment.

Form of Writ of Habere Facias Possessionem *on a Rule to deliver Possession of Land pursuant to an Award.* Rule (Pr.) M. V. 1854.

VICTORIA, &c., to the sheriff of greeting. We command you that you omit not by reason of any liberty of your county, but that you enter the same, and without delay you cause A. B. to have possession of [*here describe the lands and tenements, as in the rule for the delivery of possession*] and which lands and tenements by a rule of our Court of Q. B. [*or* C. P., *or* Exch. of Pleas], dated the day of 18 made pursuant to the 16th section of the Common Law Procedure Act, 1854, E. F. [*the party named in the rule*] was ordered to deliver possession to the said A. B., and in what manner you have executed this our writ make appear to us [*or in* C. P. to the Justices, *or in* Exch. to the Barons of the Exchequer] at Westminster, immediately after the execution hereof, and have you there then this writ.

Witness at Westminster, the day of in the year of our Lord

[1] If an award order a public officer of a company, in whose name the company are to sue and be sued, but who is exempted from personal liability to pay money or costs in respect of an action referred, if the act give no power of taking out execution against the goods of the company, and no other mode exists of enforcing payment, a mandamus will lie to the treasurer and directors, commanding them to pay the sum awarded. *R. v. St. Katherine's Dock Company*, 4 B. & Adol. 360, cited 6 Ad. and E. 365; Russ. Arb. 632, 2d. ed.; Tapping on *Mandamus*, 45.

[2] In all cases where the submission has been made a rule of court, the court or a judge has power to remit the matters referred to the re-consideration of the arbitrator, the section in the text applying to references by consent as well as to compulsory references under the statute. *In re Morris v. Morris*, 25 L. J. Q. B. 261.

The above section of the 17 & 18 Vic. c. 125, gives the court power to remit the matters to the arbitrator, where there is no clause to that effect in the order of reference, in cases only where they might before the statute have remitted such matters where there was such a clause. *Hodgkinson v. Fernie*, 27 L. J. C. P. 66; 21 Jur. 818. The court, therefore, has no greater power to remit a case where the reference was compulsory than where it was by consent. *Hogg v. Burgess*, 22 Jur. 668; 6 W. R. 504. It will be referred back if there has been a mistake or accidental omission. *Howell v. Clements*, 7 Man. & G. 1044; 8 Scott, N. R. 851; 1 C. B. 128. *Burnand v. Wainwright*, 1 L., M. & P. 455. *Davies v. Pratt*, 16 C. B. 586; 17 id. 103. See *Webber v. Lee*, 1 D. & L. 584.

[3] The application should be made immediately after, but not before, a motion to set aside. *Davies v. Pratt*, 16 C. B. 162. *Doe d. Banks v. Holmes*, 12 Q. B. 951. *Doe d. Mays v. Cannell*, 22 L. J. Q. B. 321. See *Johnston v. Latham*, 2 L., M. & P. 205.

[4] The arbitrator may be bound to rehear the case when remitted. *Nickalls v. Warren*, 6 Q. B. 615; 2 D. & L. 549. When he is not bound to rehear (*Bird v. Penrice*, 6 Mee. & W. 764. *Ex-parte Huntley*, 1 E. & B. 787. *Re Morris & Morris*, 25 L. J. Q. B. 261) it seems unnecessary to give notice to the parties to attend. *Hewett v. Clements*, 1 C. B. 128; 8 Scott, N. R. 851. *Baston v. Hunter*, 16 Mee. & W. 672. Sometimes only a part of the award is referred back. *Johnson v. Latham*, 2 L., M. & P. 205.

[5] The 17 & 18 Vic. c. 125, enacts that "the arbitrator acting under any such document or compulsory order of reference as aforesaid, or under any order *referring the award back*, shall make his award under his hand; and unless such document or order respectively shall contain a different limit of time, within three months after he shall have been appointed, and shall have entered on the reference, or shall have been called upon to act by a notice in writing from any party; but the parties may by consent in writing enlarge the time for making the award."

The award need not recite the order referring it back. *Baker v. Hunter*, 16 Mee.

(R) *Setting aside Award.*

(*a*) *In what Cases.*[1]

(*b*) *Submission must be made a Rule of Court.*[2]

(*c*) *Within what time Application to be made.*[3]

& W. 672. The second reference is part of the original arbitration, and the arbitrator has the same power as to the costs of the second as to the first. A second taxation of costs may be necessary. *Johnson v. Latham*, 2 L., M. & P. 205. *Macrae v. M'Lean*, 2 E. & B. 946. The party succeeding in the second can charge the other with that part of the arbitrator's charges of the first, which were useful to the second. *Blair v. Jones*, 6 Ex. 701.

[1] Wherever an award can be enforced by a party without any application to the court, the other party, if there is any defect, should apply to set it aside. Thus, if the award order the verdict to be entered for one party, he can sign judgment and issue execution, unless stopped. *Doe d. Turnbull v. Brown*, 5 B. & C. 385. *Wilson v. Thorpe*, 6 Mee. & W. 723. *Harrison v. Greenwood*, 3 D. & L. 353. Where, however, the award can only be enforced by action or application to the court, as such suit must necessarily fail if the award is void, the court will not interfere to set it aside (id.); yet this has been done in the case of misconduct in the arbitrator. *Lucas v. Wilson*, 2 Burr. 701. *Braddick v. Thompson*, 8 East, 344. *Brazin v. Bryant*, 3 Bing. 167. *Re Masters v. Butler*, 13 Q. B. 341. *Smith v. Troup*, 7 C. B. 757. See *Hall v. Hinds*, 3 Scott, N. R. 250. Sometimes it is useless to try to set aside the award, if there is power expressly given to the court to refer back the award to the arbitrator, as this course will enable the defect to be remedied. When, however, the submission cannot be made a rule of court, the court has no power to set aside the award.

The court will never allow the merits of the case to be entered into on an application to set aside. *Lucas v. Wilson*, 2 Bing. 701. *Williams v. Mousdale*, 7 Mee. & W. 134: *Phillips v. Edwards*, 1 D. & L. 463; *Oldfield v. Price*, 6 C. B. (N. S.) 539), but presume in favour of the arbitrator (*Sharman v. Bell*, 5 M. & S. 504. *Price v. Price*, 9 Dowl. 334. *Archer v. Owen*, id. 341. *Re Templeman v. Reed*, id. 966), unless there is strong evidence of corruption and misconduct, or of a manifest oversight on his part. *Hutchinson v. Shepperton*, 13 Q. B. 955. Thus, it is not enough to allege a mere mistake in point of law on the part of the arbitrator (*Wade v. Malpas*, 2 Dowl. 638. *Fuller v. Fenwick*, 3 C. B. 705. *Huntig v. Ralling*, 8 Dowl. 879. *Ashton v. Poynter*, 3 id. 201), unless it is manifest on the face of the award: or mere favouritism or interest (*Morgan v. Morgan*, 1 Dowl. 611. *Crossley v. Clay*, 5 C. B. 581); or that a remark made by the arbitrator induced one of the parties not to adduce witnesses (but see *Wynne v. Wynne*, 3 Scott, N. R. 435; 9 Dowl. 901); or that a material witness was interested (*Scales v. East London Waterworks Company*, 1 Hodg. 91); or that there was surprise (*Solomon v. Solomon*, 28 L. J. Ex. 129. *Tryer v. Shaw*, 27 L. J. Ex. 320). The court will not interfere if the validity of the award is merely doubtful, and the question could be tried in an action (*Richardson v. Nourse*, 3 B. & A. 237. *Re Hare*, 8 Dowl. 71, and Scott, 371. *Taylor v. Shuttleworth*, 8 Dowl. 281); nor if the bad part of the award is separable from the rest (*Re Goddard*, 1 L., M. & P. 25). Where an award or reference was improperly obtained, the application should be, not to set aside the award, but the order of reference itself, and this should be done promptly. *Sackell v. Owen*, 2 Chit. R. 39.

Sometimes the party who seeks to set aside the award may have precluded himself from doing so, by waiving the objections. Thus, he may waive an irregularity in examining witnesses *ex-parte*, or the arbitrator being interested (*Drew v. Drew*, 25 L. T. 282); or that certain infants were improperly parties to the reference (*Jones v. Powell*, 6 Dowl. 483. *Re Warner*, 2 D. & L. 148); so, if he accept costs under the award, he cannot set it aside (*Kennard v. Harris*, 4 D. & R. 272; 2 B. & C. 801: but *see Hayward v. Phillips*, 6 Ad. & E. 119; 1 Nev. & P. 288); nor if the mistake alleged to be made was in his own favour. *Moore v. Butlin*, 2 Nev. & P. 436. *Taylor v. Shuttleworth*, 8 Scott, 565; 8 Dowl. 281.

[2] Before applying to set aside the award the submission must be made a rule of court. *See ante*, p. 460. A rule *nisi* is then moved for, to show cause why the award should not be set aside.

[3] In general, where the arbitration is under a rule or order of reference, the application to set aside the award should be made before the last day of the term immediately following the publication of the award. *Potter v. Newman*, 4 Dowl. 504. *Brooke v. Mitchell*, 6 Mee. & W. 473; 8 Dowl. 392; *Dodd v. Platt*, 6 Jur. N. S. 631. So if the arbitration is under a submission which may be made a rule of court, and the award was procured by corruption or undue means. 9 & 10 Wm. 3, c. 15, s. 2. If the award was made during term, then the party has till the last day but one of next term. *Allenby v. Proudlock*, 4 Dowl. 54. *Re Smith v. Blake*, 8 id. 133. *Hobard v. Miller*, 2 Scott, N. R. 165. *Re Evans*, 4 Man. & G. 767. The Court will not entertain the application after the above period (*Reynolds v. Askew*, 5 Dowl. 682. *Re Smith v. Blake*, 8 id. 133), as on the last day of term (*Re Holloway v. Monk*, 8 id. 138), even though the arbitrator would not give up the award without payment of an exorbitant sum. *Macarthur v. Campbell*, 5

(*d*) *Objections to be stated in Rule.*[1]
(*e*) *Rule is a Stay of Proceedings.*[2]
(*f*) *Showing Cause.*[3]
(*g*) *Costs of Application.*[4]

B. & A. 518. It is no excuse for applying later that one of the parties had become insolvent (*Hobbs v. Ferrars*, 8 Dowl. 779; but see *Hemsworth v. Brian*, 8 Scott, N. R. 842); or that the other did not wish to pursue the award (*Worrall v. Deane*, 2 Dowl. 261), or that the party applying was too ill to attend to business. *Guadiano v. Brown*, 2 Jur. N. S. 338. The same rule applies if a cause is referred by order of Nisi Prius. *Hayward v. Phillips*, 1 Nev. & P. 288. *Allenby v. Proudlock*, 4 Dowl. 54. *Jones v. Ives*, 20 L. J. C. P. 69. Where a verdict is taken at Nisi Prius, and the order of Nisi Prius merely substitutes an arbitrator for the jury, the application should be within the same time as a motion for a new trial. *Paxton v. Great North of England Railway Co.* 8 Q. B. 938; 3 D. & L. 773. *Riccard v. Kingdon*, 1 B. C. Ca. 122. Where the arbitrator has power to certify, and does so in vacation, a judge may stay proceedings till the application be made. *Crouch v. Churt*, 15 Mee. & W. 310. An order staying proceedings till security for costs be given prevents the application to set aside the award. *Badham v. Badham*, 1 Ex. 824. Where judgment has been entered upon a defective award, the application to set aside the judgment may be made later than the periods before mentioned. *Doe d. Madkin v. Horner*, 8 Ad. & E. 235. *Brooks v. Parsons*, 1 D. & L. 691. *Wilcox v. Wilcox*, 19 L. J. Ex. 27); though in that case only such defects as are on the face of the award will be looked at. (Id.)

By the 18 & 19 Vic. c. 125, sect. 9, "all applications to set aside any award made on a compulsory reference under this act, shall and may be made within the first seven days of the term next following the publication of the award to the parties, whether made in vacation or term; and if no such application is made, or if no rule is granted thereon, or if any rule granted thereon is afterwards discharged, such award shall be final between the parties."

On the motion an affidavit is necessarily entitled in the court, and if there is a cause entitled in the cause, it should verify a copy of the award annexed thereto, though it need not allege that the copy has been compared with the original (*Hawkyard v. Stocks*, 2 D. & L. 936); and it has been held enough that it alleged that the paper writing was delivered to the deponent as a true copy. *Hayward v. Phillip*, 6 Ad. & E. 119. *Lund v. Hudson*, 1 D. & L. 236. If there are pleadings, and they are necessary, a copy of these should also be verified. *Allen v. Lowe*, 4 Q. B. 66. *See* as to C. P. *Sherry v. Oke*, 3 Dowl. 349. *Dicas v. Jay*, 5 Bing. 281; 2 M. & P. 448. So if the award omits matters, the affidavit should set forth such matters, and allege that they were discussed before the arbitrator. *Hancock v. Reade*, 15 Jur. 1036.

[1] When a rule to show cause is obtained to set aside an award, the several objections thereto intended to be insisted upon at the time of moving to make such rule absolute, shall be stated in the rule to show cause. Rule (Pr.) 169, H. T. 1853. The objections must be specific, and not general: thus, that the arbitrator "exceeded his authority," is too wide, and it must be stated in what respect. *Boodle v. Davies*, 4 Nev. & M. 788. *Grey v. Leaf*, 8 Dowl. 654. *Staples v. Hay*, 1 D. & L. 711. Counsel should indorse the grounds of motion on his brief before handing it in. *Whatley v. Moreland*, 2 Dowl. 249; 4 Tyr. 255. The objections should be stated, though all the arbitrator had to determine was how a verdict was to be entered (*Allenby v. Proudlock*, 4 Dowl. 54); but they need not be stated if the motion is to set aside the judgment. *Manser v. Heaver*, 3 B. & Adol. 295.

The rule *nisi* is drawn up on reading the award itself, or a copy thereof. *Sherry v. Oke*, 3 Dowl. 349. *Barton v. Ransom*, 5 id. 597. *Davis v. Potter*, 21 L. J. Q. B. 134. *Platt v. Hall*, 2 Mee. & W. 391. Unless where it would be a clearly useless expense for the party to take up the award before applying to set it aside, as when the reference was to three arbitrators, and two only made the award (*Hinton v. Meade*, 1 Jur. N. S. 46; 24 L. J. Ex. 140); but in the case of a submission the rule should be drawn up on reading the rule making the submission a rule of court. *Brown v. Collyer*, 20 L. J. Q. B. 426. *Oswald v. Earl Grey*, 24 id. 69.

[2] The rule *nisi* to set aside an award stays the proceedings. By Reg. Gen. (Pr.) H. T. 1853, r. 160. "Rules to show cause shall be no stay of proceedings, unless two days' notice of the motion shall have been served on the opposite party, except in the cases of," *inter alia*, rules to set aside awards.

[3] Sometimes cause is allowed to be shown on the last day of term. *Biynold v. Gale*, 9 Dowl. 393; 2 Scott, N. R. 502. On showing cause, the courts refuse to look at the award, unless a copy is verified by affidavit. *Doe d. Haxbey v. Preston*, 1 B. C. Rep. 77; 3 D. & L. 768. A second application for a rule *nisi* is not allowed on fresh objections. *Carmichael v. Hockin*, 3 Nev. & M. 203.

[4] As a general rule, where a party applies to set aside an award, and fails in his application, he is compelled to pay the costs. The courts have almost made this their constant practice, for where parties urge groundless objections to judges of their own choosing, it is but just that they should be subjected to the costs of the other party.

(S) *Costs of.*

(*a*) *When Submission is Silent.*[1]

(*b*) *When they are to abide the Event.*[2]

Hull. L. of C. 431. *Snook v. Hellier*, 2 Chit. R. 43. *Hockin v. Grenfell*, 6 Dowl. 280; 4 Bing. N. C. 103.

[1] Where the order or agreement of reference is silent as to costs, there is a distinction as to the power of the arbitrator with respect to the costs of the cause, and those of the reference and award. As to the former, the power of awarding costs is necessarily consequent on the authority conferred upon the arbitrator of determining the cause; and he may, notwithstanding the silence of the submission upon the subject, award to the successful party the costs of the cause, or direct by whom they shall be paid. Indeed the reason why, in references of the cause, a provision is frequently inserted that the costs shall abide the event of the award is, that the arbitrator may not have it in his power to withhold costs from the party who was in the right; but that is to be considered as the restriction of a power which he would otherwise have of awarding costs at his election. *Roe v. Doe*, 2 T. R. 644. *Firth v. Robinson*, 1 B. & C. 277. But as to the costs of the reference and award the arbitrator has no authority to adjudicate upon them, it being a matter not submitted to him, as arising subsequent to the time of the submission; but each party must bear his own expenses of the reference and the half of the award. *Taylor v. Lady Gordon*, 9 Bing. 570. *Candler v. Fuller*, Willes, 62. *Whitehead v. Firth*, 12 East, 166. *Firth v. Robinson*, 1 B. & C. 277. *Bradley v. Tunstow*, 1 B. & P. 34. *Bell v. Belson*, 2 Chit. R. 157. If a cause be referred to arbitration under an order of Nisi Prius, but a verdict be nevertheless taken for the plaintiff for a sum certain, as a security for what should be awarded to be paid by him, *and costs*, the arbitrator cannot award a sum to be paid to the plaintiff without costs, because by the terms of the order he will be precluded from entering at all into the question concerning costs. *Barlow v. Flint*, Say. *Costs*, 177. Thus, where a verdict was taken by consent for 1,038*l.*, costs, 40*s.*, subject to be reduced to such amount as an arbitrator should determine, and by his award the arbitrator ordered the verdict to be reduced by 1*s.*, costs, 40*s.*, it was held that it was, in substance, a certificate, and not an award; and that the plaintiff was entitled to the costs of the reference as costs in the cause. *Sims v. Edwards*, 17 C. B. 527. *See* also *Tregoning v. Attenborough*, 7 Bing. 733. It remains to add, that a rule or order under the 3d section of the Common Law Procedure Act, 1854, which is silent as to costs, does not confer on the arbitrator power to deal with the costs, either of the cause, reference, or award. The successful party, therefore, under such a reference, is not entitled to costs. *Bell v. Postlethwaite*, 5 E. & B. 695. *Leggo v. Young*, 16 C. B. 626. Where, however, it appeared that the parties had drawn up the rule in a general form, under the mistaken belief that, nothing being said about costs, the costs would abide the event, the court, after the award had been published, amended the rule of reference, so as to make it express the intention of the parties. *Bell v. Postlethwaite*, 5 E. & B. 695.

[2] Where it is provided by the reference that the costs shall abide the result, the party, in whose favour the award is made, is entitled to them by virtue of the reference. It is not, therefore, necessary that the arbitrator should give any specific direction as to costs; it is sufficient that he direct how the issues ought to be found; and that is the proper course for him to pursue, since he has no power over the costs. *Gore v. Baker*, 4 E. & B. 470. *Hemsworth v. Brian*, 1 C. B. 131. The arbitrator, indeed, is bound to adjudicate on all the issues in the action, where the costs of the cause are to abide the event, whether raised on different counts or different pleas; but where the costs of the reference and award only are to abide the event of the award, it has been held that the arbitrator is not bound to find on each issue, unless terms are introduced into the rule of reference to show that he is bound so to find. 1 Wms. S. 33, n. a. And it will in any case be sufficient if the necessary consequence of the finding of the arbitrator in favour of one of the parties is that all the issues must have been found in his favour, although there is no specific finding on each issue. *Humpherys v. Pearce*, 7 Ex. 696. So much are the costs payable by virtue of the reference, that where the arbitrator appointed by the award a future day for payment of the costs to the party in whose favour it was made, it was held that, as he was entitled to recover them under the order at an earlier date, his right in that respect was not affected by the terms of the award. *Cockburn v. Newton*, 9 Dowl. 676. It is, however, to be noted, that if the costs of the cause only are to abide the event and the costs of the reference are in the discretion of the arbitrator, the arbitrator may award as he pleases with respect to the costs of the reference: that is, the expense of the whole inquiry before him, the costs of the cause being the costs up to the time of the reference. *Brown v. Nelson*, 13 Mee. & W. 397. Unless it appear, therefore, by the award that the action is finally determined in favour of one of the parties, it cannot be ascertained how the costs of the action are to go, where they are to abide the event. *Boodle v. Davies*, 3 Ad. & E. 201. *In re*

(c) *When in Discretion of the Arbitrator.*[1]

Leaming, 5 B. & Adol. 403. *In re Marsack v. Webber*, 29 L. J. Q. B. 109; 6 Jur. N. S. 507. Where, however, the arbitrator awarded that on the doing of certain things on both sides the action should cease, the Court held that the award was not bad in itself, and that the event of the award was that each should pay his own costs. *Yates v. Wright*, 2 Bing. N. C. 277. And if the necessary consequence of the finding is that the suit is determined in favour of one of the parties, such party will be entitled to the costs. Thus, where under a reference, by which the costs were to "abide the event," an action and matters in difference were referred, and there was a plea of set-off in the action, and it appeared by the reference that there was a disputed balance, the arbitrator found that the defendant had a cross-demand, ordered that the action should cease, and awarded that, on the balance of accounts, a certain sum was due from the plaintiff to the defendant. The Court held that it sufficiently appeared that the suit was definitively determined in favour of the defendant. *Eardly v. Steer*, 2 C., M. & R. 327. And where the arbitrator directed that a special verdict should stand for the plaintiff, with substantial damages, which he adjudged to be due from the defendant to the plaintiff, and that certain lamps, in respect of which the plaintiff claimed damages in the declaration, should be delivered up to the defendant, the Court held that the event of the action was in favour of the plaintiff, a verdict being directed for him, and that he was therefore entitled to the costs of the action.

If not only the cause but also matters in difference are referred under a submission, providing that the costs shall abide the event, should the award be in favour of the same party as to both, he will be entitled to the costs of the action and also of the reference. Should the action be determined by the award in favour of one, and the matters in difference be given for the other, the former will be entitled to the costs of the action; but there will be no costs of the reference on either side, and the reason is, that as both the action and the matters in difference were referred, and each party has succeeded as to part, each being partially successful, neither can be called on to pay the costs of a matter in which he has not failed, or, to express it in other words, both matters being mixed up in the reference, it cannot be said that either party has been successful. This view is founded on sound reason, and is supported by recent authority. Marshall on Costs, 429. A contrary rule, however, appears to have been acted on in the case of *Chittenden v. Walker*, 3 Ad. & E. 691. There the cause and matters in difference were referred to arbitration, the costs of the cause and reference to abide the event; and the arbitrator directed a nonsuit to be entered in the action, but awarded 25*l.* to be paid by the defendant to the plaintiff. The master thought that he could not divide the costs of the reference from those of the action; but the Court held he might, and that the plaintiff ought to have the costs of the reference, on which he had succeeded, and the defendant those of the action, which had been found not maintainable. But in the subsequent case of *Gribble v. Buchanan* (18 C. B. 691), in which the order of reference contained the same direction as to costs, and the arbitrator found all the issues in favour of the plaintiff, and awarded him a sum of money in respect of the action, but as to the matters in difference found that 6*l.* was due from the plaintiff to the defendant, the Court held that as the arbitrator had awarded in favour of each, neither was entitled to the costs of the reference and award. Where, therefore, an action is depending, it is reasonable to provide that the costs shall abide the event; but where all matters in difference are referred under an order providing that the costs shall abide the event, it seems that each party must necessarily pay his own, unless everything is found in favour of one. *Boodle v. Davies*, 3 Ad. & E. 201: *per Patteson, J.* Russell on Awards, 380.

[1] Where, by the terms of the agreement or order referring the cause, or the cause and matters in difference, or matters in difference, to arbitration, it is provided that the costs of the cause and of the award shall be in the discretion of the arbitrator; unless the award provide how the costs are to go, the award will be bad for want of finality. *Richardson v. Worsley*, 5 Ex. 613. *Smith v. Wilson*, 2 id. 327. *George v. Lously*, 8 East, 13. It is sufficient, however, if the award direct by whom the costs are to be paid, without stating that they are to be paid to the opposite party. *Bailey v. Curling*, 20 L. J. Q. B. 235. And where the reference was of matters in difference between three parties, and the award directed that the costs of arbitration should be paid equally by each, without showing to whom or in what manner they should be paid, the Court held that it sufficiently appeared that they were to be paid to the arbitrator. *In re Young*, 22 L. J. C. P. 160. The arbitrator has no power to order the costs to be taxed, as between attorney and client, under a submission referring an action and the costs to his award, for that means costs in a technical sense, which are legal costs. *Marder v. Cox*, Cowp. 127. *Barker v. Gibson*, 2 W. Black. 953. Should the submission contemplate the possibility of an original and supplementary award, and give the arbitrator discretionary power over the costs of the reference and award, and it is referred back to him to reconsider, a prospective discretion is given; if the rule referring it back is silent as to costs, the clause in the submission as to costs gives the arbi-

(*d*) *When the Cause goes off on an Insufficient Reference.*[1]
(*e*) *Costs where Matter referred back to the Arbitrator.*[2]
(*f*) *Arbitrator's Charges.*[3]
(T) *Taxation of Costs.*[4]

trator power over the costs of the second reference, for the second reference is a part of the original, or rather a continuation of the reference. *Johnson v. Latham*, 20 L. J. Q. B. 237.

[1] The costs of an abortive reference drop; neither party is entitled to them. *Doe d. Davis v. Morgan*, 4 Mee. & W. 171. Thus, where a cause was referred to arbitration by an order of Nisi Prius, and the award made pursuant thereto was afterwards set aside (the arbitrator not having adjudicated on all the matters referred), and the cause was tried a second time, the party ultimately succeeding was held not to be entitled to the costs of the first trial; *Lord Abinger, C. J.*, saying that the case was analogous to that of a *venire de novo*, and must be governed by the practice which has prevailed in cases of that kind. *Wood v. Duncan*, 5 Mee. & W. 87. See *Whalley v. Laing*, 5 H. & N. 480; 29 L. J. C. P. 228.

[2] Where after an award the matter is referred back to the arbitrator, on the ground of defects in the award, and a fresh award is made on fresh evidence, the costs of the first fruitless award will be borne by each party. Costs thrown away, *e. g.* stamps, &c. should be divided equally. *Blair v. Jones*, 6 Ex. 707. If the necessity of a second reference is occasioned by the default of one of the parties, then he will be required to pay the costs of the first reference. *Gladwin v. Chilcote*, 9 Dowl. 550. The costs of an abortive reference are not costs in the cause. *Doe d. Davis v. Morgan*, 4 Mee. & W. 171.

[3] An arbitrator is at liberty to fix his own charges, and it is usual for him to do so. *Threlfall v. Fanshaw*, 19 L. J. Q. B. 334. *Hicks v. Richardson*, 1 B. & P. 93. See *Roberts v. Eberhardt*, 27 L. J. C. P. 70. He may state the amount in the award; but the more convenient course for him is, on giving notice to the parties that the award is ready, to notify also to them the amount of his charges, in order that they may be prepared to pay them. As he has a lien on the award for his reasonable costs, and as the retention of the award is the only security upon which practically he can rely for the satisfaction of his claim, the practice commonly prevails not to deliver the award up to the party demanding it until he has paid the arbitrator's charges. This mode of securing payment has been sanctioned by judicial approbation, even where the party who takes up the award is not, by the terms of its provisions, to be the party ultimately liable to them; since the party paying in the first instance may redress himself by attachment, and recover from his opponent all the costs of the award that its directions impose upon the latter. Russ. on Arb. 451, 2d ed. He may deduct the amount due to him out of a fund in his hands. 28 L. J. C. P. 74. But an arbitrator has no power to make the taking up of the award conditional on payment of the fee fixed by him, unless the submission specifically empower him so to do. *In re Coombs*, 4 Ex. 839.

Although, however, the arbitrator may fix his own charge, he is not at liberty to fix an exorbitant amount; and if he does so, and a party in order to take up the award is obliged to pay, or pays involuntarily, such unreasonable amount, he may recover the overcharge by action; for in such a case the money, being extorted under a species of duress of property contrary to law, an action lies to recover the excess. *Fernley v. Branson*, 20 L. J. Q. B. 178. *In re Coombs*, 4 Ex. 839. *Barnes v. Braithwaite*, 2 H. & N. 569. But the Court has no general jurisdiction to require the arbitrator to refund the amount received by him beyond what is allowed on taxation. *Dossett v. Gingell*, 2 Man. & G. 870; but see *Miller v. Robe*, 3 Taunt. 461. In case one of the parties has paid an excessive claim for the arbitrator's charges on taking up the award, and he be entitled to the costs of the award, he is not entitled to recover more from the opposite party than a reasonable sum for the arbitrator's fee, and the master, on taxation between party and party, may tax off the excess. And he must resort to his remedy by action against the arbitrator to recover back the amount of the overcharge. *Barnes v. Hayard*, 1 H. & N. 742. See *Bates v. Townley*, 2 Ex. 152. *Fitzgerald v. Graves*, 5 Taunt. 341.

[4] If the submission provide that the arbitrator is to ascertain the costs, he, and not the taxing master, is to do it. *Morgan v. Smith*, 9 Mee. & W. 427. In other cases, as arbitrators possess the power of awarding the costs of the cause referred to them inherent in their office, they may delegate it to the proper officer of the court where the suit is pending; that is, they may award that one of the parties shall pay to the other costs to be taxed by the master. And the reason seems to be, that as arbitrators are judges between the parties, and as it were put in the place of the Court by the parties, and possessed of the same power as the Court of giving judgment for costs, they may refer the taxation of such costs to the same officer as the Court would do. *Winter v. Garlick*, 6 Mod. 195. *Worrell v. Atworth*, Sid. 358. *Pedley v. Goddard*, 7 T. R. 77. But they cannot award that one of the parties shall pay to the other what costs two persons named in the award, but not officers of any court, shall appoint; for they can only delegate their authority in this instance to one who the Court will take notice understands the subject better than themselves. *Nott v. Long*, 2 Str. 1025; Hull, L. of C. 417. And

(*a*) *May be Taxed, though Time for setting aside not elapsed.*[1]
(*b*) *Set-off of Costs.*[2]
(*c*) *When on the Lower Scale.*[3]
(*d*) *Lower Scale does not apply to Costs of Reference.*[4]
(*e*) *What Costs allowed on Taxation.*[5]

ARCHDEACON.[6]

where the arbitrator merely directs which of the parties shall have costs, the costs are subject to taxation by the master of the court, upon the award being made a rule of court. *See* 17 & 18 Vic. c. 125, s. 17.

[1] By Reg. Gen. H. T. 1853, r. 170, it is ordered, that "costs may be taxed on an award, notwithstanding the time for setting aside the award has not elapsed." Before this rule it was necessary to wait until the time for setting aside had expired. See *Hobdell v. Miller*, 2 Scott, N. R. 163; 1 Man. & G. 978.

[2] Where the reference is of a cause the rule of Reg. Gen. H. T. r. 62, as to setting off the costs of the issues, found for one party against those of the issues found for the opposite party applies. The fact that at the time of the reference the issue was not made up makes no difference. *Danbury v. Rickman*, 1 Scott, 564. But if two actions between the same parties are referred, the arbitrator cannot award the damages and costs in one to be set-off against the damages and costs in the other, to the prejudice of the attorney's lien, as that would be contrary to the rule of court; and since, if there had been no arbitration, the parties could not by their own agreement divest the attorney of his lien on the judgment, neither can they by referring to arbitration. *Cowell v. Betteley*, 10 Bing. 432. *See* 4 Taunt. 632; 4 Dowl. P. C. 760; 3 B. & Adol. 388.

[3] Where a cause is referred at Nisi Prius, and less than 20*l.* is awarded, the costs of the cause must be taxed, both as between party and party and attorney and client, on the lower scale, unless there be an express provision to the contrary in the submission. The plaintiff's attorney should therefore take care that the submission or rule of reference should express that the arbitrator shall have power to certify as a judge might.

[4] The taxation on the lower scale applies only to the costs in the cause, and not to the costs of the reference to which the rule of court (Hil. Term, 16 Vic. "Directions to the Masters of the Courts") has no application. Such costs, therefore, where they are not to be treated as costs in the cause, are allowed on the ordinary scale, notwithstanding the costs in the action referred may be taxed on the reduced scale. *Holland v. Vancent*, 9 Ex. 274. And on a referring of a cause before trial the County Court Act does not apply. 29 L. J. C. P. 151; S. C. 28 id. 312.

[5] The same allowance is made for witnesses attending before an arbitrator as on the trial of a cause at Nisi Prius. Dax. Pr. 250. See *Galloway v. Keyworth*, 15 C. B. 228.

The expense of the attendance of counsel on the reference will be allowed, where it was proper counsel should attend. And it has been said that if the importance, magnitude, or difficulty of the case rendered the attendance of a second counsel expedient, such expense might also be allowed. *Grooms v. Gore*, 1 H. & N. 14; but see *Hawkins v. Rigby*, 29 L. J. C. P. 228. But the master was held properly to have disallowed the attendance of a shorthand-writer, whose notes of each day's proceedings before the arbitrator were supplied to counsel for his use at subsequent meetings, although it was a case in which a second counsel might perhaps have been allowed for. *Croomes v. Gore*, 1 H. & N. 14.

Where the arbitrator directs that the costs of the reference shall be paid by each party in certain specified proportions, the mode of ascertaining what sum each ought to pay is by adding together the costs of both, and then apportioning to each the proportionate part for which he is liable. Thus, if each is to pay a moiety of the costs of the reference, the costs of both will be brought as it were into hotchpot, and half paid by each party. *Day v. Norris*, 1 Dowl. N. S. 353. So, if the plaintiff is directed to pay one-third, and the defendant two-thirds of these expenses; supposing the plaintiff's costs were 68*l.*, and the defendant's 45*l.*, the share each is to bear would be ascertained by adding these sums together, which would make 113*l.*, one-third of which is 37*l.* 13*s.* 4*d.* the plaintiff's share; two-thirds, 75*l.* 6*s.* 8*d.* the defendant's share; and therefore, on taxation as between party and party, the plaintiff would be entitled to the master's *allocatur* for 30*l.* 6*s.* 8*d.*, the difference between his share of the expenses and the amount which he had actually disbursed or become liable for. *Walton v. Ingram*, 5 Jur. 462.

[6] As to the origin and antiquity of Archdeacons, and the nature and extent of their authority, *see* Gibs. 969; Stillingfleet's *Miscell.* 242; 1 Still. *Ec. Ca.* 337; 3 Com. Dig. Ecc. Pers. 65; 1 Burn. *Ecc. L.* 93, 8th ed.; Rogers, 59. Archdeaconries are commonly given by the bishops, who prefer the parties by collation. But if an archdeaconry be in the gift of a layman, the patron presents to the bishop, who institutes in the same manner as to another benefice, and then the dean and chapter induct him; that is, after some ceremonies, place him in a stall in the cathedral church to which he belongs, whereby he is said to have a place in the choir. Wats. c. 15. Archdeacons, by the 13 & 14 Car. 2, c. 4, are to read the Common Prayer, and declare their assent thereunto, as other persons admitted to ecclesiastical

ARCHDEACON'S Court.[1]

ARCHES, Court of; Jurisdiction of.[2]

AREA.[3]

ARGUMENTATIVE Pleading.[4]

ARGUMENTUM ab inconvenienti plurimum valet in lege.

Co. Litt. 66 a; Broom's *Max.* 84. *An Argument drawn from inconvenience is forcible in law.*[5]

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benefices, and also must subscribe the same before the ordinary; but they are not obliged by the 13 Eliz. to subscribe and read the Thirty-nine Articles: for although an archdeaconry be a benefice with cure, yet it is not such a benefice with cure as seems to be intended by that statute, but only such benefices with cure as have particular churches belonging to them. Wats. c. 15. And they are to take the oaths at the sessions, as other persons qualifying for offices.

[1] This is the lowest tribunal of contentious jurisdiction. In the archdeacon's absence it is held by his official. Its jurisdiction is sometimes in concurrence with, and sometimes in exclusion of, the Consistory Court of the bishop. It may hear local ecclesiastical causes; an appeal lies from it to the superior court of the bishop. 24 Hen. 8, c. 12; 3 Steph. Com. 430; 3 Bl. Com. 64; Roger. E. L. 59. Its testamentary jurisdiction is abolished. 20 & 21 Vic. c. 77, s. 33.

[2] The Court of Arches is a court of appeal belonging to the Archbishop of Canterbury, where the judge (who sits as deputy to the archbishop) is called the Dean of the Arches, because he anciently held his court in the church of St. Mary-le-Bow (*Sancta Maria de Arcubus*), though all the principal spiritual courts are now holden at Doctors' Commons. His proper jurisdiction is only over the thirteen peculiar parishes belonging to the archbishop in London; but the office of Dean of the Arches having for a long time been united with that of the archbishop's principal official, he now, in right of the last-mentioned office (as doth also the official principal of the Archbishop of York), receives and determines appeals from the sentences of all inferior ecclesiastical courts within the province. Many suits also are brought before him as original judge, the cognizance of which properly belongs to inferior jurisdictions within the province, but in respect of which the inferior judge has waived his jurisdiction under a certain form of proceeding, known in the canon law by the denomination of letters of request. 2 Chit. *Gen. Pr.* 490. See *Burgoyne v. Free*, 2 Add. 406. *Ex-parte Denison*, 4 E. & B. 292. From the Court of Arches, and from the parallel Court of Appeal in the provinces of York, an appeal lies to the Privy Council. 2 & 3 Wm. 4, c. 92. The Court of Appeal is a branch of, and annexed to the Court of Arches. It has a jurisdiction over all those parishes dispersed through the province of Canterbury, in the midst of other dioceses which are exempt from the ordinary's jurisdiction, and subject to the metropolitan only. All ecclesiastical causes arising within these peculiar or exempt jurisdictions are originally cognizable by this court, from which an appeal lies to the Court of Arches. 3 Steph. Com. 425, 4th ed. Power in testamentary matter transferred to Court of Probate. 20 & 21 Vic. c. 77, s. 4.

[3] Where an area adjoins a public highway, it is the duty of the owner to have it fenced and protected with a view to the safety of persons using the highway. Where the owner of a dangerous area adjoining the highway set up as a defence that the premises had been exactly in the same condition as far back as could be remembered, and many years before he took possession of them, *Lord Ellenborough* held, that however long the premises might have been in a dangerous state, the defendant, as soon as he took possession of them, was bound to guard against the danger to which the public had been before exposed, and that he was liable for the consequences of having neglected to do so, in the same manner as if he himself had originated the nuisance; that the area belonged to the house, and the law cast upon the occupier the duty of rendering it secure. *Coupland v. Hardingham*, 3 Camp. 398. For precedents of declarations for a nuisance in keeping an open area adjoining to a public highway, into which the plaintiff fell and was injured, see *Jarvis v. Dean*, 3 Bing. 447. *Stone v. Jackson*, 16 C. B. 199. *Barnes v. Ward*, 9 id. 392; S. C. 19 L. J. C. P. 195: and *see* 28 L. J. Ex. 141; id. Q. B. 215; 29 id. 53; 29 id. C. P. 203.

[4] Pleadings must not be argumentative; they must advance their positions of fact in an absolute form, and not leave them to be collected by inference and argument only. Steph. 179, 4th ed.; 1 Chit. Pl. 260; Bac. Ab. Pleas, &c. I–5.

[5] In questions of intention especially, an argument founded on the inconvenience of adopting a particular construction is frequently of great value. If there be in any deed or instrument equivocal expressions, and great inconvenience must necessarily follow from one construction, it is strong to show that such interpretation is not according to the true intention of the grantor; but where there is no equivocal expression in the instrument, and the words used admit only of one meaning, arguments of inconvenience prove only want of foresight in the grantor. But because he wanted foresight, courts of

ARM of the Sea.[1]

ARMORIAL Bearings;[2] Evidence in cases of Pedigree.

ARMS.[3]

ARMY.[4] *See* Billeting; Deserter; Courts Martial; Enlistment; Militia; Volunteers.

I. Officers in, p. 515.
(A) *Authority of*, p. 515.
(B) *Liabilities of*, p. 515.
(C) *Pay of, and Pensions to*, p. 517.
(D) *Commission of*, p. 517.

justice cannot make a new instrument; they must act upon the document as it is made. *Attorney-General v. Duke of Marlborough*, 3 Madd. 540: *per Sir J. Leach, V. C. Per Best, C. J.: Fletcher v. Lord Sondes*, 3 Bing. 590. See *Dean v. Clayton*, 7 Taunt. 496. The same rule is applied in construing acts of parliament. If the words used by the legislature in framing any particular clause have a necessary meaning, it will be the duty of the Court to construe the clause accordingly, whatever may be the inconvenience of such a course. *Wansey v. Perkins*, 8 Scott, N. R. 969: *per Erle, J. Mirehouse v. Rennell*, 1 Clark & Fin. 546: *per Parke, J.* But unless it is very clear that violence would be done to the language of the act by adopting any other construction, any great inconvenience which might result from that suggested may certainly afford fair ground for supposing that it could not be what was contemplated by the legislature, and will warrant the Court in looking for some other interpretation. 11 Mee. & W. 928; 10 id. 434.

Where the law is known and clear, though it be inequitable and inconvenient, the judges must determine as the law is, without regarding the inequitableness or inconvenience. These defects, if they happen in the law, can only be remedied by parliament, and therefore we find many statutes repealed and laws abolished by parliament as inconvenient, which before such repeal or abrogation were in the courts of law to be strictly observed. But where the law is doubtful, and not clear, the judges ought to interpret the law to be as is most consonant to equity, and least inconvenient. Vaugh. R. 37. *See* 1 Dods. 402; 6 Clark & Fin.

[1] A portion of the sea where the tide flows and re-flows. 5 Co. 107; 1 Kent's Com. 26–30; Hale *de Jure Maris*, pars 1, c. 4; 22 Ass. 93. An arm of the sea is considered as extending as far into the interior of a country as the water of fresh rivers is propelled backward by the ingress and pressure of the tide. Angell on Tide Waters, 73, c. 3.

[2] Armorial bearings, whether carved on wood, painted on glass, engraved on monuments, in churches, or otherwise emblazoned, are admissible in cases of pedigree, not only as tending to prove that the person who assumed them was of the family to which they of right belonged, but as illustrating the particular branch from which the descent was claimed, or as showing by the impalings or quarterings the nature of the blazonry or the shape of the shield, what families were allied by marriage, or what members of the family were descended from an illegitimate stock, or were maidens, widows, or heiresses. Harl. M.S. 1306, 6141. *Hervey v. Hervey*, 2 W. Black. 877. *Chandos Peerage*, Pr. Min. 6, 24, 37, 40, 49. *Huntingdon Peerage*, G. Bell, 280; Attorney-General's Rep. 359; S. C. *Hastings Peerage*, Pr. Min. 313; Co. Litt. 27. *Fitzwalter Peerage*, Pr. Min. 49. *Camoys Peerage*, id. 58; 1 Sid. 354. The value of this evidence depends almost wholly upon its antiquity, and as, since the Revolution, the heralds have exercised no authority in correcting usurpation, the use of armorial bearings subsequently to that date is entitled to but little, if any, weight as evidence of genealogy. 1 Phil. *Ev.* 224. Hull. *Ev. of Succession*, 696. When proof of this nature is offered, some officer of the Heralds' College should be in attendance to explain the meaning of the occult science. See *Chandos Peerage*, Pr. Min. 6, 24, 37, 40, 49.

[3] It is a right of the subject to carry arms, and proper for his defence, and this is declared by statute 1 Wm. and Mary, stat. 2, c. 2. There is an ancient act, however, against going armed, under such circumstances as may tend to terrify the people, or indicate an intention of destroying the public peace (2 Edw. 3, c. 3); and by the 60 Geo. 3, and 1 Geo. 4, c. 1, the training of persons, without lawful authority, to the use of arms, is prohibited; and any justice of the peace is authorised to disperse such assemblies of persons as he may find engaged in that occupation, and to arrest any of the persons present. 1 Steph. Com. 150. *See* 60 Geo. 3, and 1 Geo. 4, c. 1, s. 1, as to training to use of arms.

[4] 10 & 11 Vic. c. 37, regulates the time of enlisting and service in the army; and c. 63, the navy; and 42 Geo. 3, c. 90; 14 & 15 Vic. 32; 15 & 16 Vic. c. 50, 74, 75, the calling out and pay of the militia.

The Mutiny Act and Articles of War apply only to her Majesty's forces. *Wolton v. Gavin*, 16 Q. B. 48; 15 Jur. 329; 20 L. J. Q. B. 73.

II. Privates in, p. 517.
(A) *Who are*, p. 517.
(B) *Rights of*, p. 517.
(C) *Liabilities of*, p. 518.
III. Exemption of Buildings used for from Rates, p. 518.

I. Officers in.
(A) *Authority of.*[1]
(B) *Liabilities of.*[2]

Barwis v. Keppel, 2 Wils. 314.

No action lies against a commanding officer for having, without reasonable cause, reduced a sergeant to the ranks.

An action upon the case was brought against a commanding officer for wrongfully, unlawfully, and maliciously, and without any reasonable ground or cause whatever, reducing a sergeant of the Guards to a common soldier in Germany. It appeared by the evidence upon the trial that the plaintiff had been sentenced by a regimental court-martial to be suspended from his office of sergeant for one month only for a breach of orders, and that the defendant, who was the commanding officer, thinking his sentence not a sufficient punishment for the offence, ordered him to be broke absolutely, and appointed another sergeant in his place: there was a verdict for the plaintiff, subject to the opinion of the Court whether, under the particular circumstances of the case, it being in the nature of an action for a malicious prosecution, and in which malice must appear, the plaintiff was entitled to recover.

[1] The colonel of a regiment has no authority to order his servant to pay money towards lighting and warming a regimental school and schoolmaster's salary. *Warden v. Bailey*, 4 Taunt. 67. And *see* S. C. (in error), nom. *Bailey v. Warden*, 4 M. & S. 400. Nor, as it seems, to order the men to attend school to learn to read and write. Id. A colonel of a regiment, on full pay, was appointed civil superintendent of a colony, and "to command such of his Majesty's subjects as are now armed, or may hereafter arm, for the defence of the settlers." After acting both as military commander and civil superintendent some years his regiment was disbanded, and he was reduced to half-pay, but still was recognised in both capacities by the authorities at home and in the colony:—*Held*, that his appointment to command all persons armed for the defence of the colony gave him a right to command all the king's troops there, and that he did not lose that right by the disbandment of his regiment and his reduction to half-pay; and, therefore, he was justified in putting under arrest, for disobedience to orders, a commissioned officer on full pay, holding equal regimental rank with himself. *Bradley v. Arthur*, 6 D. & R. 413; 4 B. & C. 292.

Where a governor is appointed, civilly and militarily, to take the command of all persons armed, his right to command continues though his own regiment be disbanded. *Bradley v. Arthur*, 4 B. & C. 292; S. C. 6 D. & R. 413.

[2] An action of trespass lies by an inferior military officer against his superior officer (both being under martial law), who imprisons him for disobedience to an order made under colour, but not within the scope of military authority; although the imprisonment be followed by a trial by a court-martial. *Warden v. Bailey*, 4 Taunt. 67. And *see* S. C. (in error), nom. *Bailey v. Warden*, 4 M. & S. 400.

In trespass against the adjutant of a regiment of local militia, for arresting and imprisoning a sergeant in the same regiment, upon a charge of unsoldier-like conduct, in exciting disobedience and mutiny, it is a good defence upon the general issue that the action was not brought within six months after the fact committed; but, if the imprisonment be continued by the defendant, in pursuance of orders from the commanding officer of the regiment, to a period within six months, the action lies; unless the continuance of it be justifiable on the part of the commanding officer: and such continuance was held to be justifiable where it was in order to bring the plaintiff to a general court-martial, for uttering words in the presence of several sergeants and others of the same regiment, amounting to disorderly conduct on the part of plaintiff, to the prejudice of good order and military discipline, within the 24th section of the Articles of War, art. 2, although the words uttered referred to an order made by the commanding officer, which he was not strictly competent to make, and although the plaintiff was acquitted by the sentence of the court-martial. Id.

Per Cur. By the act of parliament to punish mutiny and desertion, the king's power to make articles of war is confined to his own dominions; when his army is out of his dominions he acts by virtue of his prerogative, and without the statute or articles of war; and therefore you cannot argue upon either of them, for they are both to be laid out of the case, and *flagrante bello* the common law has never interfered with the army : *inter arma silent leges.* We think, (as at present advised) we have no jurisdiction at all in this case. Judgment for defendant.

MYRTLE v. BEAVER, 1 East, 135; recognised in RICE v. CHUTE, 1 id. 579.

The captain of a troop is not liable for subsistence furnished to his men during his absence, (by whom the directions to furnish it were never given,) nor the subsistence-money received, though the troop was then under his military orders, and he was entitled to a profit on the subsistence-money.[2]

This action was brought against the defendant, who was captain of a certain troop, to recover the value of meat provided by plaintiff for the use of the said troop. It appeared that the defendant, during the period in which the meat was alleged to have been provided, had been detached from the place where the principal portion of the troop was quartered with a small party at a place about twenty miles distant; that the immediate and actual command of course devolved, as usual, on the first lieutenant (who had since absconded, and left the demand of the plaintiff unsatisfied); that the same clerk who had previously to the defendant's departure been appointed by him as his agent in issuing orders for providing subsistence for the men, continued to give the orders during his absence under the superintendence of the lieutenant; that the allowance-money to defray such expenses issued by government was paid to the first lieutenant (who was also paymaster), but never paid over to the defendant during the time the present liability was contended to have been incurred,[1] and that the returns were made and signed by the said lieutenant during the same period to the agent by whom the issues of money are regulated. It however appeared that the troops were, during the captain's absence, still subject to his military orders; that all military reports and returns of the troop were made first to him, and from him to the head-quarters, and that the defendant was during his absence on the detached command still entitled to receive a certain allowance made by government to the captain of every troop for the subsistence of the men: from which facts it was contended that the defendant was liable, as the troop was still virtually under his command, and as the plaintiff had no reason for supposing that the clerk was acting under the command of another. But the Court held that the clerk could not be considered as the agent of a private individual, but as the agent of whatever officer happened to have the command of the troop; and that the defendant, who had neither given orders for the provisions furnished, nor had in fact any authority to do so, and who had never received the money from government, could not be considered responsible in the present instance.

BROWN v. DOYLE AND OTHERS, 3 Camp. 51 n.

Officers messing together are liable for their respective shares only.

Assumpsit against defendants for necessaries supplied to a regimental mess, the defendants being members thereof.

Plea, general issue. It was proved that some of the parties to the mess had paid their individual charges.

Per Lord Kenyon. "The facts proved in evidence, I think, show that plaintiff

[1] The usual practice appeared to be for the subsistence-money to be issued every month from the agent of the regiment to the paymaster in advance, by whom it was paid over to the captains of troops, who drew upon the paymaster for it at their pleasure.

[2] So the Court held that the captain of a troop was not liable for subsistence furnished to his men by his official orders, where he had not received the subsistence-money. *Rice v. Chute,* 1 East, 578. But where a verdict under similar circumstances had been obtained by the plaintiff, and it appeared that the defendant was responsible to government as the surety of the paymaster, and was also indebted to him on a private account, the Court refused to interfere. *Rice v. Everitt,* 1 East, 583 n.

intended to charge them severally; nor do I think originally that any joint liability was created." See *Forster v. Taylor*, 3 Camp. 49; *post*, Club; and 2 Mee. & W. 172; 7 id. 427; 8 id. 505.

(C) *Pay of*,[1] *and Pensions to*.[2]

(D) *Commission of*.[3]

II. Privates in.

(A) *Who are.*

Grant v. Gould, 2 H. Black. 69.

A court-martial having passed sentence on the plaintiff, he applied to this court for a prohibition to suspend its execution, when, among other points, it involved the question whether the mere fact of a soldier receiving pay rendered himself liable to the military law.

A soldier, by receiving pay as such, renders himself liable to the military law, though he may not on his enlistment have done what is required by the act.[4]

Per Cur. The annual Mutiny Act, upon which we are to found our opinion, does not suffer us to pause as to the question whether the plaintiff's enlistment and attestation is regular or not; the words being clear and unequivocal, that "any person who shall be enlisted or receive pay as a soldier" shall be deemed a soldier, and subject to the military jurisdiction: this, therefore, fixes the military character upon him; and, once becoming subject to the military character, he can never divest himself of it unless through the medium of a regular discharge.

(B) *Rights of*.[5]

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[1] The sovereign may at any time stop the half-pay of an officer in the army, by signifying his pleasure that it shall no longer be paid. *Macdonald v. Steele*, Peake, 175: *Kenyon*. The future half-pay of an officer is not assignable. *Lidderdale v. Montrose* (*Duke of*), 4 T. R. 248. Neither is the full-pay. *Barwick v. Reade*, 1 H. Black. 627. Such an assignment of half-pay is bad in law and in equity. *Stone v. Lidderdale*, 2 Anst. 533. Though an officer's half-pay be not assignable at law, yet, it is said, the use of it may be assigned in equity; and, when so assigned, the assignor cannot maintain *assumpsit* for it, as money had and received to his use. *Stuart v. Tucker*, 2 W. Black. 1137.

[2] B., formerly an officer in the army, obtained a grant of a pension from the crown, not for a term of years, or for the whole period of life, but "until further order," for wounds received in actual service in India in 1845. In 1853, B. assigned his pension to the plaintiff to secure payment of a redeemable annuity, granted to him by B. for valuable consideration. The indentures contained a power of attorney authorising the plaintiff to receive the pension, which was payable quarterly, and they also contained covenants by the defendant to do all necessary acts to enable the plaintiff to receive the pension. The War Office, to avoid being affected by any charges on such pension, refused to recognise any assignment, or to pay the pension, except the power of attorney were in the form used in and recognised by such office, and which was revocable by the grantor. The defendant executed such power of attorney, but subsequently, without notice to the plaintiff, revoked it, and proceeded to receive and appropriate the entire amount of the pension. The plaintiff filed a bill against B., and on motion for that purpose the Court granted an injunction to restrain him from receiving the pension, and from executing a power of attorney authorising or permitting any person other than the plaintiff to receive it. No receiver was appointed, and no order for costs were made. *Knight v. Bulkeley*, 4 Jur. N. S. 527; 27 L. J.; 5 Jur. 817; Chanc. 392, V. C. S.

[3] An officer in the army cannot pledge or mortgage his commission. *Collyer v. Fallon*, 1 Turn. & Russ. 459. A sum of money was paid by A. to B. for purchasing C.'s promotion in the army, and it remained unapplied in the hands of B. at the death of A. C. having been compelled, from the bad state of his health, to quit the army, and having no prospect of being able to enter into the service again, filed a bill for the money, and it was decreed to be paid to him. *Leche v. Kilmorey* (*Lord*), 1 Turn. & Russ. 207.

[4] A member of the Army Works Corps, though subject to the provisions of the Mutiny Act, is not a soldier, so as to enable him to claim a discharge according to the Articles of War. 4 H. & N. 368.

Where A. applied to two soldiers, a drummer and a private, to enlist him, which they at first refused, but afterwards the drummer gave him a shilling for that purpose, on A.'s wanting to go away they detained him:—*Held*, that the drummer had no authority to enlist A., and therefore no right to detain him. *Rex v. Longden*, R. & R. C. C. 228; 1 Russ. C. & M. 439. See *Re Doug.* 3 D. & G. 509; 3 Q. B. 825; 12 L. J. Q. B. 49.

[5] A soldier is gifted with all the rights of other citizens, and is bound to all their duties, and he is therefore as much bound

(C) *Liabilities of.*[1]

III. Exemption of Buildings used for from Rates.[2]

ARMY Agent.[3] *See* Principal and Agent.

Davis v. Edgar, 4 Taunt. 63.

An agent purchasing a commission in the army cannot recover a sum exceeding the price authorised by government.

The defendant being desirous of procuring a cornetcy in the Life Guards, commissioned the plaintiff, not a regular army agent, to purchase one that was held by G. C., for which the sum paid by the defendant to G. C. exceeded, after deducting by the desire of G. C. the sum of 38*l.* for the plaintiff's agency, the sum allowed by the regulations of the War Office. The plaintiff had frequently applied for the money, and reminded the defendant of his promise, which he, by several letters, declared his intention of fulfilling. The Court held that the plaintiff's claim depended on the legality of G. C.'s title, and as G. C. could not recover a sum exceeding the price allowed by the government, therefore the plaintiff, standing in a mediate character, was debarred from maintaining his action. Rule absolute.

ARMY Clothier.[4]

ARRAIGNMENT.[5] *See* Indictment, Pleading to ; Trial.

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to prevent a breach of the peace or a felony as any other person. If it be necessary for the purpose of preventing mischief, or for the execution of the law, it is not only the right of soldiers, but it is their duty, to exert themselves in assisting the execution of a legal process, or to prevent any crime or mischief being committed. *Burdett* (*Bart.*) *v. Abbott*, 4 Taunt. 449. And *see* S. C. 5 Dow, 165 ; 14 East, 1, 154.

[1] A soldier is liable to an indictment for disobeying an order of justices requiring him to pay for the maintenance of a bastard child, notwithstanding the provisions of the 52d section of the Mutiny Act, such an indictment being "a criminal matter" within the exception in that statute. *Reg. v. Ferrall*, 2 Den. C. C. R. 51; T. & M. 390; 15 Jur. 42 ; 20 L. J. M. C. 39.

A justice, before whom a deserter is brought, and by whom committed to the county gaol, may, if the deserter be unable to bear the charges himself, direct the expenses of conveying him thither to be paid by the treasurer of the county to the constable of the parish who found and apprehended him in the parish, and conveyed him to the gaol. *Rex v. Pierce*, 3 M. & S. 62.

[2] A building intended to be the dépôt and storehouse for the arms and accoutrements of the London Militia, which are the property of the Crown, is within the exemption in sect. 6 of the Metropolitan Building Act (18 & 19 Vic. c. 122), as a building "employed for her Majesty's use or service," though it is erected by the Commissioners of Lieutenancy for London, under the superintendence of their architect, and when completed will be their property. *Reg. v. Jay*, 8 El. & Bl. 469 ; S. C. *nom. Jay v. Hammon*, 4 Jur. N. S. 407 ; 27 L. J. M. C. 25.

By sect. 38 of the Mutiny Act, 20 & 21 Vic. c. 13, the place of imprisonment of persons under sentence of general courts-martial shall be appointed by the officer commanding the district:—*Held*, that a person imprisoned under sentence of a general court-martial in any place other than the place appointed by the officer commanding the district, is entitled to be discharged summarily by *habeas corpus*, unless the officer commanding the district shall have changed the place by his order in writing, under the provisions of sect. 41. *Allen, ex-parte*, 9 W. R. 99; 3 L. T. (N. S.) 468, Q. B.

[3] The plaintiff being representative of a deceased officer of artillery, of which corps the defendants were paymasters, they delivered to him an account current, in which they acknowledged themselves to have received, from the year 1806 to the year 1820, pay according to an increased rate allowed by an order of the Board of Ordnance, dated August 28, 1806:—*Held*, that they could not, in 1821, be permitted to say that this admission was by mistake, as in 1816 the Board of Ordnance had announced, that, by the true construction of the order of 1806, persons in the situation of the deceased were not entitled to the benefit of it, this announcement of the Board never having been communicated to the deceased by the defendants till the year 1821. *Skyring v. Greenwood*, 6 D. & R. 401; 4 B. & C. 281; 1 C. & P. 517.

[4] Is not a person within the meaning of stat. 22 Geo. 3, c. 45, prohibiting government contractors from sitting in parliament. *Thompson qui tam v. Pearse*, 3 Moore, 260; S. C. 1 B. & B. 25.

[5] The arraignment is the calling a prisoner to the bar of the court to answer the matter charged upon him in the indictment. The prisoner is to be called to the bar by his name, and it is laid down in our ancient books, that, though under an indictment of

ARRANGEMENT with Creditors. *See* Bankrupt; Composition with Creditors; Insolvent; Protection.

ARRAY, Challenge to. *See* Jury; Trial.

ARREST in Criminal Proceedings. In Civil, *see* p. 525.

See Bail
Coroner
Escape
False Imprisonment
Justices of the Peace
Libel
Malicious Arrest and Prosecution
Police
Rescue
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Warrant.

I. What is, p. 519.

II. When may be, without Warrant at Common Law, p. 519.

(A) *In Cases of Felony*, p. 520.

(B) *In Cases of Misdemeanour*, p. 520.

(C) *On Sunday*, p. 521.

III. Who may be Arrested, p. 521.

IV. When under a Warrant. *See* Warrant.

V. Proceedings subsequent to Arrest. *See* Justices of Peace.

I. What is.[1]

II. When may be, without Warrant at Common Law.[2]

the highest nature, he must be brought to the bar without irons or any manner of shackles or bonds, unless there be evident danger of an escape, and then he may be secured with irons. The indictment is read to him distinctly in the English tongue; after which it is demanded of him whether he is guilty of the felony or misdemeanour whereof he stands indicted, or not guilty. When a criminal is arraigned, he either stands mute or confesses the fact; or else he pleads to the indictment. *See* 4 Steph. Com. 456. If he stand mute of malice, the Court may immediately direct a jury to be sworn to try this collateral issue, namely, whether the defendant is mute of malice or by the act of God: in which case witnesses are examined as to his state of mind, and the jury find accordingly. If they find that he is mute of malice, the plea of not guilty is entered for him as above-mentioned; but if they find that he is mute by the act of God, or, in other words, insane, the finding is then recorded, and the Court orders him to be kept in strict custody until her Majesty's pleasure shall be known. *See* 39 & 40 Geo. 3, c. 94, s. 2.

[1] See what constitutes an arrest under civil process, *post*, p. 525. The following authorities may be found useful:—Any restraint put on the freedom of another, by show of authority or force, is sufficient to constitute an arrest. Actual contact is not necessary. If a bailiff who has a process against any one says to him, "You are my prisoner; I have a writ against you," upon which the party addressed submits, turns back, or goes with him, though the bailiff never touched him, yet it is an arrest, because he submitted to the process. *Grainger v. Hill*, 4 Bing. N. C. 212. *Bird v. Jones*, 7 Q. B. 743. And if you put your hand upon a man, or tell him he must go with you, and he goes, supposing you have the right and the power to compel him, that is an arrest. *Wood v. Lane*, 6 C. & P. 774. But a partial restraint of the will of a person is not sufficient. *Bird v. Jones*, 7 Q. B. 742.

[2] In cases of civil injuries without force, or even of a breach of the peace, as an assault or battery, no private individual can in general at common law arrest, apprehend, or imprison the wrongdoer. He can at most remove him from his dwelling-house, but cannot imprison (*Williams v. Glenister*, 2 B. & C. 699; 4 Q. B. 217); and in the case of an importunate beggar who refuses to quit a party's premises, the latter can only legally turn him out, but cannot imprison him, unless he come within the provisions of the Vagrant Act. *Price v. Severn*, 7 Bing. 316. So, though it would seem that the master of a merchant-ship may, during the attack of an enemy, restrain, confine, or imprison a passenger who refuses to assist in the defence, yet, after the battle has ceased, the continuance of the imprisonment would be illegal. *Boyce v. Bayliff*, 1 Camp. 60. *Watson v. Christie*, 2 B. & P. 224.

(A) *In Cases of Felony.*[1]

(B) *In Cases of Misdemeanour.*[2]

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[1] Private individuals are not only permitted, but enjoined by law, to arrest an offender, when present at the time a felony is committed or dangerous wound given, and witnessing the same, on pain of fine and imprisonment if the wrongdoer should escape through their negligence (1 Hale, 587; 1 East, P. C. 298; Hawk. b. 2, c. 12, s. 13. *Rex v. Hunt*, R. & M. 93; 3 B. & Ad. 966, n. g.); and the same duty exists where a person is detected in the attempt to commit a felony (*Rex v. Hunt*, R. & M. 207); and although the offender ran away, and gave over his intention of committing the felony, still it seems on fresh pursuit he may be apprehended by any one. *Rex v. Howorth*, id. And when it is certain that a felony has in fact been committed by some one, any private individual, though not particularly interested, is excused in imprisoning a person who turns out to have been wholly innocent, if he can prove that he had reasonable or probable cause for suspecting that he was the felon; and in such a case he may himself apprehend, or direct a peace-officer to apprehend, the party whom he so supposes to have been guilty. *Sedwille v. Catchpole*, Cald. 291. *Samuel v. Payne*, Dougl. 359. *Mure v. Kay*, 4 Taunt. 34. *Guppy v. Brittlebank*, 5 Price, 525. *Davis v. Russell*, 5 Bing. 364; 4 Inst. 144. But if it should turn out that no felony had been committed by any one, then he would have no defence to an action for false imprisonment, although he had probable cause for suspecting the guilt. *See post*, False Imprisonment. And to justify even a constable arresting without warrant, he must have *reasonable* cause to suspect that the person has committed a felony. Accordingly, where a constable arrested a person whom he had known for many years to be a respectable householder, upon a charge made against him by another of a felony committed a year before, the constable was held liable in an action for damages. *Hogg v. Ward*, 3 H. & N. 417; 27 L. J. Ex. 443.

If the party complaining of a wrongful arrest has brought the injury upon himself by his own misstatements and misrepresentations, he has no ground for maintaining an action of damages. If there was lawful ground for arresting A., and B. represent himself to be A., and is arrested in consequence of that representation, he has obviously no valid ground for complaining of the imprisonment, which naturally resulted from his own act. But after he has given notice that he is not the person he represented himself to be, he cannot lawfully be detained for a greater length of time than may be reasonably necessary to ascertain which of the several statements he has made is in accordance with the truth. *Dunstan v. Paterson*, 2 C. B. (N. S.) 495; 26 L. J. C. P. 267.

[2] In cases of misdemeanour, suspicion that a party has on a former occasion committed a misdemeanour, though accompanied with proof of the offence having been committed by some one, is no justification for giving the former in charge to a constable without a justice's warrant; and there is no distinction in this respect between one kind of misdemeanour and another, as breach of peace and obtaining goods by false pretences. *Fox v. Gaunt*, 3 B. & Adol. 798. *Williams v. Glenister*, 4 D. & R. 217; 2 B. & C. 699. Nor can a private person at common law apprehend or imprison another for a misdemeanour or breach of the peace, after it is over, without a warrant; nor can a constable do so at common law unless he had view of such misdemeanour or breach. *Bowditch v. Balchin*, 5 Ex. 380. *Griffin v. Coleman*, 28 L. J. Ex. 134; 4 H. & N. 265; Hawk. b. 2, c. 12, s. 20; 1 East, P. C. 300. *Rex v. Dyson*, 1 Stark. 246. *Fox v. Gaunt*, 3 B. & Adol. 798. But if, after an assault or breach of the peace is over, the party obstinately refuse to depart or continue in the house where the breach of the peace was committed, contrary to the request of the occupier, and consequently there is danger of a renewal of the breach of the peace, the latter may give charge to a peace-officer, although the latter had not view of the actual disturbance, and the latter may take the offender before a justice, or remove him. *Timothy v. Simpson*, 5 Tyr. 251: *per Parke, B.* Though a person may push or force a person out of his house or from a church when making a disturbance there, yet after he has removed the party he cannot, without warrant, apprehend or imprison him, even for the purpose of conveying him before a magistrate. *Williams v. Glenister*, 2 B. & C. 699; 4 D. & R. 217. In cases of mere breach of the peace, before any charge has been made to a peace-officer, and before he acts upon it without a justice's warrant, the latter must himself have had actual view of the breach of the peace, or the arrest without warrant would be illegal. *Sharrock v. Hannemer*, Cro. Eliz. 375. *Rogers v. Jones*, R. & M. 132. *Hobbs v. Branscomb*, 3 Camp. 428. *McCloughan v. Clayton*, Holt, N. P. 479. *Hardy v. Murphy*, 1 Esp. 294. *Rex v. Bright*, 4 C. & P. 387.

By various statutes private persons and officers are authorised, either with or without warrant, to apprehend supposed offenders, as under the Metropolis Police Act, 3 Wm. 4, c. 19; the Vagrant Act, 5 Geo. 4, c. 83; the Act against Malicious Injuries to Property, 7 & 8 Geo. 4, c. 30, s. 28; the Game Act, 1 & 2 Wm. 4, c. 32; the Act against Night Poaching, 9 Geo. 4, c. 69; and various other statutes, general and local. These will be found under their appropriate titles.

(C) *On Sunday.*[1]

III. Who may be Arrested.[2]

Rex v. Wilkes, 2 Wils. 159.

Per Pratt, C. J. "If Mr. Wilkes had been described as a member of parliament in the return, we must have taken notice of the law of privilege of parliament, otherwise the members would be without remedy where they are wrongfully arrested against the law of parliament. We are bound to take notice of their privileges as being part of the law of the land. 4 Inst. 25, says, the privilege of parliament holds, unless it be in three cases, viz. treason, felony, and the peace. These are the words of *Coke*, in the trial of the seven bishops. The word *peace*, in this case of privilege, is explained to mean where security of the peace is required." *See* Dalton, J., 170.

Members of parliament have no exemption from arrest in case of treason, felony, and actual breach of the peace.[3]

ARREST of Judgment. *See* also Demurrer. *Non obstante Veredicto.*

I. In Civil Proceedings, p. 521.

(A) *Grounds of; must be for Defect on the Record*, p. 521 n.

(B) *Mode of taking advantage of; by Motion*, p. 522.

(C) *Not allowed after Judgment on Demurrer*, p. 522.

(D) *Nor* in Auditâ Querelâ, p. 522.

(E) *Nor for anything; aided by Pleading over, by Verdict, or amendable or formal Defects*, p. 522.

(F) *Suggestions and Insertions of omitted Facts or Matters, under* 15 & 16 *Vic. c.* 76, p. 523.

(G) *Motion, when and how Made*, p. 523.

(H) *Costs on*, p. 523.

(I) *Limitation of Action after*, p. 523.

II. In Criminal Proceedings, p. 524.

I. In Civil Proceedings.

(A) *Grounds of;*[4] *must be for Defect on the Record.*

[1] The 29 Car. 2, c. 7, s. 6, prohibits the service or execution on Sunday of any writ, process, warrant, order, judgment, or decree, except in cases of treason, felony, and breach of the peace. *Wells v. Gurney*, 8 B. & C. 769.

[2] In criminal cases, all persons are in general liable to arrest when accused of capital crimes or violent injuries. 4 Inst. 24, 25; 1 Bl. Com. 145. The exemptions which exist in civil cases are here inapplicable. Thus, a married woman, when she has committed an offence for which she is subject to punishment, is liable to be apprehended. 3 Burr. 681; Hawk. b. 1, c. 1; Dalton, J. c. 170. And although it has been enacted that clergymen shall not be arrested in churches and churchyards, this is a privilege which extends only to civil process, and in cases of crimes affords no protection. *See* 1 Rich. 2, c. 15; 50 Edw. 3, c. 5; Cro. Jac. 321.

[3] Or peers (Forts. 359); and according to the resolutions of both houses of parliament in 1763, members are not privileged from arrest, even when accused of writing and publishing a seditious libel. See 1 *State Trials*, 305; the *Annual Register* for 1763; and the protest entered in the Lords' Journal, 29th Nov. 1763; and *see* 1 Gow. Rep.; 2 B. & B.; 8 Taunt. Persons in execution in civil suits may be detained under a justice's warrant. *Rex v. Woodham*, 2 Str. 828.

[4] A judgment once pronounced can only be arrested for some matters *intrinsic* appearing upon the face of the record which could render the decree erroneous and reversible. 1 Salk. 77. It can never be arrested upon the suggestion of erroneous, extrinsic, or foreign matters. The Court are to adjudicate upon the record itself, that their successors may have the grounds of their opinion. *Rex v. Ramsbottom*, 5 Price, 447; but *see* 1 Ld. Raym. 232; 1 Salk. 77. It is said that arresting the judgment, instead of compelling the defendant to bring error, is rather matter of indulgence than of right. In *Bluchelis v. Cullett* (9 C. B. 24), *Maule, J.*, said, "It will be granted only in a tolerably clear case; in others the defendant must be left to proceed in error."

JACKSON v. PESKED, 1 M. & S. 234.

Wherever a fair and reasonable intendment cannot cure an omission or defect on the pleadings, the judgment will be arrested.

The plaintiff brought an action of trespass on the case, as being entitled to the reversion of a certain yard and wall, to which the declaration stated an injury to have been committed, but omitted to allege that the reversion was in fact prejudiced, or to show any grievance which in its nature would necessarily prejudice the reversion; the Court arrested the judgment after a verdict had been given in favour of the plaintiff, and held the fault to be one which the verdict could not cure. See *Davis v. Black*, 1 Q. B. 800. *Kedjell v. Moore*, 9 C. B. 364; and *see* Dougl. 679; id. 683.

(B) *Mode of taking advantage of*;[1] *by Motion.*

(C) *Not allowed after Judgment on Demurrer.*[2]

(D) *Nor* in Auditâ Querelâ.[3]

(E) *Nor for anything; aided by Pleading over,*[4] *by Verdict,*[5] *or amendable*[6] *or mere formal Defects.*[7]

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[1] This is done by an application to the Court in which the judgment has been entered for a rule to show cause why it should not be arrested. It must be made within the prescribed time. *See* p. 523 n. The granting or refusing the motion is entirely in the discretion of the Court: the theory is, that the party moving does so, as *amicus curiæ*.

[2] After judgment on demurrer there can be no motion in arrest of judgment for any exception that might have been taken on arguing the demurrer. *Weston v. Mason*, 3 Burr. 1725. But it is otherwise after judgment by default. *Cresswell v. Packham*, 6 Taunt. 650. *Edwards v. Blunt*, 1 Str. 425.

So where a defendant, having suffered judgment by default in an action for unliquidated damages, has appeared and defended on a writ of inquiry (*Freeland v. Hunt*, 2 Wils. 380); nor will the courts entertain a motion of this kind upon an issue of fact directed to be tried at law by a court of equity, it being incompatible with the nature and object of the trial of issues in aid of that court. *Moseley v. Davies*, 11 Price, 162.

[3] The defendant *in auditâ querelâ* cannot move in arrest of judgment, but must either demur at the time of filing the writ of *auditâ querelâ*, or, if the verdict be given against him, must bring a writ of error or move for a new trial. *Giles v. Nathan*, 1 Marsh. 226.

[4] Thus, in action of trespass for taking a hook, where the plaintiff omitted to allege in the declaration that it was his hook, or even that it was in his possession, and the defendant pleaded a matter in confession and avoidance, justifying his taking the hook out of the plaintiff's hands, the Court, on motion in arrest of judgment, held that as the plea itself showed that the hook was in the possession of the plaintiff, the objection, which would otherwise would have been fatal, was cured. *Brooke v. Brooke*, Sid. 184; cited Bac. Ab. Trespass, p. 603.

[5] Omissions and defects may be aided by verdict. Hence, where there is any defect, imperfection, or omission in any pleading, which would have been a fatal objection upon demurrer, yet if the issue joined be such as necessarily required on the trial proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given the verdict, such defect, imperfection or omission, is cured by the verdict. 1 Saund. 228, n. 1. *See* also as to the extent of aider by verdict, *Harris v. Goodwyn*, 2 Man. & G. 405. *Thomas v. Fredericks*, 10 Q. B. 775.

If the judgment be on a verdict giving general damages for the plaintiff in respect of several claims, some of which are not good in law, a *venire de novo* will be awarded (*Leach v. Thomas*, 2 Mee. & W. 427. *Emblin v. Dartnell*, 1 D. & L. 1010. *Holt v. Scholefield*, 6 T. R. 69); if the claims are all good, but are misjoined (as where they are not by and against the same parties, and in the same rights, or where one of them is in replevin or ejectment, *vide* 15 & 16 Vic. c. 76, s. 41), and such general damages be given, the judgment will be arrested. *Carnes v. Thew*, 4 Mee. & W. 163. In such cases, however, he might have the damages separately assessed on each count, and sign judgment only in respect of those that are good. *See* 4 Mee. & W. 168.

[6] By moving on a writ of judgment the defendant is not precluded from bringing error on the judgment, and the opposite party, after error brought, may amend, on payment of costs. *Wilkinson v. Shorland*, 10 Ex. 724.

[7] Technical and formal matters no longer furnish grounds for arrest of judgment. The 50th section (15 & 16 Vic. c. 76, s. 50) expressly provides that no judgment shall be arrested, stayed, or reversed for any imperfection, omission, defect in, or in lack of form. *See* the Statutes of Feofails, 2 Tidd, 919; 1 Wms.; Saund. 228, n. a.

WILKINSON v. SHORLAND, 10 Ex. 724.

A defendant by his mode of pleading may be estopped from moving in arrest of judgment.

The declaration, purporting to be in the form given by the act 1852, stated that the plaintiff sued the defendant for freight, instead of "for money payable" for freight. It was held, upon motion in arrest of judgment, that though on demurrer the declaration would have been bad, as not showing that any debt was due, yet it was not competent for a party who had pleaded to it as a claim for a debt payable *in præsenti*, afterwards to arrest the judgment on the ground that it might also mean a debt payable *in futuro*.

(F) *Suggestions and Insertions of omitted Facts or Matters,*[1] *under 15 & 16 Vic. c. 76.*

(G) *Motion, when and how made.*[2]

(H) *Costs on.*[3]

(I) *Limitation of Actions after.*[4]

[1] By 15 & 16 Vic. c. 76, s. 143, upon any motion made in arrest of judgment, or to enter an arrest of judgment pursuant to 1 Wm. 4, c. 7, for judgments *non obstante veredicto*, by reason of the non-averment of some alleged material fact or facts, or material allegation or other cause, the party whose pleading is alleged or adjudged to be therein defective may, by leave of the Court, suggest the existence of the omitted fact or facts, or other matter, which, if true, would remedy the alleged defect; and such suggestion may be pleaded to by the opposite party within eight days after notice thereof, or such further time as the court or judge may allow, and the proceedings for trial of any issues joined upon such pleadings shall be the same as in an ordinary action. As to this enactment it has been decided by the Queen's Bench, that they will not grant the leave therein mentioned unless they see probable grounds for believing that the final decision on the suggestion will be in favour of the applicant; that the affidavits in support of the application must clearly show that the fact, the non-averment of which is sought to be supplied, really exists; and that it is not enough that they should be satisfied the application is not made for the purpose of delay. *Manley v. Boycott*, 2 El. & Bl. 66. *Fisher v. Bridges*, id. 128 n. If the fact or facts suggested be admitted or found to be true, the party suggesting shall be entitled to such judgment as he would have been entitled to if such fact or facts or allegations have been originally stated in such pleading, and proved or admitted on the trial, together with the costs of and occasioned by the suggestion and proceedings thereon; but if such fact or facts be found untrue, the opposite party shall be entitled to his costs, and if occasioned by the suggestion and proceedings thereon, in addition to any other costs to which he may be entitled. 15 & 16 Vic. c. 76, s. 144.

[2] By R. H. T. 1853, that "no motion in arrest of judgment, or for judgments *non obstante*, shall be allowed after the expiration of four days from the day of trial, nor in any case after the expiration of the term (if the cause be tried in term), or after the expiration of the first four days of the ensuing term, when the cause is tried out of term, unless entered in a list of postponed motions by leave of the Court" (*Harrison v. Great Northern Railway Co.* 11 C. P. 542); and further, by rule 51, that "no suitor (who appears in person) shall be at liberty to set down any motion in such list of postponed motions without the express leave of the Court" (Reg. Gen. H. T. 1853 (Pr.) r. 51); and by rule 53, that "if such motion be entered in such list, or if such motion be postponed by leave of the Court (in the case of a cause tried in term), the attorney who has instructed counsel to make the motion shall give notice of it to the attorney of the opposite party, shall be deemed regular, and every suitor who appears in person shall give a similar notice." Id. s. 53. See *Doe dem. Whitby v. Carr*, 20 L. J. Q. B. 83.

Although the ordinary application to arrest the judgment cannot be made after judgment has been signed and execution issued thereon; but if the fourteen days after verdict shall have elapsed, and execution have issued before application can be made to the Court; or if a judge have ordered execution at an earlier period; or if the judgment have been signed in vacation on a writ of trial or of inquiry, still a motion may be made in the ensuing term to vacate the judgment entered, and to order an arrest thereof. *Dyke v. Glendenning*, 2 Dowl. P. C. 611.

[3] Where the judgment is arrested as to the whole cause of action, neither party recovers the general costs of the cause from the other (*Cameron v. Reynolds*, Cowp. 403); but by the 15 & 16 Vic. c. 76, s. 145, the party whose judgment is arrested recovers from the other the costs incurred by the trial of the issues of fact (arising out of the pleadings, for the defect of which the judgment was so arrested), upon which such party shall have succeeded, and such costs are set off against any money or costs adjudged to the opposite party, and execution may issue for the balance of any. 15 & 16 Vic. c. 76, s. 145. *See* Marshall on Costs, 176.

[4] The stat. 21 Jac. 1, c. 16, s. 3, provides that after arrest of judgment the plaintiff may commence a new action within a year, but not after. 1 Tidd, 15, 9th ed.

II. In Criminal Proceedings.[1]

[1] At any time between the conviction and the sentence, or immediately at the assizes, the defendant may move the Court in arrest of judgment. 5 T. R. 445; 4 Harg. *St. Tr.* 779; 11 id. 289; Comb. 364; Hawk. b. 2, c. 48, s. 1; 4 Blac. Com. 375. *See* Proceedings, Harg. *St. Tr.* 289. The causes on which this motion may be grounded are confined to objections which arise upon the face of the record itself, and which make the proceedings apparently erroneous, and therefore no defect in evidence or improper conduct on the trial can be urged in this stage of the proceedings. 4 Burr. 2287; 1 Ld. Raym. 231; 1 Salk. 77, 315; 1 Sid. 65; Com. Dig. Indictment, N.; and now by 14 & 15 Vic. c. 100, s. 25." Every objection to an indictment for any formal defect apparent on the face thereof shall be taken by demurrer or motion to quash such indictment, before the jury shall be sworn, and not afterwards; and every court before which any such objection shall be taken for any formal defect may, if it be thought necessary, cause the indictment to be forthwith amended in such particular by some officer of the court or other person, and thereupon the trial shall proceed as if no such defect had appeared.

No judgment upon any indictment or information for any felony or misdemeanour, whether after verdict or outlawry, or by confession, default, or otherwise, shall be stayed or reversed for want of the averment of any matter unnecessary to be proved; or for the omission of the words "*as appears by the record*," or the words "*with force and arms*," or the words "*against the peace;*" nor for the insertion of the words "*against the form of the statute*," instead of the words "*against the form of the statutes*," or *vice versâ;* nor for that any person or persons mentioned in the indictment or information is or are designated by a name of office or other descriptive appellation, instead of his, her, or their proper name or names; nor for omitting to state the time at which the offence was committed, in any case where time is not of the essence of the offence; nor for stating the time imperfectly; nor for stating the offence to have been committed on a day subsequent to the finding of the indictment or exhibiting the information, or on an impossible day, or on a day that never happened; nor for want of a proper or perfect venue, where the court shall appear by the indictment or information to have had jurisdiction over the offence. 7 Geo. 4, c. 64, s. 20. And this extends to indictments for offences committed abroad, as well as for offences committed in this country. *Douglas v. The Queen*, 17 L. J. M. C. 177. This latter provision as to venue, however, does not aid the omission of venue altogether (*R. v. O'Connor, et al.*, 13 L. J. M. C. 33; 5 Q. B. 16), or the laying of the venue in a wrong county. *R. v. Mitchel*, 2 Q. B. 636. By stat. 14 & 15 Vic. c. 100, s. 24, no indictment shall be holden insufficient for any of the defects above enumerated, or for want of a proper or formal conclusion, or for want of or imperfection in the addition of any defendant, or for want of the statement of the value or price of any matter or thing, or the amount of damage, injury or spoil, in any case where the value or price, or the amount of damage, injury or spoil, is not of the essence of the offence. In what cases the indictment may be amended, *see* Indictment.

No judgment after verdict upon any indictment or information for any felony or misdemeanour, shall be stayed or reversed for want of a *similiter;* nor by reason that the jury process has been awarded to a wrong officer upon an insufficient suggestion; nor for any misnomer or misdescription of the officer returning such process, or of any of the jurors; nor because any person has served upon the jury who has not been returned as a juror by the sheriff or other officer; and that where the offence charged has been created by any statute, or subject to a greater degree of punishment by any statute, the indictment or information shall after verdict be held sufficient, if it describe the offence in the words of the statute. 14 & 15 Vic. 100, s. 21. See *R. v. Martin et ux.*, Ad. & E. 481.

Where there are two more counts, and one bad, and a general verdict as to both, this is not the subject of a motion in arrest of judgment: because the judgment may still be several, though the verdict be general. Arch. *New Cr. Law*, 176. And where the indictment contained two counts for larceny, and a third count stating the prisoner feloniously received and had the goods "so as aforesaid feloniously stolen, taken, and carried away," it was moved to arrest the judgment, because the jury, by their verdict on the two first counts, had negatived the larceny, "as aforesaid:" but the judges held that the last count was good, and the judgment ought not to be arrested; some of them holding that the words "so as aforesaid" might be rejected as surplusage, and others that supposing these words had the effect of importing into the third count that the prisoner had stolen the goods, that still the third count would be good. *R. v. Craddock*, 20 L. J. M. C. 31.

The Court have no authority to amend an indictment for a material defect, after verdict, so as to prevent the defendant from moving in arrest of judgment. *R. v. Larkin*, 23 L. J. M. C. 125. *Vide* Archbold's *Justice of the Peace*, 4, 30.

ARREST[1] on Mesne Process.

See Affidavit to hold to Bail
Ambassador
Attorney
Bail
Bankrupt
Barrister
Clergy
Commons, House of
Detainer
Husband and Wife
Infant
Insolvent Debtor
Malicious Arrest
Outlawry
Parliament
Peer
Prisoner
Witness.

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(C) *For Liquidated Damages or Penalty*, p. 528.

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(*b*) *In the Vicinity of one of the Palaces, or formerly in a Sanctuary*, p. 533.

(*c*) *In Courts of Justice*, p. 533.

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(B) *After prior Arrest in a Foreign Country, and Ireland*, p. 535.

(C) *On new Security for same Cause of Action*, p. 535.

(D) *Where Time has been given without new Security*, p. 535.

[1] The restraint of a person's liberty by the actual seizure or apprehension of his body, or otherwise in execution of any legal process. It is well described as "the beginning of imprisonment, when a man is first taken and restrained of his liberty by power of a lawful warrant." 2 Shep. Abr. 299. Wood's *Inst.* 575.

(E) *After Discontinuance of former Suit*, p. 535.
(F) *Where made by a different Party on the same Security*, p. 535.
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(H) *Where made after Criminal Arrest for the same Cause*, p. 535.

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IX. Of the Discharge from, p. 538.
(A) *In general, by Order of Court or Judge*, p. 538.
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(C) *Discharge by Plaintiff or his Attorney*, p. 538.

X. Deposit in lieu of Bail. *See* Bail.

XI. Giving Bail-bond to Sheriff. *See* Bail-bond.

XII. Putting in and justifying Bail. *See* Bail.

I. Of the Cause of Action for which a Party may or may not be Arrested.[1]

(A) *The Cause of Action must be to the Amount of* 20*l. or upwards.*

Arrests on mesne process in any inferior

The 1st sect. of 1 & 2 Vic. c. 110, after reciting that the present power of arrest upon mesne process is unnecessarily extensive and severe, and ought to

[1] At common law, and prior to any legislative interposition either conferring the right to arrest for debt or limiting the sum to a certain amount, a defendant was not amenable to process against his person for civil injuries, except in cases of aggressions committed with force, or *vi et armis*.

The providing a remedy by arrest for a pecuniary demand was first endeavoured to be effected by the statute of Marlbridge, 23, in the 53 Hen. 3, which enacted, "that if bailiffs, who ought to make account to their lords, do withdraw themselves, and have no lands or tenements whereby they may be distrained, then their bodies shall be taken, so that the sheriff shall cause them to make their account." This act was confined in its operation to the now almost obsolete action of account, and was not followed by any new regulation till the 11 Edw. 1, c. 1, commonly called "The Statute Merchant," which rendered the person of the debtor liable to arrest if he had not sufficient goods and chattels to satisfy the claim against him. But experience soon demonstrated that this enactment would prove abortive, as it induced the debtor to conceal his personal chattels, and live exclusively on the immediate and daily product of the soil. A statute was consequently passed in the thirteenth year of the reign of the same king, permitting execution to issue against the body, lands, and goods of persons indebted on bonds or other specialties.

By the statute 25 Edw. 3, c. 17, this power was extended to actions of debt and detinue; and it was not until the expiration of 150 years after the extension of the right to arrest the person of the wrongdoer in trespass, account, debt, and detinue, that a corresponding privilege was given in actions of trespass on the case.

The distinction between instances connected with an infringement of a civil contract, or founded on a violation of the public peace, was thus progressively abolished. But its removal was attended by a concomitant evil; for, according to the law as then established, a defendant was liable, in all cases whatsoever, to be arrested in the first instance, without receiving any previous intimation of the justice of the demand, the nature of the injury, or the extent of the loss sustained by the complainant.

Another defect in the ancient system existed; the sheriff had no guide or fixed rule by which to regulate his acceptance or rejection of bail. His power was, therefore, in that respect arbitrary, unchecked, and

be relaxed, enacts, "that from and after the time appointed for the commencement of this act, no person shall be arrested upon mesne process in any civil action in any inferior court whatsoever, or (except in the cases and in the manner hereinafter provided for) in any superior court."

or superior court are prohibited,

By sect. 3 it is enacted, "that if a plaintiff in any action, in any of her Majesty's superior courts of law at Westminster, in which the defendant is now liable to arrest, whether upon the order of a judge or without such order, shall, by the affidavit of himself or of some other person, show, to the satisfaction of a judge of one of the said superior courts, that such plaintiff has a cause of action against the defendant or defendants, to the amount of twenty pounds or upwards, or has sustained damage to that amount, and that there is probable cause for believing that the defendant, or any one or more of the defendants, is or are about to quit England, unless he or they be forthwith apprehended, it shall be lawful for such judge, by a special order, to direct that such defendant or defendants, so about to quit England, shall be held to bail for such sum as such judge shall think fit, not exceeding the amount of the debt, or damages; and thereupon it shall be lawful for such plaintiff, within the time which shall be expressed in such order, but not afterwards, to sue out one or more writ or writs of *capias*, into one or more different counties, as the case may require, against any such defendant so directed to be held to bail: which writ of *capias* shall be in the form contained in the schedule to this act annexed, and shall bear date on the day on which the same shall be issued: Provided always, that the said writ of *capias*, and all writs of execution to be issued out of the superior courts of law at Westminster, into the counties palatine of Lancaster and Durham, shall be directed to the chancellor of the county palatine of Lancaster, or his deputy there, or to the chancellor of the county palatine of Durham, or his deputy there."

without a judge's order, grounded on an affidavit disclosing such facts as show that the defendant is is about to quit England.

By sect. 5 it is enacted, "that any such special order may be made, and the defendant arrested in pursuance thereof, at any time after the commencement of such action, and before final judgment shall have been obtained therein; and that a defendant in custody upon any such arrest, and not previously served with a copy of the writ of summons, may be lawfully served therewith."

Such order may be obtained any time after the commencement of the action.

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beyond judicial control. These evils were endeavoured to be corrected by the stat. 13 Car. 2, st. 2, c. 2, which enacted, that "no person arrested by any sheriff, &c. wherein true cause of action was not expressed in the process, should be compelled to give security for his appearance in any sum exceeding 40*l*." This act did not prevent malicious persons, by inserting a fictitious cause of action in the writ, obtaining bail for any amount.

It was not until the beginning of the last century that the legislature began to recognise the obligation to control, within certain definite limits, the exercise of the pre-existing unqualified privilege of a creditor to arrest his debtor for any money demand, however trifling.

The first act introducing restrictive regulations was the stat. 12 Geo. 1, c. 29, which was afterwards amended by the 5 Geo. 2, c. 27, made perpetual by the 21 Geo. 2, c. 3, and extended to inferior courts by the 19 Geo. 3, c. 76, and the sum mentioned was directed to be exclusive of costs by the 43 Geo. 3, c. 46, s. 1, increased by 51 Geo. 3, c. 124, to 15*l*.; and, finally, by 1 & 2 Vic. c. 110, s. 3, to 20*l*.

When it is intended to arrest a defendant, the first consideration is, for what amount. If the debt be clearly due, and there be evidence on which there can be no doubt of recovering the whole, no objection can be made to arresting the defendant for the full amount; but if a portion of the claim be doubtful, it is only prudent to hold to bail for the clearly sustainable part. Where the arrest is sought to recover unliquidated damages, as in detinue, trespass case, or trover, the judge must be fully satisfied that the plaintiff has a good cause of action. The affidavit should show all the facts necessary to support it, and enable him to see the amount which may probably be recovered; and great care should be taken in this respect, for, even though the judge make the order, the affidavit may afterwards be brought under the consideration of the Court on a motion to discharge the defendant out of custody.

The affidavit of debt, or of the cause of action, may be incorporated with the affidavit showing the defendant's intention to quit the country, or there may be separate affidavits; taking care, however, in the latter case, to identify the defendant, that is, to show that the same person is spoken of in both affidavits.

All personal actions to be by writ of summons.

By sect. 2 it is enacted, "that all personal actions in her Majesty's superior courts of law at Westminster shall be commenced by writ of summons."

(B) *For Cause of Action accruing Abroad or in Scotland.*[1]

(C) *For Liquidated Damages or Penalty.*

WILDEY v. THORNTON, 2 East, 409.

A party may be arrested for stipulated damages, but not for a penalty.[2]

Per Cur. The rule is clear that for stipulated damages the defendant may be holden to bail, but not for a penalty. See *Stinton v. Hughes*, 6 T. R. 13. *Hatfield v. Linguard*, 6 id. 217. *Kettleby v. Woodcock*, Barnes, 86.

(D) *Where the Legality of the Contract is doubtful.*

SUMNER v. GREEN, 1 H. Black. 301.

Where it is uncertain whether the agreement intended to be

The applicant had been holden to bail upon a bottomry bond for 5900*l.*, entered into, as he alleged, contrary to the provisions of the stat. 7 Geo. 1, c. 1, s. 21. On motion it was contended that he was, in consequence of the illegality, entitled to be discharged from custody. It was urged, in opposition to the

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[1] In *Melan v. the Duke de Fitzjames*, 1 B. & P. 138; *Maule v. Murray*, 7 T. R. 470; it was held that the power of arresting a defendant on contracts made in parts beyond sea, was co-extensive only with the right of arresting the person of the debtor abroad (*see* also 2 Str. 1243; 2 H. Black. 248; 3 B. & A. 52; 2 East, 455); but it has since been determined that for a cause of action in a foreign country, where no arrest is allowed by the law of that state, the remedy must nevertheless be according to the practical procedure in England, where the party resides. *De la Vega v. Vianna*, 1 B. & Adol. 284.

The Court will not interfere where proceedings have been contemporaneously taken in a foreign state, unless it appear that the plaintiff had the same remedy in that country (*Naylor v. Eagar*, 2 Y. & J. 90. *Cox v. Mitchell*, 29 L. J. C. P. 33); though, where a party was liable to arrest in Scotland for fee-farm rent issuing out of the lands there:—*Held*, that he could not be arrested in England in respect of such claim. *Mackenzie v. Johnson*, 1 Scott, 594.

[2] In these cases difficulty has sometimes occurred in distinguishing between penalties and liquidated damages. The general principles are accurately stated by Mr. Holt, in a note to his *Reports*, p. 45; that—

1st. Where a sum of money, whether in the name of a penalty or otherwise, is introduced in an agreement merely to secure the enjoyment of a collateral object, the enjoyment of the object is considered as the principal intent of the contract, and the penalty only as accessory, and therefore only to secure the damage really incurred.

2d. Where an agreement contains provisions for the performance of several things, and then a large sum is stated at the end of it to be paid upon the breach of performance, it will be considered as a penalty.

3d. Where the payment of a smaller sum is secured by a larger.

4th. Where the word "penalty" is specifically used, it is merely as a security, and will effectually prevent the Court from considering the sum mentioned as liquidated damages. *Smith v. Dickinson*, 3 B. & P. 630.

5th. A court of equity will relieve against a penalty upon a compensation, and a court of law will not enforce it beyond the actual damage sustained; but where there is an agreement to pay a particular liquidated sum, neither a court of equity nor a court of law can make a new agreement for a man, nor is there any room for compensation or relief.

6th. Where the precise sum, therefore, is not the essence of the agreement, the *quantum* of damages may be assessed by a jury; but where the precise sum has been fixed and agreed upon by the parties, that very sum is the ascertained and liquidated damages, the jury are confined to it, and the plaintiff cannot recover beyond it. See *Harrison v. Wright*, 13 East, 343. *Astley v. Weldon*, 2 B. & P. 346. *Lowe v. Peers*, 4 Burr. 2225. *Fletcher v. Dyche*, 2 T. R. 32. *Wilbeam v. Ashton*, 1 Camp. 78. *Cotterel v. Hooke*, Dougl. 101. *Winter v. Trimmer*, 1 Bl. 395. *Bird v. Randall*, id. 373, 387. *Hardy v. Martin*, 1 Br. Cas. in Chan. 419. *Sloman v. Walter*, id. 418.

From these general rules the conclusion is simple and obvious, that where the stated damage is the real debt and the essence of the contract, the party may be holden to bail; but where the stipulated sum is to operate merely *in terrorem*, and as a security, the right to the protection of bail is limited to the legal debt, that is, the amount actually due, and not the stipulated forfeiture.

application, that it was improper that a question arising out of the illegality of the contract, and on which the whole merits of the case might depend, should be discussed on a summary application, and not put upon the record; but the Court, in answer to this suggested difficulty, said, "where the plaintiff has the defendant in custody," and the cause of the arrest, as communicated in *his own affidavit*, appears, by reference to the security on which the debt arises, that it would be improper to detain the party in prison, the contract, which is the foundation of the action, being void: and that if the contract were not only void but malicious, the law might be evaded, if the plaintiff were permitted to retain the advantage which he has gained over the defendant, and make use of the opportunity of treating with him while in confinement; for possibly the merits of the case might then never meet the examination of a court of justice. See *Whitwick v. Banks*, Torr. 153.

enforced is legal, the defendant ought not to be arrested.

(E) *Effect of Arresting for too large an Amount under* 43 *Geo.* 3, *c.* 46, *s.* 3.[1]

[1] Although it would appear from *Ricketts v. Noble*, 3 Ex. 521; S. C. 18 L. J. Ex. 201 (and *see* 4 Ex. 260; 7 D. & L. 100), that this statute does not apply to an arrest under a judge's order and *capias*, still, as this is not quite clear, and as its provisions and cases upon it have a direct bearing where a plaintiff does not recover the amount sworn to for the purpose of making the party a bankrupt under 12 & 13 Vic. c. 106, it is thought not right to omit the section and the decision altogether. The 3d section of 43 Geo. 3, enacts, that "in all actions to be brought in England or Ireland, wherein the defendant or defendants shall be arrested and held to special bail, and wherein the plaintiff or plaintiffs shall not recover the amount of the sum for which the defendant or defendants in such actions shall have been so arrested and held to special bail, such defendant or defendants shall be entitled to costs of suit, to be taxed according to the custom of the court in which such action shall have been brought; provided that it shall be made appear, to the satisfaction of the Court in which such action is brought, upon motion to be made in court for that purpose, and upon hearing the parties by affidavit, that the plaintiff or plaintiffs in such action had not any reasonable or probable cause for causing the defendant or defendants to be arrested and held to special bail in such amount as aforesaid, and provided such court shall thereupon, by a rule or order of the same court, direct that such costs shall be allowed to the defendant or defendants: and the plaintiff or plaintiffs shall, upon such rule or order being made as aforesaid, be disabled from taking out any execution for the sum recovered in any such action, unless the same shall exceed, and then in such sum only as the same shall exceed, the amount of the taxed costs of the defendant or defendants in such action: and in case the sum recovered in any such action shall be less than the amount of the costs of the defendant or defendants, to be taxed as aforesaid, that then the defendant or defendants shall be entitled, after deducting the sum of money recovered by the plaintiff or plaintiffs in such action, from the amount of his or their costs, so to be taxed as aforesaid, to take out execution for such costs, in like manner as a defendant or defendants may now by law have execution for costs in other cases."

The act only applies to cases where a verdict has been recovered (*Weaver v. Birdsall*, 12 Price, 734), and not to a cause removed from the Palace Court. *Connel v. Watson*, 2 Dowl. P. C. 139; S. P. *James v. Dawson*, 1 id. 341. There must be an arrest (*Wilson v. Broughton*, 2 id. 631) in fact (*James v. Askew*, 8 Ad. & E. 351); and holding to bail; putting in bail without an arrest (*Bates v. Pilling*, Ex. 2 Dowl. P. C. 367; S. C. 2 C. & M. 374); unless he be detained until he execute a bail-bond (*Reynolds v. Matthews*, 7 Dowl. P. C. 580), or an undertaking being given and then a discharge on a common appearance, on the ground of a defective affidavit, is not within the statute. *Amor v. Blofield*, 9 Bing. 91; S. C. 1 id. 277; S. C. 2 M. & Scott, 156. However, malice need not be proved, the want of reasonable or probable cause being sufficient. *Donlan v. Brett*, 10 B. & C. 117. But the proof of want of probable cause lies on the defendant (*Nicholas v. Hayter*, 2 Ad. & E. 348; S. C. 4 Nev. & M. 882; S. P. *White v. Prickett*, 6 Dowl. P. C. 445; S. P. *Twiss v. Osborne*, 2 Ad. & E. 34); however, it is sufficient if he establish a *primâ facie* case (id.); as where an arrest was made before the credit expired (*Day v. Picton*, 10 B. & C. 120); or where the party at the time has little or no knowledge of the amount of the debt (*Griffiths v. Pointon*, 2 Nev. & M. 675); or where the sum recovered bears no proportion to the amount of the arrest, unless rebutted by the plaintiff. *Summers v. Grosvenor*, 2 Dowl. P. C. 224; S. C. 2 C. & M. 341. So, where defendant was arrested for goods sold, for the greater part of which he had given his acceptances; such arrest was holden to be without reasonable or probable cause, and defendant entitled to his costs under the statute. *Heywood v. Flower*, 3 M. & Scott, 801.

So, if the plaintiff arrest a defendant for one side of a mutual account, without giving credit for what he knows to be due from

II. Proceedings to authorise Arrest.[1]

(A) *Judge's Order,[2] or Order of Court of Bankruptcy, or County-Court Judge,[3] must be Obtained, and a* Capias *issued, or Warrant granted.*

himself, although the defendant has refused to deliver his account, the latter is entitled to his costs under the 43 Geo. 3, c. 46, s. 3. *Ashton v. Naull*, 2 Dowl. P. C. 727. *Linley v. Bates*, 2 C. & J. 659. *Gompertz v. Denton*, 1 Dowl. P. C. 623.

So, a defendant will be entitled to such costs if he has been arrested for a larger sum than that found to be due, when the plaintiff ought to have known that he had not legal proof in support of his claim to the extent for which the arrest took place. *Robinson v. Whitehead*, 6 id. 292.

So, where the plaintiff failed in recovering the sum for which he arrested the defendant, the Court allowed the defendant his costs under the 43 Geo. 3, c. 46, though the account was very long and had been running for several years, it appearing that there must have been either gross neglect or wilful overcharges in making out the claim. *Hall v. Forget*, 1 id. 696. Though, where there is a reasonable doubt in law as to the right of the plaintiff to recover part of his demand:—*Held*, that defendant was not entitled to claim the benefit of the 43 Geo. 3, c. 46. *Stovin v. Taylor*, 1 id. 697 n. So, where the evidence is contradictory, the defendant is not entitled to relief. *Shatwell v. Barlow*, 3 id. 709.

And where the defendant tendered 25*l.* the plaintiff afterwards arrested him for 32*l.*, on reference to arbitration the former sum was awarded, no money being paid into court:—*Held*, that the defendant was not entitled to costs under the 43 Geo. 3 (*Sherwood v. Taylor*, 6 Bing. 280; 3 M. & P. 641), as the statute does not apply where a cause is referred to arbitration. *Keene v. Deeble*, 3 B. & C. 491; S. C. 5 D. & R. 383; S. P. *Holden v. Raitt*, 2 Ad. & E. 445. Or, where an attorney arrests for two sums, as to one of which he had delivered no bill (*Hamilton v. Pitt*, 7 Bing. 230; S. C. 1 Dowl. P. C. 209); or a plaintiff for goods delivered, when part had been returned, which the plaintiff did not know. *Roper v. Shevely*, 2 Dowl. P. C. 14; S. C. 1 C. & M. 496; S. P. *Sutton v. Burgess*, 4 Dowl. P. C. 376. So, paying money into court, which is taken out by the plaintiff, deprives the defendant of his right to costs. *Rowe v. Rhodes*, 2 C. & M. 379; S. C. 2 Dowl. P. C. 384. However, in the case of *Day v. Clark*, 7 id. 147, where the defendant was arrested by the plaintiff, an architect, for 34*l.* 5*s.* for work and labour, &c. The cause having been referred, the arbitrator awarded the plaintiff a sum of 11*l.*, over and above 200*l.* paid into court. The plaintiff's claim was founded upon a per-centage of 5*l.* chargeable on the sum expended on the building on which he was employed; which was sworn by various persons to amount to from 2000*l.* to 5000*l.*:—*Held*, that there was reasonable and probable cause for the arrest; and that the defendant was not entitled to his costs. S. P. *Brooks v Rigby*, 2 Ad. & E. 21. In deciding on the 43 Geo. 3, the Court will take into consideration the way in which the debt was contracted. *Erle v. Wynne*, 1 C. & M. 532; S. C. 2 Dowl. P. C. 23; S. C. 3 Tyr. 586. As, where plaintiff arrested defendant for 500*l.* *Plea:* coverture. Verdict for 38*l.* for money advanced, since her husband's death: defendant applied for costs under 43 Geo. 3, c. 46, s. 3:—*Held*, that to entitle her to apply, it must be shown that the plaintiff knew of her coverture at the time of the arrest. *Spooner v. Danks*, 1 Dowl. P. C. 232.

[1] Formerly, if the defendant was to be arrested, the arrest was the first step in the cause after issuing the writ; but now the defendant may, in actions whether for debts or damages, be arrested at any time during the pendency of the action, that is, any time before final judgment, if he be about to abscond. These are termed bailable proceedings: they are authorised by 1 & 2 Vic. c. 110, s. 3, *supra*. They are entirely collateral to the ordinary procedure in the action. The writ of *capias* is a new writ, introduced by the 2d section, and is no longer, as it was formerly, the commencement or foundation of the suit.

[2] For the affidavit required for this purpose, *see ante*, p. 250, and for the interposition of court of bankruptcy, or county-court judge, *see ante*, p. 58.

The application is *ex-parte*. The judge to whom it is made must be satisfied of the existence of a legal cause of action against the defendant for a debt or damages to the amount of 20*l.* or upward (1 & 2 Vic. c. 110, s. 3, *supra*), and that there is a probable cause for believing that the defendant is about to quit England. The criterion, we have seen (*ante*, p. 251), is whether the defendant is on the eve of leaving for a mere temporary purpose, or for so long as would prejudice the plaintiff. Mere suspicion that a defendant is about to withdraw from England is not sufficient. *Coleridge, J.: Harvey v. O'Meara*, 7 Dowl. P. C. 725.

After a judge's order to stay proceedings for a fixed time the plaintiff cannot arrest under 1 & 2 Vic. *Ball v. Stanley*, 6 Mee. & W. 396. And a judge's order for detaining a party already in custody till he find bail, must be absolute, and not until further orders. *Boddington v. Woodley*, 8 Ad. & E. 925; S. C. 1 Per. & D. 159. The judge's order is filed with the masters, as their authority for signing the *capias*, and is not served.

The defendant cannot be arrested till a writ of summons and a writ of *capias* have been issued, and the writ of summons must be issued before the writ of *capias*, but both may be issued on the same day.

[3] The other mode of proceeding to arrest a

III. Who may or may not be Arrested.[1]

(A) *Personal Exemptions from Arrest.*[2]

(*a*) *The Sovereign and Royal Family.*[3]

(*b*) *Servants of the Sovereign.*[4]

debtor is to apply to a court of bankruptcy, or county-court judge for an order, under the 14 & 15 Vic. c. 52. It does not involve the necessity of issuing a writ of *capias* before the arrest; and, therefore, under certain circumstances, may be more expeditious; but it should not be resorted to unless the plaintiff has reason to believe that he will probably fail to cause the defendant to be arrested, if he proceed in the first instance by application to a judge of one of the superior courts, for, unless he can satisfactorily show that that was so, he may lose his costs of obtaining the warrant, &c. Sect. 10.

We have seen, *ante*, p. 58, the application to the bankruptcy commissioners or county-court judge is for a warrant to authorise the messenger of the Court of Bankruptcy, or the high-bailiff of the County Court, to arrest the debtor or defendant within seven days after the date of the warrant, including the day of the date; which warrant must be dated on the day of issuing, and may be executed in any part of England, and a copy of the warrant must at the time of the arrest be served upon the party arrested.

[1] With the exceptions hereafter noticed, all persons are liable to be arrested again, when a judge's order can be obtained.

[2] There is nothing expressed in the act of 1 & 2 Vic. c. 110, ss. 1 and 2, or the stat. 14 & 15 Vic. c. 52, to affect the privilege from arrest in those cases in which it before existed. It should, however, be stated, that doubts have been entertained whether the privilege can now be allowed to the same extent and in all the same cases as formerly; and it has been decided that an attorney has not now the permanent privilege from arrest which he formerly had, but only the temporary privilege whilst attending in court on his client's business, as when attending at the master's office to tax costs. 9 Jur. 846; 7 Bod. 157; 12 L. J. C. P. 89.

[3] The king, the queen consort, or the queen dowager, and the other branches of the royal family, are all exempt from arrest. Co. Litt. 133; 2 Inst. 50.

[4] None of the king's household or menial servants, or officers, *bonâ fide* employed in his service, can be arrested* (*The King v. Moulton*, 2 Keb. 3; S. P. *Starkie's case*, 1 id. 842. *Rex and Capell v. Baud*, id. 876); as coachman in ordinary (*King v. Foster and another*, 2 Taunt. 167); or clerk of the kitchen (*Bartlett v. Hebbes*, 5 T. R. 686); or a person invested by patent with the office of lighter of the fires and candles to the king's yeoman of the guard. *Forster v. Hopkins*, 2 Chit. Rep. 46.

But it has been doubted whether a gentleman of the king's privy chamber is privileged. *Luntley v. Battine*, 2 B. & A. 234. And it it appears from a subsequent case that the Court absolutely refused to discharge such a person. *Tapley v. Battine*, 1 D. & R. 79.

And it is now doubtful whether a yeoman of the guard is privileged. If he be, the court of Queen's Bench will not enter an *exoneretur* on the bailpiece after he has put in and perfected bail, on removing his cause from the Palace Court into the Queen's Bench. *Sard v. Forrest*, 1 B. & C. 139; S. C. 2 D. & R. 250.

The deputy-governor and major of the Tower is not, as such, privileged from arrest. *Batson v. M'Lean*, 2 Chit. Rep. 51. And the Court refused to discharge him, on the ground that he had been arrested when returning from an attendance on the Prince Regent, it not appearing that he had been attending by the command of his Royal Highness, although the defendant swore that he could not leave the Tower but on business connected with his official situation.

A chaplain to the king is exempt from arrest. *Byrn v. Dibdin*, 1 C., M. & R. 821; S. C. 5 Tyr. 357; S. C. 3 Dowl. P. C. 448. So is a lord of the bedchamber. *Parke, J.*, at chambers, 1835. *Aldridge v. Lord Tullamore*, id. 450 n. And the privilege from arrest applies to a page of the second class in ordinary to the queen (*Reynolds v. Pocock*, 4 Mee. & W. 371; S. C. 7 Dowl. P. C. 4); and to the candle and fire-lighter to the yeoman of the guard. *Hatton v. Hopkins*, 6 M. & S. 271. But, on motion, the Court refused to discharge out of custody "the Somerset Herald," leaving him to his writ of privilege. *Leslie v. Disney*, 1 C., M. & R. 578; 5 Tyr. 181; S. C. 3 Dowl. P. C. 437.

The mere fact of the king not residing personally at the time in the palace in which the servant is employed does not affect his right to exemption. *Winter v. Miles*, 10 East, 578; S. C. 1 Camp. 475 n.

When the privilege is clear, the Court will discharge the party on motion; where it is doubtful, they will leave him to his writ of privilege. *Bartlett v. Hebbes*, 5 T. R. 686.

* This is the prerogative of the king — an exemption from the ordinary course and operation of the laws, instituted not for the protection of the servant, but for the convenience and dignity of the sovereign. The reason of this privilege is thus stated by Lord Coke: "Concerning those that serve the king in his household, their continual service and attendance upon the royal person is necessary." To persons of this description, therefore, the privilege must be limited and restricted.

(e) *By Writ of Protection.*[1]

(B) *Temporary Exemptions.*

(a) *Parties to a Cause attending Courts of Justice.*[2]

(C) *Local Exemptions.*

(a) *In the Sovereign's Presence.*[3]

S. P. *Luntley v. Battine*, 2 B. & A. 234.

The domestics of the queen or queen dowager have no privilege. *Starkie's case*, 1 Keb. 842.

A clergyman on his way to the altar is privileged from arrest. *Goddard v. Harris*, 7 Bing. 320; 5 M. & P. 122.

[1] At common law, and still under certain restrictions, the sovereign possessed the prerogative of exempting his debtor from the proceedings of other creditors until the crown debt was satisfied. *See* Co. Litt. 131 b; 3 Bl. Com. 289; 3 Lev. 332; Cro. Car. 389.

[2] Every person who has any relation to a suit, whether his presence be compulsory or not, is exempt from arrest while attending court. *Meekins v. Smith*, 1 H. Black. 636. So are parties to a cause *eundo*, provided they are guilty of no unnecessary deviation. *Ricketts v. Gurney*, 1 Chit. 682; 7 Price, 699. *Harrison v. Hart*, 1 Com. 411. So suitors coming *bonâ fide* from abroad or any part of the kingdom to attend a court of justice, are privileged during the period of their journey. Bro. Ab. 6, Privilege.

Or parties returning from court after pleading to an indictment. *Garibaldo v. Cagnoni*, 6 Mod. 90; S. C. 1 Salk. 102; S. C. Holt. 89.

Where a suitor, during a *bonâ fide* attendance at the sittings in which his cause was to be tried, was arrested before the actual day of trial in a coffee-house adjacent to the court, he was ordered to be discharged. *Childerston v. Barrett*, 11 East, 439.

So where a suitor attending a cause which was postponed early in the day, continued in court until five o'clock in the afternoon, and retired to a tavern, where he was arrested during dinner, the Court held that such a refreshment did not annul his privilege *redeundo*. *Lightfoot v. Cameron*, 2 Bl. 1113.

So it extends to a party attending to justify as bail. *Johannet v. Lloyd*, Barnes, 27; S. C. Prac. Reg. 341.

If a party coming to attend the trial of his cause be arrested, the judge presiding at Nisi Prius will immediately grant a *habeas corpus** (*Solomon v. Underhill*, 1 Camp. 229; S. P. *ex-parte Tillotson*, 1 Stark. 470) and postpone the trial on payment of costs. *Solomon v. Underhill*, 1 Camp. 229.

[3] Parties in the actual presence of the sovereign, or in one of the royal palaces, are protected from arrest. 3 Bl. Com. 289.

* Or order the officer who executed the process to attend, to show cause why the party should not be discharged *instanter*. *See* 1 Archbold's *Prac.* 69.

The privilege from arrest applies to a petitioning creditor, *eundo, morando, et redeundo*, whilst attending the Commissioners of Bankrupts. *Selby v. Hills*, 8 Bing. 166; S. C. 1 M. & Scott, 253; S. C. 1 Dowl. P. C. 257. And to a suitor *redeundo* from court, notwithstanding a slight deviation. *Pitt v. Coombs*, 3 Nev. & M. 212. As, where a party to a cause on returning from court to his residence, stopped at his office to take refreshment, where he was arrested; but the Court discharged him, his privilege continuing. Id. 4 Nev. & M. 535; S. C. 5 B. & Adol. 1078. So, a witness voluntarily attending a trial, which was referred to arbitration, is privileged from arrest on his return home. *Alderson, J.: Rishton v. Nisbett*, Sp. Ap. 1834; N. P. 1 M. & Rob. 347. So, a subpœnaed witness, on a criminal trial, who is committed for a contempt, on being discharged from his imprisonment, has the same privilege from arrest in returning home after the imprisonment as he would have had in returning home after trial. *Rex v. Wigley*, 7 C. & P. 4. But the privilege from arrest does not extend to a party attending an arbitrator, who stayed to await the event of an application to the Court, in consequence of a revocation of the submission, and his want of pecuniary means of returning. *Spencer v. Newton*, 5 Ad. & E. 623; S. C. 1 Nev. & P. 818. See *Webb v. Taylor*, 1 D. & L. 676; 13 L. J. Q. B. 24.

Upon a charge of forgery, and without warrant, a defendant was arrested on Sunday. On being discharged by the magistrate, when leaving the police-office, he was arrested upon civil process:—*Held*, he was not privileged from arrest. *Jacobs v. Jacobs*, 3 Dowl. P. C. 675. And the same rule holds where the defendant is returning home from gaol after having been tried and acquitted. *Goodwyn v. London*, 1 Ad. & E. 378; S. C. 3 Nev. & M. 879; S. C. 2 Dowl. P. C. 504; S. P. *Anon.* 1 id. 157. See *Hare v. Hyde*, 16 Q. B. 394; 20 L. J. Q. B. 185, that on a *ca. sa.* he may be arrested in court when acquitted of a criminal charge. *Aliter*, where returning from the chambers of a judge, who has discharged him on *habeas corpus*. *Rex v. Blake*, 4 B. & Adol. 355; S. C. 2 Nev. & M. 312. And the Court only granted a rule *nisi* where the defendant was arrested on his way to court to deliver himself up to receive judgment on a conviction for a conspiracy. *Sharplin v. Hunter*, 6 Dowl. P. C. 632. Parties attending justices of the peace are privileged as when attending a superior court.

(*b*) *In the Vicinity of one of the Palaces, or formerly in a Sanctuary.*[1]

(*c*) *In Courts of Justice.*[2]

(*d*) *In Prisons.*[3]

IV. Consequence of arresting Privileged Persons.[4]

[1] No arrest can be made nor process executed within a limited district of the royal residence. *Elderton's case*, 3 Salk. 91; S. C. 6 Mod. 74; 2 Ld. Raym. 978; S. C. Holt. 590.

Though merely making the arrest within the verge* of the palace will not create any ground for discharging the defendant out of custody; but the owner of the franchise, whose exclusive jurisdiction has been encroached upon, is the party to complain, and the person making the arrest will be amenable to him. *Fitzpatrick v. Kelly*, cited in the *King v. Stobbs*. *Sparks v. Spink*, 7 Taunt. 311.

But where the process issues out of the Palace Court at Westminster it may be lawfully executed within the palace, notwithstanding the king is actually resident there, and no leave has been obtained from the Board of Green Cloth. *The King v. Stobbs*, 3 T. R. 735.

To confer this privilege, it is not necessary that his Majesty should be absolutely or virtually dwelling in the palace at the time of the arrest. *Winter v. Miles*, 10 East, 578; S. P. *Elderton's case*, *supra*.

Hence an arrest within the Tower† is illegal. *Batson v. M'Lean*, 2 Chit. Rep. 51. Id. 48. But a party may be lawfully arrested in the Temple.‡ *Brown v. Burlace*, 3 Salk. 45.

Where the affidavits varied as to the place where the arrest was made, the Court dismissed an application to discharge the defendant founded on a *privilegium loci*. *Batson v. M'Lean*, 2 Chit. Rep. 48.

[2] Civil process cannot be executed in Palace Yard *sedente curiæ* (*Long's case*, 2 Mod. 181; S. C. 1 Lev. 166); and in general civil process cannot be executed in the king's courts of justice while the judges are sitting there. 3 Inst. 140; 3 Bl. Com. 289.

[3] An actual residence within the walls of a prison, although not by compulsion, exempts the defendant from arrest; and the only mode of proceeding is by entering a detinue against the party. *Wilkinson v. Jacques*, 3 T. R. 392. This could not happen on mesne process, as no judge's order could be obtained. *See* Prisoner, as to how and when detained or discharged.

[4] A party privileged from arrest has not unfrequently a choice of remedies; as, right to be discharged on motion; to prosecute the party for a contempt; or to bring an action for damages: thus some would not only be relieved upon motion, but the individual executing the process, as in proceeding against a branch of the royal family, a peer, or a member of the House of Commons, would incur the liability of being committed for a breach of privilege by the House of Lords or House of Commons, according to the source from whence the protection was derived. It has been seen, that if the sheriff were to arrest an ambassador, or his servant, not only the sheriff and his officer, but also the plaintiff at whose suit the process issued, and his attorney, would be subject to fine, imprisonment, and corporeal punishment; and it would seem that a contempt would be incurred by arresting a person to whom the king had extended his prerogative of protection.

Where the privilege from arrest is clear the Court will discharge the party on motion. *Luntley v. Battine*, 2 B. & Ad. 234; S. P. *Bartlett v. Hebbes*. But where it is doubtful they will compel him to plead his privilege. *Whittingham v. De la Rieu*, 2 Chit. Rep. 53; S. P. *Duncomb v. Church*, Comb. 390.

If a person be privileged from arrest by a certain warrant or commission, authority should be shown to the Court. *Batson v. M'Lean*, 2 Chit. Rep. 48.

Trespass and false imprisonment are not sustainable against the sheriff or his officer for arresting a person privileged from arrest. *Tarlton v. Fisher*, Dougl. 671; S. P. *Anon.* Lofft. 433.

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* The boundaries of what is technically denominated the verge of the palace of Westminster, are described by the stat. 28 Hen. 8, c. 12, to be from Charing Cross to Westminster Hall. 4 Coke, 46.

† Fifteen yards paved from the gate of the Tower are equally privileged with the Tower itself. 2 Chit. Rep. 51. In *Lord Ferrar's case*, 10 *St. Tr.*, it is stated to be the usual place within the gates of the Tower of London. The Spur-gate is within the precinct. Id.

As great inconvenience accrued from indigent persons resorting to a number of pretended privileged places to elude public justice, under the pretence of their having been palaces of the crown, such as Whitefriars, Savoy, &c., all these sanctuaries have been abolished.

‡ Though an arrest within the precincts of the Tower is irregular, yet the party entitled to complain is only he whose franchise has been invaded. *Bell v. Jacobs*, 4 Bing. 523; S. C. 1 M. & P. 309.

V. Of the Capias, and Form of.[1]

VI. Second Arrest for same Cause of Action.[2]

(A) *General Rule.*[3]

To grant or refuse relief to a privileged person arrested is discretionary with the Court. *Eidgood v. Davies*, 6 B. & C. 84; S. C. 9 D. & R. 153. And the application should be made before any subsequent step taken. Hence, a witness arrested, by giving bail, waives his right to apply for his discharge. *Lyne, ex-parte*, 3 Stark. 132. If a privileged person be arrested as a witness, he must apply to the judge at Nisi Prius, or the court out of which the process issued. *Pitt v. Evans*, 2 Dowl. P. C. 223. Where a party privileged from arrest *redeundo* was arrested on a writ of *capias ad respondendum*, and applied for and obtained a judge's order for his discharge in that action, on the ground of his privilege; at the time of his arrest other writs of *ca. sa.* against him were in the hands of the sheriff:—*Held*, that the sheriff was justified in detaining him on those writs, notwithstanding notice of the judge's order. *Watson v. Carroll*, 4 Mee. & W. 592.

[1] Victoria, &c. to the sheriff of [*or* to the constable of Dover Castle, *or* to the mayor and bailiffs of Berwick-upon-Tweed, *or as the case may be*], greeting.

We command you that you omit not by reason of any liberty in your bailiwick, but, that you enter the same and take C. D., if he shall be found in your bailiwick, and him safely keep until he shall have given you bail, or made deposit with you according to law, in an action on promises [*or* of debt, &c.] at the suit of A. B., or until the said C. D. shall by other lawful means be discharged from your custody. And we do further command you, that on execution hereof you do deliver a copy hereof to the said C. D. And we hereby require the said C. D. to take notice, that within eight days after the execution hereof on him, inclusive of the day of such execution, he should cause special bail to be put in for him in our court of to the said action, and that in default of so doing, such proceedings may be had and taken as are mentioned in the warning written or indorsed hereon. And we do further command you, that immediately after the execution hereof you do return this writ to our said court of together with the manner in which you shall have executed the same, and the day of the execution thereof; or if the same shall remain unexecuted, then that you do so return the same at the expiration of one calendar month from the date hereof, or sooner if you shall be thereto required by order of the said court, or by any judge thereof.

Witness at Westminster [*or as the case may be*], the day of

Memorandum to be subscribed to the Writ.

This writ is to be executed within one calendar month from the date thereof, including the day of such date, and not afterwards.

A Warning to the Defendant.

If a defendant, having given bail on the arrest, shall omit to put in special bail as required, the plaintiff may proceed against the sheriff or on the bail-bond.

Indorsements to be made on the Writ.

Bail for pounds, by order of [*naming the judge making the order*], dated this day of

This writ was issued by E. F. of attorney for the plaintiff [*or* plaintiffs] within named.

Or,

This writ was issued in person by the plaintiff within-named, who resides at [*mention the city, town, or parish, and also the name of the hamlet, street, and number of the house of the plaintiff's residence, if any such there be*].

After the writ is issued, it is taken with a copy to the office of the sheriff, with instructions for a warrant to be given to the officers. The arrest, by sect. 104, must be made within one calendar month after date of writ, and within the county of the sheriff to whom directed; but if necessary, concurrent writs may be issued into different bailiwicks.

It appears to be also necessary to indorse the *capias* (when the affidavit to hold to bail deposed to a debt), with a notice that if the debt and costs are paid within four days further proceedings will be stayed, as in the case of a writ of summons.

The statute (1 & 2 Vic. c. 110, s. 3) allows the issue of concurrent writs into different counties, and these may be issued, it would seem, on different days, if within the time limited by the order. There is no provision for removing a *capias ad respondendum*. If it cannot be executed during the month, a new order must be obtained before another can be issued.

[2] The cases on this subject are extremely numerous; but as no arrest on mesne process can now take place without a judge's order, and as the judicial sanction is granted or withheld according to the details brought before the judge or court, second arrests for the same cause can rarely occur.

[3] By R. G. 1662, Q. B., no person shall be arrested twice for the same cause of action. The rule only applies to where the plaintiff is in fault, and not the defendant; as, where defendant was discharged on the terms of his giving security, which he never gave. *Cantellow v. Trueman*, 2 Dowl. P. C. 2; S. C. 1 C. & M. 536; S. C. 3 Tyr. 579. But where the plaintiff is in fault; as where he arrests for two demands, one he recovers,

(B) *After prior Arrest in a Foreign Country, or Ireland.*[1]

(C) *On a new Security for same Cause of Action.*[2]

(D) *Where Time has been given without new Security.*[3]

(E) *After Discontinuance of former Suit.*[4]

(F) *Where made by a different Party on the same Security.*[5]

(G) *After Death of Plaintiff by his Representative.*[6]

(H) *Where made after a Criminal Arrest for the same Cause.*[7]

VII. Of the Arrest.

(A) *Of the* 1 & 2 *Vic. c.* 110.

By 1 & 2 Vic. c. 110, s. 4, it is enacted, "that the sheriff, or other officer to whom any such writ of *capias* shall be directed, shall, within one calendar month after the date thereof, including the day of such date, but not afterwards, proceed to arrest the defendant thereupon; and such defendant, when so arrested, shall remain in custody until he shall have given a bail-bond to the sheriff, or shall have made deposit of the sum indorsed on such writ of *capias*, together with ten pounds for costs, according to the present practice of the said superior courts; and all subsequent proceedings as to the putting in and perfecting special bail shall be according to the like practice of the said superior courts, or as near thereto as the circumstances of the case will admit."

The sheriff may arrest any time within one month after the date of the *capias*, and detain till defendant find bail, or make deposit.

(B) *Of the Warrant.*[8]

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the other he does not, for want of observing a necessary formality; he cannot arrest again for the latter. *Hamilton v. Pitt*, 7 Bing. 231; 1 Dowl. P. C. 209; 4 M. & P. 868.

[1] Upon a judgment obtained in a foreign country, founded upon an arrest, it was holden, defendant might be arrested in England on that judgment. *Aliven v. Furnival*, 1 Dowl. P. C. 614. But where a defendant had been arrested in Ireland on a bill of exchange, but discharged on common bail, the affidavit being defective, in an action on the judgment obtained in Ireland:—*Held*, the defendant could not be arrested again in England. *Gunn v. M'Clintock*, 2 id. 660; S. C. 2 C. & M. 668; S. C. 4 Tyr. 988.

[2] An arrest on new securities cannot be made in the absence of fraud. *Wilson v. Hamer*, 8 Bing. 54; S. C. 1 M. & Scott, 120; S. C. 1 Dowl. P. C. 248: *Semble contra Puckfold v. Maxwell*, 6 T. R. 52. But, where a defendant was arrested, and to obtain his discharge gave a bill of exchange on a third party, the plaintiff discontinued that action; the bill not being paid when due:—*Held*, that a second arrest on the bill was good. *Hamber v. Cooper*, 2 C., M. & R. 148; S. C. 3 Dowl. P. C. 671.

[3] Where after an arrest an undertaking was given, and it was agreed no proceedings should be taken without three months' notice:—*Held*, that after three months' notice, and sixteen months having elapsed, a second bailable writ might issue. *Ryves v. Bunning*, 3 Dowl. P. C. 817.

[4] A party was arrested, and his attorney having pointed out an irregularity in the process, the plaintiff discontinued the action, taxed the defendant's costs, and paid them, and then sued out a fresh writ, and arrested the defendant thereon:—*Held*, that it was not necessary to give the sheriff notice of the discontinuance, although he had taken an undertaking for a bail-bond on the first arrest, and claimed to detain the defendant thereon, the latter not having sustained any damages. *Price v. Day*, 5 Tyr. 456; S. C. 3 Dowl. P. C. 463.

[5] An arrest made by a different party on the same security cannot be sustained. *M'Clure v. Pringle*, 13 Price, 8; S. C. M'Clel. 1.

[6] An arrest by a testator does not preclude his executors arresting for the same cause of action. *Mellin v. Evans*, 1 C. & J. 82.

[7] The rule as to second arrest does not apply where the first arrest was on criminal process wholly unfounded, or on process wholly irregular. *Mackie v. Warren*, 5 Bing. 176; S. C. 2 M. & P. 279.

[8] A sheriff's officer cannot justify an arrest made without a warrant, by procuring a warrant previously issued to another sheriff's officer, but not executed, to be delivered to himself, with his name inserted after the arrest. *Collins v. Yewens*, 2 Per. & D. 439; S. P. *Richards v. Yewens*, 2 id. 444. An arrest by an officer without his warrant or the writ in his possession, though a ground for discharging the defendant out of custody, still the defendant may be taken again on the same writ. *Plomer v. Ball*, 5 Ad. & E. 823. A sheriff's warrant to his bailiff to take, and the gaoler to detain, until bail be put in, &c., omitted to state the court out of which the writ issued:—

(C) *Of the Manner and Place of the Arrest.*[1]

On the arrest, a copy of the writ must be

By 2 Wm. 4, c. 39, s. 4, it is enacted, "that in all actions, wherein it shall be intended to arrest and hold any person to special bail, who may not be in the

Held sufficient. *Ashby v. Goodyer*, 4 Tyr. 414. But the warrant of the Chancellor of Oxford for arresting a party does not extend to a defendant not resident at the time of the commencement of the suit within the precinct of the University:—*Held*, that the arrest under such circumstances was bad. *Perrin v. West*, 3 Ad. & E. 405; S. C. 5 Nev. & M. 291.

S., a sheriff's officer, arrested the defendant, not then having any warrant, and took him to a lock-up house. At that time there was a warrant in the sheriff's office, directed to another officer, to arrest the defendant at the suit of the plaintiff. S. went to the sheriff's office, and representing that he had an opportunity of arresting the defendant, got his own name inserted in that warrant. It appeared that this was in accordance with the practice of the office, and it was sworn that the sheriff was ignorant that the defendant had at that time been already arrested. S. took the warrant and arrested the defendant, at the suit of the plaintiff:—*Held*, that the defendant was not entitled to be discharged. *Robinson v. Yewens*, 5 Mee. & W. 149.

[1] Mere words do not constitute an arrest, although the party say, "I will come to you immediately." *Russen v Lucas*, 1 R. & M. 26; S. C. 1 C. & P. 153. Formerly it was thought otherwise. Bull. N. P. 6; but *see* 6 Mod. 173; S. C. 1 Salk. 179. But if the party be touched, it is an arrest. *Nicholl v. Darley*, 2 Y. & J. 399. So, placing a party under restraint of a sheriff's officer, who shows the *capias*, is an arrest. *Grainger v. Hill*, 4 Bing. N. S. 212; S. C. 5 Scott, 561. And to constitute an arrest where the warrant is not shown to the defendant, or mentioned, or the defendant informed that he is in custody, though closely watched, there is no arrest. *Williams, J.: Robins v. Hender*, 3 Dowl. P. C. 543; S. P. *Williams v. Jones*, Ca. temp. Hard. 301; S. C. 2 Str. 1049. A sheriff's officer having a warrant from the sheriff to arrest a party for debt, went to the party, and read his warrant to him, and then, having taken a fee, proceeded to the party's attorney to let him know, for bail to be put in. After this, the officer returned that he had taken the party:—*Semble*, that this is no arrest. *Lord Tenterden, C. J.: George v. Radford*, 3 C. & P. 464. So, if a sheriff's officer send his servant to a party to inform him that there is a writ out against him, and that he must come and give bail to it, and the party go to the officer's house and execute a bail-bond, this is not an arrest. *Abbott, C. J.: Berry v. Adamson*, 2 C. & P. 503.

To make an arrest, the outer door cannot be broken open; if it be, the defendant will be discharged out of custody (*Patteson, J.: Hodgson v. Towning*, 5 Dowl. P. C. 410); but the officer may break open the door of a lodger, having first gained peaceable entrance at the outer door of the house (see *Gansell's case*, Lofft. 374).

The doctrine respecting the breaking open of the inner door is not confined to lodgers. *Smith v. Butler*, Comb. 326.

Hence, where an officer had gained possession of an outer door, and found the chamber-door of a stranger secured, it was holden that he was justified in breaking through a window thereto, having first informed the defendant that he had process to serve. *Lloyd v. Sandilands*, 8 Taunt. 250; S. C. 2 Moore, 207. But a door at the top of a staircase opening into a stable-yard cannot be broken open. *Hopkins v. Nightingale*, 1 Esp. 99.

And a mere suspicion that the party is secreted in an inner room of the house of a stranger is no justification for breaking inner door to search. *Johnson v. Leigh*, 1 Marsh. 565.

In executing a *capias utlagatum*, the officer may break open outer doors after demand and refusal (*Rex v. Bird*, Show. 87; S. P. 19 Vin. Abr. 433); so after an arrest the outer door may be broken open, to retake the prisoner (*Anon.* Lofft. 390); so after touching the person against whom he has a warrant through the window (Id. 7 Mod. 8; S. P. *Genner v. Sparks*, 6 id. 173. *Wilson v. Gary*, id. 211. *Sheriff of Hampshire v. Godfrey*, 7 id. 288); so after touching the party's hand, which was stretched out of the window. *Anon.* 1 Vent. 306.

An arrest in the night as well as in the day is lawful (3 Salk. 46); but must be within the limited time and in the county into which *capias* issued, and not made on Sunday. *See* Sunday. *Hammond v. Taylor*, 3 B. & A. 408. And the officer is liable to an action if he arrest a party out of his jurisdiction. 11 Mod. 50; 1 Salk. 201. An objection, that the defendant was arrested in one county and taken into another county, and detained there two days, cannot be taken twenty-three days after the arrest. *Fownes v. Stokes*, 2 Scott, 205; S. C. 4 Dowl. P. C. 125. A defendant may be arrested whilst in gaol, if there for his own purposes. *Littledale, J.: Loveitt v. Hill*, 4 Dowl. P. C. 579. But the place of arrest cannot be proved by a note made by the sheriff's officer and transmitted with the writ to the sheriff's office, though the officer be dead. *Chambers v. Bernasconi*, 4 Tyr. 531; 1 C. M. & R. 347.

custody of the marshal of the Marshalsea of the Court of King's Bench, or of the warden of the Fleet Prison, the process shall be by writ of *capias*, according to the form contained in the said schedule; and so many copies of such process, together with every memorandum or notice subscribed thereto, and all indorsements thereon, as there may be persons intended to be arrested thereon, or served therewith, shall be delivered therewith to the sheriff, or other officer or person to whom the same may be directed, or who may have the execution and return thereof, and who shall, upon or forthwith after the execution of such process, cause one such copy to be delivered to every person upon whom such process shall be executed, by him, whether by service or arrest, and shall indorse on such writ the true day of the execution thereof, whether by service or arrest."

delivered to the defendant.[1]

(D) *Sheriff and his Officers' Duty after.*[2]

Barsham v. Bullock, 10 Ad. & E. 23; S. C. 2 Per. & D. 241.

In debt for a penalty, under 32 Geo. 2, c. 28, against defendant for taking the plaintiff, who had been arrested by the defendant, to a public drinking-house, without the plaintiff's consent. The plea traversed the taking the plaintiff to the drinking-house without his consent. Evidence was given at the trial that the same officer of the defendant who arrested the plaintiff also took him to the drinking-house against his consent.

Held, that as the plea admitted the officer who arrested was the defendant's agent, and the evidence showed that the same officer took the plaintiff to the drinking-house, it was not necessary to produce the warrant to make the defendant liable.

On suing for penalties under 32 Geo. 2, c. 28, it is not necessary to produce the warrant to the bailiff, when the arrest is admitted by the plea, and the evidence shows the illegal act was done by the same party who arrested.

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[1] The copy of the writ delivered should have no word written varying from the original in sense or sound, as "Middesex" for "Middlesex" (*Hodgkinson v. Hodgkinson*, 1 Ad. & E. 533; S. C. 3 Nev. & M. 564; S. C. 2 Dowl. P. C. 535); and must contain the date (*Smart v. Johnson*, 6 Dowl. P. C. 90); and the plaintiff's name: if it does not, the defendant will be discharged out of custody. *Coleridge, J.: Hodd v. Langridge*, 5 id. 721.

[2] The 32 Geo. 2 prohibits the taking a party to gaol within twenty-four hours after arrest, and directs the officer to require the party to nominate some convenient place to be taken to. *Simpson v. Renton*, 5 B. & Adol. 35; S. C. 2 Nev. & M. 52. In *Silk v. Humphrey and another*, 4 Ad. & E. 959; S. C. 7 C. & P. 14. In debt for a penalty under this statute against the sheriff, for carrying the plaintiff to prison within twenty-four hours:—*Plea*, that it was with his consent, on which issue was joined:—*Held*, on motion for judgment, *non obstante veredicto*, a good plea, the circumstances being equivalent to a refusal:—*Held*, also, issue being joined on the allegation of the consent to go to L.'s house, that the consent to be proved was not such consent as a person would give who had the option of being at large; but that the question was, whether plaintiff consented to go to the particular house, as a person would consent who was obliged to be in confinement somewhere:—*Held*, also, that the fact of the sheriff suggesting L.'s house did not prevent the consent from being free within the meaning of the issue.

The sheriff is entitled to exercise a reasonable discretion in determining whether a house nominated by a prisoner under arrest as a safe and convenient dwelling-house be a safe place for the custody of the prisoner. If a party request to be taken to a house for the purpose only of consulting a person there, that is not a nomination of a house within the statute. *Dewhirst v. Pearson*, 1 C. & M. 365. If a defendant, on being arrested, does not name any safe and convenient dwelling-house within the county in which he is arrested, he may be taken immediately to gaol, notwithstanding the 32 Geo. 2, c. 28, s. 2. *Pitt v. Sheriff of Middlesex*, 1 Dowl. P. C. 200. But a previous demand of admittance is essential. *Ratcliffe v. Burton*, 3 B. & P. 223.

It is not requisite that the officer who has the authority should be the hand that arrests, or be present, or in sight, or within any precise distance of the person arrested. *Blatch v. Archer*, Cowp. 63.

A party cannot justify carrying a person by force to a place, and whilst there arresting him. *Birch v. Prodger*, 1 N. R. 135.

A common bailiff need not show his warrant, but a special one must. *Anon.* 3 Salk. 45. And in all cases the warrant, if demanded, should be produced. *Hall v. Roche*, 8 T. R. 188.

IX. Of the Discharge from.[1]

(A) *In general, by Order of Court or Judge.*[2]

(B) *Under* 1 & 2 *Vic. c.* 110.

Party arrested upon a *capias* may apply to a judge or the court suggesting grounds for his discharge, supported by proper affidavits.[3]

By 1 & 2 Vic. c. 110, s. 6, "that it shall be lawful for any person arrested upon any such writ of *capias* to apply at any time after such arrest to a judge of one of the superior courts at Westminster, or to the court in which the action shall have been commenced, for an order or rule on the plaintiff in such action to show cause why the person arrested should not be discharged out of custody; and that it shall be lawful for such judge or court to make absolute or discharge such order or rule, and to direct the costs of the application to be paid by either party, or to make such other order therein as to such judge or court shall seem meet: Provided that any such order made by a judge may be discharged or varied by the court on application made thereto by either party dissatisfied with such order."

(C) *Discharge by Plaintiff or his Attorney.*[4]

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[1] This may happen either by order of the court or a judge, or by the order of the plaintiff or his attorney; or it may take place as the legal consequence of the defendant having made such deposit as is required by statute for that purpose, or by giving a bail-bond to the sheriff.

[2] A party in custody under mesne process, is entitled in all cases to apply to a judge by summons, or to the court, for a rule to show cause why he should not be released from custody, if he can establish that the proceedings are illegal or irregular, or prematurely taken; or the sheriff or his officers in making the arrest has been guilty of any infringement of his duties. Neither the court nor a judge will in general interfere to discharge defendant out of custody upon the merits (*Mason v. Smith*, 5 Dowl. P. C. 179); or on an affidavit that the plaintiff has no cause of action (*Burton v. Haworth*, 4 B. & Adol. 462; S. C. 1 Nev. & M. 318); unless abuse of the process of the court can be shown (*Tucker v. Tucker*, E. T. 1833, C. P. 1); or that it has been applied to the purpose of oppression. *Curzen v. Hodges*, 5 Dowl. P. C. 98; Scott, 463. It is no ground for discharging a defendant that the plaintiff's particulars show that the debt is barred by the Statute of Limitations. *Merceron v. Merceron*, 5 id. 271. Or that an arrest was against good faith, plaintiff having engaged to receive the debt by instalments. *Udall v. Nelson*, 2 Ad. & E. 215; S. C. 4 Nev. & M. 637. But such a motion will be granted if the debt and costs be paid, no matter by whom they were discharged (*Williams, J.: Rimmer v. Turner*, 3 Dowl. P. C. 601); or if defendant will pay into court the sum claimed and expenses (*Pitt v. Coombs*, 2 Ad. & E. 459; S. C. 4 Nev. & M. 535); and the Court will not summarily release from custody a foreigner arrested for the residue of a debt, from which he had been discharged in his own country upon proceedings analogous to the English bankrupt laws (*Bretillot v. Sandos*, 4 Scott, 201); or on the ground that the debt for which he has been arrested is founded on an illegal consideration, and an injunction has been issued from the Court of Chancery to stay proceedings at law.

[3] The application under the act should be for the discharge of the defendant, not that the order for holding to bail, or the *capias* issued under it, be set aside (*Burness v. Grimmoch*, 4 Ex. 320); as where the affidavit is insufficient (*Hopkinson v. Salembrier*, 5 Mee. & W. 423; S. C. 7 Dowl. P. C. 493, by name of *Hopkinson v. Salembrier*); and it should be promptly made, at least within the time for putting in bail (*Sugars v. Concanon*, 5 Mee. & W. 30), even when the process is defective. *Brashour v. Russell*, 4 Bing. N. C. 31; 5 Scott, 268. Trifling defects in a writ of *capias* is no ground for discharging a defendant out of custody. *Pocock v. Mason*, 1 Scott, 51. Nor, it seems, a mistake of the sheriff in making an incorrect copy. Id. At all events, any irregularity in the mode of arrest cannot be taken advantage of after the plaintiff has declared, judgment signed, and defendant charged in execution. *Patteson, J.: Cross v. Marsh*, 6 Dowl. P. C. 280. And where the arrest was made on the 3d February, held, that an application to discharge the defendant out of custody on the 18th of April was too late. *Regina v. Burgess*, 8 Ad. & E. 275.

[4] The sheriff is bound to discharge the defendant upon the debt and costs being paid to the plaintiff, or on receiving an authority in writing, either from the plaintiff's attorney or from the plaintiff himself, to discharge the prisoner. *Taylor v. Brander*, 1 Esp. 45. *Martin v. Francis*, 2 B. & Adol. 402. And though the attorney has given notice to the sheriff not to discharge his prisoner without his consent, claiming a lien for his costs, the sheriff will not be justified

ARSENIC, Restrictions on the Sale of. By the 14 & 15 Vic. c. 13, the sale of arsenic and arsenious preparations is subjected to restrictions. Particulars are to be entered by the vendor, and signed by the purchaser, of the day of sale; the name, abode, and condition of the purchaser; the quantity sold, and the purpose for which required. Where the purchaser is unknown to the vendor, the sale must be in the presence of a person known to the vendor, and to whom also the purchaser is known. The purchaser must be a person of full age, and the arsenic must be coloured with an admixture of indigo or soot, unless where represented by the purchaser to be required for some purpose for which it would be rendered unfit by such admixture, when it may be sold in a quantity of not less than ten pounds. But the act does not extend to arsenic forming part of the prescription of a member of the medical profession, or sold by wholesale to retail dealers upon orders in writing in the ordinary course.

ARSON.

I. Setting Fire to Houses, Churches, &c. p. 539.
(A) *Indictment*, p. 542.
(B) *Punishment*, p. 542.
II. Setting Fire to Dwelling-house, some Person being therein, p. 543.
III. Setting Fire to a Coal-mine, p. 543.
IV. Setting Fire to Ships, p. 543.
(A) *With intent to Murder*, p. 544.
V. Setting Fire to Stacks, &c. p. 544.
VI. Attempting to set Fire to Buildings, &c. p. 544.
VII. Setting Fire to Crops, &c. p. 544.

I. Setting Fire to Houses, Churches, &c.

7 Wm. 4, and 1 Vic. c. 89, s. 3, enacts, that "whosoever shall unlawfully and maliciously[1] set fire to any church or chapel, or to any chapel for the reli- Unlawfully and maliciously setting

in detaining him. *Martin v. Francis, ubi sup.* And see *Barker v. St. Quintin*, 12 Mee. & W. 441. And the sheriff has no right to detain the prisoner as security, on being compelled himself, under the pressure of an attachment, to pay the debt and costs. *Rimmer v. Turner*, 3 Dowl. P. C. 601. The party may be detained in custody for a reasonable time, to enable the officer to search for other writs. *Taylor v. Burder*, 1 Esp. 45.

Indeed, when irregularity is relied upon for the discharge, the application falls within Reg. Gen. H. T. 1853, "that no application to set aside process or proceedings for irregularity shall be allowed, unless made within a reasonable time," *i. e.* within the time allowed for putting in bail. See *Sugars v. Concanon*, 7 Dowl. P. C. 391. *Brashour v. Russell*, 4 Bing. N. C. 31. Illness of the defendant would seem not sufficient excuse for delay (*Day v. Mahon*, 4 id. 8); "nor, if the party applying has taken a fresh step after knowledge of the irregularity." But where the application is founded on a material defect in, or, as it would seem, on the falsity of the affidavit, the defendant may perhaps apply at any time while the suit is pending. See *Newton v. Harland*, 3 Jur. 679. *Walker v. Lumb*, 9 Dowl. P. C. 131. In the latter cases, the motion may be to set aside or rescind the order. *Hopkinson v. Salembrier*, 7 id. 493. A defendant cannot apply to set aside the writ till it has been executed, nor obtain a copy of the affidavit used before the judge. Generally, in support of the application to the Court, affidavits not used before him may be available. *Bullock v. Jenkins*, 1 L., M. & P. 645.

[1] The burning must be done wilfully and maliciously, in order to be an offence either at common law or within the statute 7 Wm. 4, and 1 Vic. c. 89, and therefore no negligence or mischance amounts to it. 4 Bl. Com. 222; 3 Inst. 67. For this reason, though an unqualified person by shooting with a gun happen to set fire to the thatch of a house, this Lord Hale determines not to be felony, contrary to the opinion of former writers. 1 Hale, 569. But if a man, intending to commit a felony, by accident set fire to another's house, this it should seem would be arson at common law, and also within the statute. *See* Fost. 258, 259. If, intending to set fire to the house of A., he

fire to a church or chapel, house, warehouse, &c. is felony.

gious worship of persons dissenting from the United Church of England and Ireland, or shall unlawfully or maliciously set fire to[1] any house, stable, coach-house, out-house, warehouse, office, shop, mill, malt-house, hop-oast, barn, or granary, or to any building or erection used in carrying on any trade or manufacture, or any branch thereof, whether the same or any of them respectively shall then be in the possession of the offender, or in the possession of any other person,[2]

accidentally set fire to that of B., it is felony. 1 Hale, 569. Even if a man, by wilfully setting fire to his own house, burn also the house of one of his neighbours, it will be felony (see *R. v. Probert*, 2 East, P. C. 1031. *R. v. Isaac*, id.), for the law in such a case implies malice, particularly if the party's house were so situate that the probable consequence of its taking fire was that the fire would communicate to the houses in its neighbourhood. And, generally, if the act be proved to be done wilfully, it may be inferred to have been done maliciously, unless the contrary be proved. The absence of malice or spite to the owner is no answer to the charge. *R. v. Salmon*, R. & R. 26.

[1] The words in this statute being "set fire to" merely, it is not necessary to aver in the indictment that the house, &c. was burnt, nor need it be proved that the house, &c. was actually consumed. *R. v. Salmon*, R. & R. 26. *R. v. Stallion*, 1 Mood. C. C. 398. But within this act, as well as to constitute the offence of arson at common law, there must be an actual burning of some part of the house; a bare intent or an attempt to do it is not sufficient. Where upon an indictment upon the repealed statute 9 Geo. 1, c. 22, for setting fire to a paper-mill, it appeared that defendant set fire to some paper that was drying in one of the lofts, but that no part of the mill itself was burnt, the judges held that it did not amount to an offence within the act. *R. v. Taylor*, 1 Leach, 49. And where the defendant set fire to a parcel of unthrashed wheat it was holden not to be within that statute. *R. v. Judd*, 2 T. R. 235. But the burning and consuming of any part of the house, however trifling, is sufficient, although the fire be afterwards extinguished. 1 Hawk. c. 39, s. 17; 3 East, 661; Hale, 569; Dale, 506. Where, on an indictment upon the act now in force, it was proved that the floor of a room was scorched, that it was charred in a trifling way, it had been at a red heat, but not in a blaze, this was held a sufficient burning to support the indictment. *Reg. v. Parker*, 9 C. & P. 45. But where a small fagot having been set on fire on the boarded floor of a room, the boards were thereby scorched black, but not burnt, and no part of the wood was consumed; this was held not sufficient. *Reg. v. Russell*, Car. & M. 541. *See* now the 9 & 10 Vic. c. 25, s. 7, *post*, p. 544.

It is seldom that a wilful burning by the defendant can be made out by direct proof, the jury in general have to presume the defendant's guilt from circumstantial evidence. Where a house was robbed and burnt, the defendants being found in possession of some of the goods which were in the house at the time it was burnt, was admitted as evidence, tending to prove him guilty of the arson. *R. v. Rickman*, 2 East, 1035. So where the question is whether the burning was accidental or wilful, evidence is admissible to show that on another occasion the defendant was in such a situation as to render it probable that he was then engaged in the commission of the like offence against the same property. *Reg. v. Dossett*, 2 C. & Kir. 306.

[2] Arson at common law extended to the burning not only of dwelling-houses but of all out-houses parcel thereof, such as barns, stables, &c., though not contiguous thereto, nor under the same roof, as in the case of burglary. 1 Hale, 567. Upon an indictment for burning a dwelling-house, either at common law or under the statute, it would perhaps be sufficient to prove a burning of a building parcel of the dwelling-house. Where such out-house was burnt, and an indictment on the stat. 9 Geo. 1, c. 22, described it as a certain out-house, an objection that the offence should have been described as a burning of the dwelling-house (the word out-house in the statute meaning, as it was suggested, an out-house which is not parcel of a dwelling-house) was overruled by the judges. *R. v. North*, 2 East, P. C. 1021. So where the indictment described the house in some of the counts as a certain out-house, in others, as a certain house, and the evidence was of the burning of a school-room, separated from the dwelling-house by a small passage, but the roof of one extending over the roof of the other, it was holden that the evidence satisfied the description in both sets of counts. *R. v. Winter*, R. & R. 295. So where the indictment charged the burning of a certain house of the corporation of Liverpool, and the proof was of a burning of a gaol belonging to the corporation, the judges held it to be sufficient. *R. v. Donnovan*, 2 W. Black. 612. But a building constructed as a dwelling-house, but which had not been completed or inhabited, and in which the owner had deposited straw and agricultural instruments, was holden not to be a house, out-house, or barn, within the meaning of the repealed statute; it was not a house in respect of which burglary could be committed; it was a house intended for residence, but not inhabited, and it was not, therefore, a dwelling-house, though it was intended for one; it was not an out-house, because it was not parcel of a dwelling-house; and it was not a barn within the meaning of that statute. *Elsemore v. St. Briavells*, 8 B. & C. 461. So a building erected not for habitation, but for workmen to dry their clothes and take their meals in, having four walls, a roof, and a door, but no

with intent thereby to injure or defraud any person,[1] shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of the natural life of such offender, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years."[2] *See* 9 & 10 Vic. c. 24, s. 1, reducing the sen-

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windows, was held not to be a house within the statute, although a person slept in it with the knowledge, but without the actual permission, of the owner. *Reg. v. England*, 1 C. & Kir. 533. So an indictment for burning a stable is not supported by proof of burning a shed, which has been built for and used for a stable originally, but had latterly been used merely as a lumber-shed. *Reg. v. Colley*, 2 M. & Rob. 475. An open building in a field, at a distance from and out of sight of the owner's house, though boarded round and covered in, is not an out-house within the meaning of this statute. *R. v. Ellison*, 1 Mood. C. C. 336. But an open shed in a farm-yard, composed of upright posts, supporting pieces of wood laid across them, and covered with straw as a roof, is. *R. v. Stallion*, 1 Mood. C. C. 398; 1 C. & Kir. 303. Where a building, formerly a kiln, but latterly used for keeping a cow, was set fire to; and it appeared that the building was one hundred yards from any house, and a much greater distance from the house of the owner, it was held to be neither a stable nor an out-house within the meaning of the statute. *R. v. Haughton*, 5 C. & P. 555. And where the building fired was a kind of cart-hovel formed of uprights, covered with a stable roofing, in a field by itself, some distance from any dwelling, *Vaughan, B.*, was of opinion that it was not an out-house, and would have saved the point, but the prisoner was acquitted. *R. v. Parrott*, 6 C. & P. 402. All these distinctions, however, are now rendered immaterial by the provisions of the stat. 7 & 8 Vic. c. 62, s. 1, which extends the operation of the former statute to any hovel, shed, or fold, or any farm-building, or any building or erection used in farming land. *See infra.*

The house also must be proved to be the house of the person alleged, in the same manner as in burglary. *R. v. Glanfield*, 3 East, P. C. 1024. Where a parish pauper set fire to a house in which he was put to reside by the overseers, and it was not known who the trustees were in whom the legal ownership was vested, it was holden that it might be described as the house of the overseers, or of persons unknown. *R. v. Rickman*, 2 East, P. C. 1034. And a house, in part of which a man lives, but lets other parts to lodgers, may be described as his house, even though he be an insolvent debtor, and have assigned the house to his assignee, if the assignee have not taken possession; at all events, the room in which he lives may be described as his house. *R. v. Ball*, 1 Mood. C. C. 30. So if the possession of a house be obtained wrongfully, it may be described as the house of the wrongful occupier. *R. v. Wallis*, id. 344. At common law, and under the repealed stat. 9 Geo. 1, c. 22, it was necessary to describe and prove the house to be the house of another; but under the present statute it is immaterial whether the house be that of a third person or of the defendant himself, for these statutes apply whether the house, &c., be in the possession of the offender or in the possession of another person. 7 Wm. 4, and 1 Vic. c. 89, s. 3; 7 & 8 Vic. c. 62, s. 1.

[1] The intent stated in the indictment must be proved as laid. Where the offence consists in the setting fire to the house of a third person, the intent to injure that person is inferred from the act, for every person is deemed to intend the necessary consequence of his own act, and, therefore, when the defendant was indicted for setting fire to a certain mill with intent to injure the occupiers thereof, it was holden that he was properly convicted, although it appeared at the trial that he was a harmless, inoffensive man, and had no motive to induce him to commit the act. *R. v. Ferrington*, R. & R. 207. But this doctrine can only arise when the act is wilful, and, therefore, as the fire appeared to be the result of accident, the party who is the cause of it will not be liable. *Ante*, p. 539. On the other hand, when the defendant is charged with setting fire to his own house, the intent to defraud cannot be inferred from the act itself, but must be proved by other evidence. Where, therefore, upon an indictment for arson, with intent to defraud an insurance company, the policy was inadmissible by reason of its not being stamped, a majority of the judges held that it could not be received in evidence, and as the insurance could not otherwise be proved, the defendant ought to be acquitted. *R. v. Gibson*, R. & R. 131. The intention must be to injure some person who is not identified with the defendant. Therefore, a married woman cannot be indicted for setting fire to the house of her husband with intent to injure him. *R. v. Marsh*, 1 Mood. C. C. 182. Since the 14 & 15 Vic. c. 19, it is felony for a man to set fire to goods in a house in his own occupation, with intent to defraud an insurance company by burning the goods. *Reg. v. Lyons*, 28 L. J. M. C. 33; 8 Cox, C. C. 84.

[2] 7 & 8 Vic. c. 62, s. 1, after reciting 7 Wm. 4, and 1 Vic. c. 89, s. 3, and that it had been doubted whether its provisions extend to the offence of unlawfully and maliciously setting fire to any hovel or shed, not being appendant to any house, enacts that "whosoever shall unlawfully and maliciously set fire to any hovel, shed, or fold, or to any farm-building, or any building or erection used in farming lands, whether the same or any of them respectively shall then be in the

tence to seven years' transportation; and *see* 16 & 17 Vic. c. 99, s. 1, by which no person shall be sentenced to transportation, who, if this act had not been passed, would not have been liable to be transported for life, or for a term of fourteen years or upwards; and no person shall be sentenced to transportation for any less term than fourteen years; and by which other punishments are substituted. *See post*, Penal Servitude.

So setting fire to any station, engine-house, &c. belonging to any railway, dock, &c.

14 & 15 Vic. c. 19, s. 8. "If any person shall wilfully and maliciously set fire to any station, engine-house, warehouse, or other building, belonging or appertaining to any railway, dock, canal, or other navigation, every such person shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of his natural life, or for any term not less than seven years, or to be imprisoned with or without hard labour for any term not exceeding three years; and if any person shall wilfully and maliciously set fire to any goods or chattels being in any building, the setting fire to which is made felony by this or any other act of parliament, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for any term not exceeding ten years, nor less than seven years, or to be imprisoned, with or without hard labour, for any term not exceeding three years."

(A) *Indictment.*[1]

(B) *Punishment.*[2]

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possession of the offender or in the possession of any other person, with intent thereby to injure or defraud any person, shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of the natural life of such offender, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years."

Sect. 2 of the same act enacts, "that whosoever shall unlawfully set fire to any hay, straw, wood, or other vegetable produce, being in any farm-house or farm-building, or to any implement of husbandry being in any farm-house or farm-building, with intent thereby to set fire to such farm-house or farm-building, and to injure and defraud any person, shall be liable to the pains and penalties of unlawfully and maliciously setting fire to the said farm-house or farm-building, with intent thereby to injure or defraud such person."

[1] *Indictment for Setting Fire to a House with intent, &c.*

Central Criminal Court } The jurors for our
to wit. } Lady the Queen,
upon their oath, present that J. S. late of the parish of B. in the county of M. labourer, on the 1st day of June, in the year of the reign of our Sovereign Lady Queen Victoria, with force and arms at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, feloniously, unlawfully, and maliciously did set fire to a certain [*dwelling-house*] of T. W. there situate, with intent thereby then and there to injure the said T. W. [*or defraud a certain insurance company, called*], against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

Where the indictment omitted the word "unlawfully," the judges held it to be bad. *R. v. Turner*, 1 Mood. C. C. 239; 4 C. & P. 245.

[2] 7 Wm. 4, and 1 Vic. c. 89, s. 12. "Where any person shall be convicted of any offence punishable within this act, for which imprisonment may be awarded, it shall be lawful for the Court to sentence the offender to be imprisoned, or imprisoned and kept to hard labour, in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement for any portion or portions of such imprisonment, or of such imprisonment with hard labour, not exceeding one month at any one time, and not exceeding three months in any one year, as to the Court in its discretion should seem fit."

7 & 8 Vic. c. 62, s. 3. "Every male person under the age of eighteen years, who shall be convicted of any offence under this act, shall be liable, at the discretion of the Court before which he shall be convicted, in addition to any other sentence which may be passed upon him, to be publicly or privately whipped, in such manner and so often, not exceeding thrice, as the Court shall direct."

9 & 10 Vic. c. 25, s. 9, enacts, that "every male person under the age of eighteen years, who shall be convicted of feloniously setting fire to any building, vessel, or mine, or to any stack or steer, shall be liable, at the discretion of the Court before which he shall be convicted, in addition to any other sentence which may be passed upon him, to be publicly or privately whipped, in such manner, and so often, not exceeding thrice, as the Court shall direct."

II. Setting Fire to Dwelling-house, some Person being therein.

7 Wm. 4, and 1 Vic. c. 89, s. 2, enact, that "whosoever shall unlawfully and maliciously set fire to any dwelling-house, any person being therein, shall be guilty of felony, and being convicted thereof shall suffer death"[1] And party suffer death if any person in dwelling-house.

III. Setting Fire to a Coal-mine.

7 Wm. 4, and 1 Vic. c. 89, s. 9, enact, that "whosoever shall unlawfully and maliciously set fire to any mine of coal, or cannel coal, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of the natural life of such offender, or for any time not less than fifteen years,[2] or to be imprisoned for any term not exceeding three years." Felony to set fire to coal-mines;

IV. Setting Fire to Ships.

7 Wm. 4, and 1 Vic. c. 89, s. 6, enact, that "whosoever shall unlawfully and maliciously set fire to, or in anywise destroy any ship or vessel, whether the same be complete or in an unfinished state, or shall unlawfully and maliciously set fire to, cast away, or in anywise destroy any ship or vessel,[3] with intent thereby to prejudice any owner or part-owner of such ship or vessel, or of any goods on board the same, or any person that hath underwritten or shall underwrite any policy of insurance upon such ship or vessel, or on the freight thereof, or upon any goods on board the same,[4] shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be transported or ships.

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[1] *Indictment for Setting Fire to a House, some Person being therein.*

[Commencement as *ante*, p. 542], in the county aforesaid, feloniously, unlawfully, and maliciously did set fire to a certain dwelling-house of T. W. then situate in J. M. and S. his wife then, to wit, at the time of the committing of the felony aforesaid, being in the same dwelling-house, against the form of the statute, &c.

The defendant cannot upon this indictment be convicted under sect. 3 (*ante*, 539), because under that section an intent to injure or defraud some person must be alleged. *Reg. v. Price*, 1 C. & R. 73. It is not sufficient to prove that the persons were in the house at the time the defendant set fire to an adjoining building, from which the flames communicated to the house, they having then left it. *Reg. v. Fletcher*, 2 C. & Kir. 215.

[2] Seven years, 9 & 10 Vic. c. 24, s. 1.

[3] A pleasure-boat, eighteen feet long, was set fire to, and *Patteson, J.*, inclined to think that it was a vessel within the meaning of the act, but the prisoner was acquitted on the merits, and no decided opinion was expressed. *R. v. Bowyer*, 4 C. & P. 559. Upon an indictment for firing a barge, *Alderson, J.*, said, that if the prisoner was convicted, he would take the opinion of the judges as to whether a barge was within the meaning of the statute. The prisoner was acquitted. *R. v. Smith*, 4 id.

[4] Where upon an indictment against the defendant for setting fire to a ship, with intent to prejudice E. and G. his part-owners, it appeared that the defendant had declared that E. and G. were part-owners, and a bill of sale was produced, by which forty-three sixty-fourths of the vessel were transferred by the defendant, the sole owner, to E. and G., and also an entry in the books of registry in the following form:—"Custom House, Padstow, 11 August, 1829. W. P. of, &c., has sold by bill of sale, dated, &c., forty-three sixty-fourth shares to N. G., of &c., and R. E. of &c., signed, &c.;" and it was objected that the bill of sale was not valid, because by stat. 6 Geo. 4, c. 118, s. 37, the entry must contain not only the date of the bill of sale, but also the date of the production of it, the judge thought that the date, 11th of August, in the commencement of the entry, might be considered as the date of the production of it: particularly as the entry followed the form given by the statute, and it was holden that the defendant was properly convicted. *R. v. Philp*, 1 Mood. C. C. 263. Indeed, it would seem that acts of ownership would of themselves be sufficient to prove this allegation, liable, however, to be rebutted by the entry in the register. The burning of a ship, of which the defendant was part-owner, is within the statute. *Reg. v. Wallace*, Car. & M. 200. In *R. v. Philp*, 1 Mood. C. C. 263, there was no proof of malice against the owners, and the ship was insured for more than its value; but the judge thought that the defendant must be understood to contemplate the consequence of his act, and the judges held that as to this point the conviction was right. See *R. v. Nevill*, 1 Mood. C. C. 458. The underwriters on a policy on goods fraudulently made are within the statute, though no goods be put on board. *Reg. v. Wallace*, 1 Mood. C. C. 200.

beyond the seas for the term of the natural life of such offender, or for any term not less than fifteen years,[1] or to be imprisoned for any term not exceeding three years."

(A) *With Intent to Murder.*

With intent to murder, capital offence.

7 Wm. 4, and 1 Vic. c. 89, s. 4, enact, that "whosoever shall unlawfully and maliciously set fire to, cast away, or in anywise destroy any ship or vessel, either with intent to murder any person, or whereby the life of any person shall be endangered, shall be guilty of felony, and being convicted thereof shall suffer death."

V. Setting Fire to Stacks, &c.

Firing stacks, felony.

7 Wm. 4, and 1 Vict. c. 89, s. 10, enact, that "whosoever shall unlawfully and maliciously set fire to any stack of corn, grain, pulse, tares, straw, haulm, stubble, furze, heath, fern, hay, turf, peat, coals, charcoal, or wood, or any steer of wood, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of the natural life of such offender, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years."[2]

VI. Attempting to set Fire to Buildings, &c.

Attempt to set fire to, &c. felony;

9 & 10 Vic. c. 25, s. 7, enacts, that "whosoever shall unlawfully and maliciously, by any overt act, attempt to set fire to any building, vessel, or mine, or to any stack or steer, or to any vegetable produce of such kind, and with such intent that if the offence were complete the offender would be guilty of felony, and liable to be transported beyond the seas for the term of his natural life,[3] shall, although such building, vessel, mine, stack, steer, or vegetable production be not actually set on fire, be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be transported beyond the seas for any term not exceeding fifteen years, or to be imprisoned for any term not exceeding ten years."

VII. Setting Fire to Crops, &c.

or set fire to crops.

7 & 8 Geo. 4, c. 30, s. 17, enacts, that "if any person shall unlawfully and maliciously set fire to any crop of corn, grain, or pulse, whether standing or

[1] Seven years, 9 & 10 Vic. c. 24, s. 1.

[2] An indictment for setting fire to a stack of beans (*R. v. Woodward*, 1 Mood. C. C. 323), or barley (*R. v. Snatkins*, 4 C. & P. 548), is good; for the Court will take notice that the beans are pulse, and barley corn; but it was said before the last statute that a stack of stubble (not included in the repealed statute) could not be described as a stack of straw. *R. v. Reader*, 4 C. & P. 245. The prisoner was indicted for setting fire to a stack of wood, and it appeared that the wood set fire to consisted of a score of fagots heaped one on the other in a temporary loft over the gateway. *Parke, J.*, held this not to be a stack of wood. *R. v. Aris*, 6 id. 348. Upon the repealed statute, which did not contain the word "haulm," it was holden that an indictment for setting fire to a stack of straw was not supported by proof that the stack was composed partly of stubble and partly of coleseed-straw. *R. v. Tottenham*, 7 id. 237; 1 Mood. C. C. 461. But where upon an indictment under the 1 Vic. c. 89, s. 10, for setting fire to a stack of grain, it was proved that the prisoner set fire to a stack of flax, with the seed in it, and the jury found that flax-seed is a grain, a conviction upon such finding was supported. *Reg. v. Spencer*, 1 Dears & B. 131; 26 L. J. M. C. 16; 1 Cox, C. C. 189. The offence is not of a local nature. *R. v. Woodward*, 1 Mood. C. C. 323.

[3] In the case of attempting to set fire to any vegetable produce, it must appear that it was vegetable produce of such kind as that, if the offence were completed, the defendant would be guilty of felony, and liable to be transported for life. The attempt, therefore, to set fire to any crop of corn, grain, or pulse, or to any wood, coppice, or plantation, or to any heath, gorse, furze, or fern (the actual setting fire to which subjects the offender to transportation to no longer term than seven years, 7 & 8 Geo. 4, c. 30, s. 17, *supra*), is not felony under this act, although it would be a misdemeanour at common law. Arch. *Cr. L.* 341.

cut down, or to any part of a wood, coppice, or plantation of trees, or to any heath, gorse, furze, or fern, wheresoever the same may be growing, every such offender shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding ten years, or if a male, to be once, twice, or thrice publicly or privately whipped (if the Court shall so think fit), in addition to such imprisonment."[1]

ART-UNIONS. 9 & 10 Vic. c. 48, after reciting that "certain voluntary associations have been and may hereafter be formed in various parts of the United Kingdom, under the name of Art-Unions, for the purchase of paintings, drawings, and other works of art, to be afterwards allotted and distributed, by chance or otherwise, among the several members, subscribers, or contributors forming part of such associations, or for raising sums of money by subscription or contribution, to be allotted and distributed by chance or otherwise, as prizes among the members, subscribers, or contributors forming part of such associations, on the condition, nevertheless, that such sums of money so allotted and distributed be expended solely and entirely in the purchase of paintings, drawings, or other works of art, &c., enacts that "all such voluntary associations as aforesaid, now constituted or which may hereafter be constituted, according to the provisions hereinafter contained, shall be deemed to be lawful associations; and the members of and subscribers and contributors to all such lawful associations, and all persons acting under their authority, or on their behalf, for the purposes aforesaid, shall be freed and discharged from all pains and penalties, suits, prosecutions and liabilities, to which by law they would be liable but for the passing of this act, as being concerned in illegal lotteries, littlegoes, or unlawful games, by reason of anything done, or which may be done by them, or any of them, in furtherance of the allotment or distribution, by scheme or otherwise, of paintings, drawings, or other works of art, or of the allotment or distribution of sums of money as prizes to be expended for their purchase: Provided always, that a royal charter or charters shall have been first obtained for the incorporation of any such association, or provided that the deed of partnership, or other instrument or instruments constituting such association, and the rules and regulations relating to the proceedings of such association, for such purpose as aforesaid, shall have first been submitted to the consideration, and be approved of, by a committee of her Majesty's most honourable Privy Council, and a copy thereof deposited with such committee, and that it shall be expressed in every such charter, deed, or instrument: That it shall be lawful for any committee of her Majesty's Privy Council, to whom the consideration of Art-Unions shall be referred by her Majesty, whenever it shall appear to them that any such association is perverted from the purposes of this act, to certify the fact to her Majesty; and thereupon it shall be lawful for her Majesty to revoke or annul the charter, deed, or instrument, under which the association so offending shall have been constituted; and nothing in this act shall be deemed to extend to any association whose charter, deeds of partnership, or other instrument constituting the same, shall have been revoked or annulled."[2]

Voluntary associations constituted for the distribution of works of art by lot are to be deemed legal, provided a royal charter shall have been first obtained.

[1] Sect. 27 enacts, that "where any person shall be convicted of any indictable offence punishable under this act, for which imprisonment may be awarded, it shall be lawful for the Court to sentence the offender to be imprisoned and kept to hard labour in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement for the whole or any portion or portions of such imprisonment, or of such imprisonment with hard labour, as to the Court in its discretion shall seem meet." *See* 7 Wm. 4, and 1 Vic. c. 90, s. 5.

[2] *See* the 21 & 22 Vic. c. 102, "An Act to indemnify certain Persons, who have formed a Voluntary Association for the Disposal of Works of Utility and Ornament, by Chance or otherwise, as Prizes."

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I. To Whom and for what Period he must be Articled.[1]

(A) *Generally for Five Years.*

Generally five years.

6 & 7 Vic. c. 73, sec. 3. "No person[2] shall after the passing of this act be capable of being admitted and enrolled as an attorney or solicitor, unless such person shall have been bound by contract in writing to serve as clerk, for and during the space of five years, to a practising attorney or solicitor, in England or Wales, and shall have duly served under such contract for and during the said term of five years, and also unless such person shall, after the expiration of the said term of five years, have been examined and sworn in the manner hereinafter directed."

(B) *Or Three Years' Service, where the Clerk has taken a University Degree.*

Unless obtained university degree.

23 & 24 Vic. c. 127, s. 2. "Any person having taken the degree of bachelor of arts or bachelor of laws in the University of Oxford, Cambridge, Dublin, Durham, or London, or in the Queen's University in Ireland, or the degree of bachelor of arts, master of arts, bachelor of laws or doctor of laws, in any of the Universities of Scotland, none of such degrees being honorary degrees, and who at any time after having taken such degree,[3] and, either before or after the passing of this act, has been bound by and has duly served under articles of clerkship to a practising attorney or solicitor for the term of three

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[1] The articles must be entered into with a duly-qualified practitioner, and the clerk of a barrister must be disbarred to make the service available. 14 L. J. Q. B. 89. By the 4th section of 6 & 7 Vic. c. 173, no attorney or solicitor shall have more than two articled clerks at one and the same time; and further, no attorney or solicitor shall take, have, or retain any clerk who shall be bound by contract in writing after such attorney or solicitor shall have discontinued or left off practising as, or carrying on the business of, an attorney or solicitor, nor whilst such attorney or solicitor shall be retained or employed as a writer or clerk by any other attorney or solicitor; and service by any clerk under articles to an attorney or solicitor during any time that such attorney or solicitor shall be employed as writer or clerk by any other attorney or solicitor shall not be deemed or accounted as good service under the articles. Where two attorneys are in partnership each may have two articled clerks. *Ex-parte Bailey*, 9 B. & C. 691; 4 M. & R. 600. But where a clerk is articled to one partner who dies, and then the clerk served the other without getting the articles assigned, this is insufficient.

[2] By the 46th section of 6 & 7 Vic. c. 73, it is provided, "that nothing in this Act contained shall extend or be construed to extend to the examination, swearing, admission, or enrolment of the clerks of the Petty-Bag Office, or of the clerk of the Queen's Coroner and Attorney in the Court of Queen's Bench for the time being, but that the said clerks respectively shall and may be examined, sworn, and admitted, and practise in their respective courts and offices, in like manner as they might have been or done before the making of this act."

And by the 47th section, "this act, or anything herein contained, shall not extend or be construed to extend to the examination, swearing, admission or enrolment, or any rights or privileges of any persons appointed to be solicitors of the Treasury, Customs, Excise, Post-office, Stamp-duties, or any other branch of her Majesty's revenue, or to the solicitor of the city of London, or to the assistant to the council for the affairs of the Admiralty or Navy, or to the solicitor for the Board of Ordnance."

[3] The degree must be taken before the articles are entered into. *Ex-parte Bradford*, 28 L. J. Q. B. 138; 23 Jur. 648; 7 W. R. 188.

years, and has been examined and sworn in manner directed by the first hereinbefore mentioned act (6 & 7 Vic. c. 73), and by this act, may be admitted and enrolled as an attorney or solicitor; and service for any part of the term, not exceeding one year, with the London agent of such attorney or solicitor, in the business, practice, or employment of an attorney or solicitor, either by virtue of any stipulation in such articles, or with the permission of such attorney or solicitor, shall be and be deemed to have been good service under such articles for such part of the said term; and where any person has, before the passing of this act, and at any time after having taken such degree, been bound as aforesaid for five years, he may, after having duly served three years of such term, in such manner as would have been required if he had been bound for three years only, and having been examined and sworn as aforesaid, and with the consent in writing (indorsed on his articles of clerkship) of the attorney or solicitor to whom he may be bound, to the immediate determination of his articles of clerkship, be admitted and enrolled as an attorney or solicitor; and where such consent is given as aforesaid and acted upon under this provision by the person hereby made eligible to be admitted and enrolled as aforesaid, the articles of clerkship shall be deemed to have determined as if they had determined by effluxion of time."

(C) *Or after Four Years' Service, if the Clerk has, previous to being articled, passed an Examination at one of the Universities.*

Or passed an examination at one of the universities.

By 23 & 24 Vict. c. 127, s. 5, "the Lord Chief Justices of the Courts of Queen's Bench and Common Pleas, and the Lord Chief Baron of the Exchequer, jointly with the Master of the Rolls, may, if they think fit, from time to time, by regulations to be made by them, direct that any person having successfully passed an examination now or hereafter to be established in any of the Universities hereinbefore mentioned, and to be specified in such regulations, may be admitted and enrolled as an attorney or solicitor, after having subsequently been bound by and having duly served under articles of clerkship to a practising attorney or solicitor for the term of four years, and been examined and sworn as aforesaid; and the said judges may from time to time revoke or alter such regulations as they think fit, but not so as to allow a less term of service than four years."

(D) *Or after Three Years' Service, if he has been previously called to the Bar.*

Or previously called to the bar.

23 & 24 Vict. c. 127, s. 3. "Every person who has been called to the degree of utter barrister in England, and who, before becoming such barrister, has been bound to serve as a clerk for the term of five years, or who, after ceasing to be a barrister, has been bound by contract in writing to serve as a clerk for the term of three years to a practising attorney or solicitor, and has in either of the said cases continued in such service for the term of three years, and during the whole of such three years served in such manner as is hereinbefore required in the case of persons who have taken degrees in the said Universities, and having been examined and sworn as aforesaid, after the expiration of such term of three years (the examination and swearing taking place in the first-mentioned case after the person has ceased to be a barrister), may be admitted and enrolled as an attorney or solicitor: Provided always, that in the case of any such person as aforesaid who has been bound for five years, it shall be necessary for such term to be determined with consent, as hereinbefore provided in the case of persons having taken degrees, who may have been bound for five years before the passing of this act."

(E) *Or after Three Years' Service, if he were previously a Writer to the Signet, or Solicitor, in Scotland.*

23 & 24 Vict. c. 127, s. 15. "Every person who has been admitted and

enrolled as a writer to the signet or as a solicitor in the supreme courts of Scotland, or as a procurator before any of the sheriff courts of Scotland, and who, after being so admitted and enrolled, has been bound by and has duly served under articles of clerkship in England or Wales to a practising attorney or solicitor for the term of three years, and has been examined and sworn in manner directed by 6 & 7 Vict. c. 73, and by this act, may be admitted and enrolled as an attorney or solicitor; and service for any part of the term not exceeding one year with the London agent of such attorney or solicitor in the proper business, practice, or employment of an attorney or solicitor, either by virtue of any stipulation or with the permission of such attorney or solicitor, shall be and be deemed to have been good service under such articles for such part of the said term."

(F) *Or after Three Years' Service, if he has been a Clerk to an Attorney or Solicitor for Ten Years previous to the Articles.*

Or been ten years clerk to an attorney previous to being articled.

23 & 24 Vict. c. 127, s. 4. "Any person who, either before or after the passing of this act, shall for the term of ten years have been a *bonâ fide* clerk to an attorney, solicitor, or proctor, or attornies, solicitors, or proctors, and during that term shall have been *bonâ fide* engaged in the transaction and performance, under the direction and superintendence of such attorney, solicitor, or proctor, or attornies, solicitors, or proctors, of such matters of business as are usually transacted and performed by attornies, solicitors, and proctors, and who shall produce to the examiners satisfactory evidence that he has faithfully, honestly, and diligently served as such clerk, and who, after the expiration of the said term of ten years, has been bound by and has duly served under articles of clerkship to a practising attorney, solicitor, or proctor for the term of three years, and has been examined and sworn in the manner directed by the first hereinbefore-mentioned act and by this act, may be admitted and enrolled as an attorney and solicitor, or proctor; and service for any part of such term, not exceeding one year, with the London agent of such attorney, or solicitor, or proctor, in the proper business, practice, or employment of an attorney, solicitor, or proctor, either by virtue of any stipulation in such articles, or with the permission of such attorney, solicitor, or proctor, shall be and be deemed to have been good service under such articles for such part of the said term; and where any such person has, before the passing of this act, been bound for five years, he may, after having duly served three years of such term in such manner as would have been required if he had been bound for three years only, and having been examined and sworn as aforesaid, and with the consent in writing (indorsed on his articles of clerkship) of the attorney, solicitor, or proctor to whom he may be bound, to the immediate determination of his articles of clerkship, be admitted and enrolled as an attorney or solicitor; and where such consent is given as aforesaid and acted upon under this provision by the person hereby made eligible to be admitted and enrolled as aforesaid, the articles of clerkship shall be deemed to have determined, as if they had determined by effluxion of time."

II. The Articles, and Service under.[1]

[1] The term of service counts from the execution of the articles. *Ex-parte Angell*, 4 Jur. 656.

The following may be the form of

Articles of Clerkship.

Articles of agreement made the day of 18 between A. A. [*the attorney*] of gentleman, one of the attornies of her Majesty's Court of Queen's Bench, Common Pleas, and Exchequer of Pleas at Westminster, and a solicitor of the High Court of Chancery, of the one part, and C. C. of and D. C. [*the clerk*] (son of the said C. C.) of the other part. Witness that the said D. C., of his own free will (and by and with the consent and approbation of the said C. C.) hath placed and bound himself, and by these presents doth place and bind himself, clerk to the said A. A., to serve him from the day of the date hereof for and during and until the full end and term of five [four

(A) *Defect in Articles is no ground for striking Attorney off the Rolls after admission, unless Application be made within a year, save in case of Fraud.*

Defect in articles no ground for striking off roll, unless application within a year, or fraud.

6 & 7 Vict. c. 73, s. 29. "No person who has been admitted and enrolled shall be liable to be struck off the rolls for or on account of any defect in the articles of clerkship, or in the registry thereof, or in his service under such articles, or in his admission and enrolment, unless the application for striking him off the rolls be made within twelve months from the time of his admission and enrolment: provided that such articles, registration, service, admission, or enrolment be without fraud."

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or three, *see supra*] years from hence next ensuing, and fully to be completed and ended. And the said C. C. doth hereby for himself, his heirs, executors, and administrators, covenant with the said A. A., his executors, administrators, and assigns, that the said D. C. shall and will, well and faithfully and diligently, serve the said A. A. as his clerk in the business, practice, or profession of an attorney-at-law or solicitor in Chancery, from the day of the date hereof, for and during and until the full end of the said term of five [four *or* three] years; and that the said D. C. shall not at any time during such term cancel, obliterate, spoil, destroy, waste, embezzle, spend, or make away with any of the books, papers, writings, documents, monies, stamps, chattels, or other property of the said A. A., his executors, administrators, or assigns, or his partner or partners, or any of his clients or employers. And that in case the said D. C. shall act contrary to the last-mentioned covenant, or if the said A. A., his executors, administrators, or assigns, or his partner or partners, shall sustain or suffer any loss or damage by the misbehaviour, neglect, or improper conduct of the said D. C., the said C. C., his heirs, executors or administrators, shall indemnify the said A. A., and make good and reimburse him the amount or value thereof. And further, that the said D. C. will at all times keep the secrets of the said A. A., and his partner or partners, and will at all times during the said term readily and cheerfully obey and execute his or their lawful and reasonable commands; and shall not depart or absent himself from the service or employ of the said A. A. at any time during the said term, without his consent first obtained; and shall from time to time, and at all times during the said term, conduct himself with all due diligence, honesty, and propriety. And that the said C. C., his executors and administrators, will from time to time, and at all times during the said term, find and provide the said D. C. with all and all manner of necessary and becoming apparel, and also physic and surgery in the case of illness. [*This covenant may be extended to the support and maintenance of the clerk.*] And the said D. C. doth hereby for himself covenant with the said A. A., his executors, administrators, and assigns, that he the said D. C. will truly, honestly, and diligently serve the said A. A. at all times for and during the said term as a faithful clerk ought to do, in all things whatsoever in the manner above specified. In consideration whereof, and of £ by the said C. C. to the said A. A., paid at or before the sealing and delivery of these presents (the receipt whereof the said A. A. doth hereby acknowledge, and of and from the same doth release and discharge the said C. C. for ever by these presents), the said A. A., for himself, his heirs, executors, and administrators, doth covenant with the said C. C., his executors and administrators, that the said A. A. will accept and take the said D. C. as his clerk, and also that the said A. A. will, by the best ways and means he may or can, and to the utmost of his skill and knowledge, teach and instruct, or cause to be taught and instructed, the said D. C. in the said practice or profession of an attorney-at-law or solicitor in Chancery, which he the said A. A. then doth or shall at any time hereafter during the said term use or practise; and also will, at the expiration of the said term, use his best means and endeavours at the request, cost, and charge of the said C. C. and D. C., or either of them, to cause and procure him the said D. C. to be admitted and sworn an attorney of her Majesty's said Courts of Queen's Bench, Common Pleas, and Exchequer, or either of them, and of the High Court of Chancery, or any other of her Majesty's courts of law or equity, provided the said D. C. shall have well, faithfully, and diligently served his said intended clerkship: Provided always, and the said A. A. doth hereby for himself, his heirs, executors, and administrators, covenant with the said C. C., his executors and administrators, that in case the said A. A. or the said D. C. shall depart this life within the first [*three*] years of the said term, he, the said A. A., his heirs, executors, or administrators, will repay to the said C. C., his executors or administrators, such portion of the said sum of £ as is hereinafter mentioned: that is to say, if such decease of either of them, the said A. A. and D. C., shall happen before the expiration of the first year of the said term, the sum of £ ; if such decease shall happen after the first year and before the expiration of the second year of the said term, the sum of £ ; and if such decease shall happen after the expiration of the second year and before the expiration of the third year of the said term, the sum of £ . In witness whereof the parties aforesaid have hereunto set their hands and seals the day and year first above mentioned.

Signed, &c.

(B) *Stamp Duty on Articles.*[1]

(C) *An Affidavit of the Execution of the Articles must be filed, and the Articles enrolled within Six Months after Execution.*

Affidavit of execution of articles must be filed, and they must be enrolled within six months.

6 & 7 Vic. c. 73, s. 8.[2] "Whenever any person shall after the passing of this act be bound by contract in writing to serve as a clerk to any attorney or solicitor as aforesaid, the attorney or solicitor to whom such person shall be so bound as aforesaid shall within six months[3] after the date of every such

[1] The stamp duty on the articles is 80*l.* 16 & 17 Vic. c. 63, sched. If the admission is only in the Palatine Courts, or other inferior court of record, it is 60*l.*; and the additional 20*l.* may be paid thereafter on enrolment of the articles in the superior court, the service being reckoned from the date of the articles. 16 & 17 Vic. c. 59, s. 7. If the articles are not stamped at the time they are executed, the 19 & 20 Vic. c. 81, s. 3, provides that it shall be lawful for the Commissioners of Inland Revenue, in any case where they shall be directed so to do by the Commissioners of her Majesty's Treasury, to stamp such articles, upon payment of the duty chargeable thereon at the date thereof, and of so much as is thereinafter specified by way of penalty, and in lieu thereof, that is to say:—

As to any such instrument, bearing date and executed before 5th August, 1853, the sum of	£20
As to any other instrument where the same shall be brought to be stamped within the period of one year from the date thereof, the sum of . . .	10
After one year and within two years .	20
After two years and within three years .	30
After three years and within four years	40
And after four years	50

Where the articles of clerkship were not stamped until after the expiration of the six months, and they were then stamped on payment of the penalty under 19 & 20 Vic. c. 81, s. 3, the Court, upon being satisfied by affidavit that the nonpayment of the stamp duty on the execution of the articles arose from an unforeseen emergency, allowed that the service should be reckoned from the date of the execution of the articles, and not from the date of the filing of the affidavit (*Ex-parte Bishop*, 30 L. J. C. P. 32. *Ex-parte Fenton*, 7 W. R. 160; 32 L. T. 243). But if it appear that payment of the stamp duty was omitted purposely, the Court will not sanction such a course. *Per Erle, C. J.: ex-parte Bishop, supra. See* 26 L. J. Q. B. 24; 27 id. 213; 28 id. 263; 8 W. R. 541.

[2] By sect. 9 it is provided, that in case such affidavit be not filed within such six months, the same may be filed by the said officer after the expiration thereof; but the service of such clerk shall be reckoned to commence and be computed from the day of filing such affidavit, unless one of the said courts of law or equity shall otherwise order. Where a party has omitted duly to file the affidavit, the course is to file it and apply to the court or a judge for an order that the service shall be reckoned from the date of the execution of the articles (*Re Denbigh*, 1 L., M. & P. 210. *Ex-parte Mavin*, 2 id. 187. *Anon.* 27 L. J. Q. B. 184. *Re Welch*, id. 213). The omission must, however, be shown by affidavit to have arisen from some *bonâ fide* excuse, and not mere inadvertence (*Re Benson*, 10 Bears. 435. *Ex-parte Cunningham*, 8 Jur. 405). Where, however, it occurred from the neglect of the clerk, who had taken a degree of B.A., to furnish the master with an affidavit of his matriculation and degree, the Court ordered the service to be reckoned from the date of the articles. *Ex-parte Trafford*, 32 L. T. 135.

Where the attorney to whom the clerk was assigned died within six months of the assignment, without having made the necessary affidavit of the fact of assignment, and it appeared that his memory was impaired, the Court remitted the assignment to be enrolled afterwards, upon satisfactory evidence being given of the facts which should have been contained in the affidavit. *Ex-parte Lee*, 8 W. R. 541.

If the articles have been lost or destroyed, the Court, on being satisfied of the fact by affidavit (*Ex-parte Nash*, 5 Man. & G. 696; 6 Scott, N. R. 695), and that the stamp duty has been paid, and that the copy submitted is a true copy (*Ex-parte Clarke*, 3 B. & A. 610. *Ex-parte Chapman*, 3 Dowl. 562. *Ex-parte Briggs*, 1 D. & L. 94), may direct such copy to be enrolled, and the service to be reckoned from the date of the articles, or other date (2 & 3 Vic. c. 33, s. 9; 3 & 4 Vic. c. 16. See *Ex-parte Cunningham*, 8 Jur. 109). But where, after a clerk had served under unstamped articles for two years, he abandoned the service and qualified himself for the bar, and was called to the bar, the Court refused after the lapse of some years to order the articles to be enrolled *nunc pro tunc*, with a view to enable the applicant to serve the remainder of his time under the articles. *Ex parte Parker*, 8 W. R. 460.

Persons who neglected to file an affidavit of articles executed before the 9th August, 1844, are indemnified from any incapacity or disability arising therefrom. *See* 7 & 8 Vic. c. 86, s. 1.

[3] Where the father of the clerk executed the articles at Bombay on the 1st January, 1853, and inserted that date on the deed, and the clerk and the attorney executed them on the 16th July following, the latter was held to be the date at which the six months commenced to run. *Anon.* 27 L. J. Q. B. 184. *See* also *Ex-parte Leggatt*, 21 Jur. 1218; 30 L. T. 157.

contract make and duly swear, or cause or procure to be made and duly sworn, an affidavit or affidavits of such attorney or solicitor having been duly admitted, and also of the actual execution of every such contract by him the said attorney or solicitor, and by the person so to be bound to serve him as a clerk as aforesaid; and in every such affidavit shall be specified the names of every such attorney or solicitor, and of every such person so bound, and their places of abode respectively, together with the day on which such contract was actually executed, and every such affidavit shall be filed within six months after the execution of the said contract, with and by the officer appointed or to be appointed, as hereinafter mentioned,[1] who shall thereupon enroll and register the said contract, and shall make and sign a memorandum of the day of filing such affidavit upon such affidavit, and also upon the said contract."

(D) *Affidavit of Execution of Articles.*[2]

(E) *Registration of Articles.*

Articles must be produced to the registrar, and entered by him in a book kept for that purpose.

23 & 24 Vic. c. 127, s. 7. "The contract or articles whereby any person shall be bound to serve as a clerk, and also any assignment thereof, shall, within three months after the same has or have been enrolled and registered pursuant to the 6 & 7 Vic. c. 73, be produced to the registrar, who shall enter the names of the parties to and the dates of such contract or articles, and also of such assignment (if any) and the term of service, in a book to be kept for that purpose; and the registrar shall mark such contract or articles and such assignment (if any) as having been so produced and entered, with the date thereof, and shall be entitled to receive a fee of 5*s.* for the entry of such contract and articles, and the like fee for such assignment (if any); and such book shall be open to public inspection during office hours, without fee or reward; and in case such contract or articles and such assignment (if any) be not so produced to and entered by the registrar as aforesaid, within such three months as aforesaid, the service of the clerk shall be reckoned to commence from the date of such production and entry, unless upon an application, of which notice shall be given, to the registrar of one of the superior courts of law at Westminster, or a judge thereof, or a judge of the Court of Chancery, shall otherwise order."

(F) *During Articles, the Clerk must not be engaged in any other Employment.*

Must not be engaged in any other

23 & 24 Vic. c. 127, s. 10. "No person hereafter bound by articles of clerkship to any attorney or solicitor shall, during the term of service mentioned in such articles, hold any office or engage in any employment whatsoever other

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[1] By sect. 20, the masters of the several courts are appointed to file the above affidavits. The fee payable on filing the affidavit of execution of articles, and registering them, is five shillings.

[2] In the Q. B. [*or* C. P. *or* Exch. of P.]

We, J. G. of and A. A. of gentlemen, make oath and say:

And first, I, J. G., for myself, say as follows:—

1. By articles of agreement, dated the day of A.D. 18 and made between the said A. A. of gentleman, one of the attornies of her Majesty's Court of Q. B. [*or* C. P. *or* Exch. of P.], at Westminster [*and a solicitor in the High Court of Chancery*], of the one part, and C. C. of and D. C. of [*son of the said C. C.*], of the other part; the said D. C. for the considerations therein mentioned did put, place, and bind himself clerk to the said A. A., to serve him in the business, profession, and practice of an attorney-at-law [*and solicitor in Chancery*], from the day of the date of the said articles, for the term of five [four *or* three] years thence next ensuing, and fully to be completed and ended; and which said articles were in due form of law executed by the said A. A., C. C., and D. C., on the day of [*or* on the day of the date thereof], in my presence [*and also in the presence of T. F. of*]; and the name of J. G., set and subscribed to the said articles as a witness to the due execution thereof is my handwriting [*and that the name of T. F. also set and subscribed to the said articles as a witness is the proper handwriting of the said T. F.*].

And I, the said A. A., for myself, say as follows:—

2. At the time of the execution of the said articles I was and still am an attorney of the said Court of Q. B. [C. P. *or* Exchequer], and a solicitor of the said Court of Chancery.

Sworn, &c. J. G.
A. A.

than the employment of clerk to such attorney or solicitor, and his partner or partners (if any), in the business, practice, or employment of an attorney or solicitor, save as by the 6 & 7 Vic. c. 73, or this act, is otherwise provided; and every person bound as aforesaid shall, before being admitted an attorney or solicitor, prove by the affidavit required under sect. 14 of the 6 & 7 Vict. c. 73, that he has not held any office or engaged in any employment contrary to this enactment, and the form of such affidavit as aforesaid shall be varied by such addition thereto as may be necessary for this purpose." [1] Employment during service under articles.

(G) *Examinations during Clerkship on Professional Subjects.*

(*a*) *Judges may require Clerks to be Examined during their Articles, in order to ascertain their Progress in acquiring Professional Knowledge.*

23 & 24 Vic. c. 127, s. 9. "The Lord Chief Justices of the Courts of The judges may require

[1] Besides the above section it is by the 6 & 7 Vic. c. 73, s. 12, enacted, that "every person who now is or hereafter shall be bound, by contract in writing, to serve as a clerk to any attorney or solicitor, shall during the whole time and term of service, to be specified in such contract, continue and be actually employed by such attorney or solicitor in the proper business, practice, or employment of an attorney or solicitor." "The object of the legislature," said *Abbott, C. J.*, commenting on 22 Geo. 2, c. 46, s. 8, which was in the same words as the above section, "was, that every person before he could be admitted should acquire competent skill and knowledge to conduct the business of an attorney; and to attain that object the legislature has expressly enacted that there shall be a service as a clerk, under a contract to serve for five years. It has happened in some instances that the service has been put an end to before the five years have expired, and there has been a definite and precise interval, and afterwards an additional binding and service, and it has been held that the deficiency might in that manner be supplied. The service," said his lordship, "required by the Act of Parliament must be a service to the master, continuing during the time and term of years specified in the contract, and not a service broken by devoting days and hours to a different employment accepted by the clerk." *Re Taylor*, 4 B. & C. 341; 5 B. & A. 538. *Scriveners' Co. v. Reg.* 12 L. J. Ex. 492. *Ex-parte Hill*, 7 T. R. 456. *Ex parte Rowle*, 2 Chit. R. 6. Where, therefore, a five-year's service having been held bad on the ground that the clerk had during the whole term likewise acted as a surveyor of taxes, the clerk subsequently served under fresh articles for nearly three years, and it appeared on two affidavits that for a period of three years and three quarters out of the five years he had been exempted from any occupation as tax-surveyor, so that on the whole there had been a service, although not a continuous service, for the requisite period, the rule was made absolute for striking him off the roll, the provisions of the statute of Geo. 2 not having been complied with. *Re Taylor*, 4 B. & C. 341. See *Ex-parte Carr*, 2 Q. B. 477. So where the clerk, after about four years' service, left and went into the militia, and also became a surveyor of taxes, and after an absence of about three years returned to the attorney's office and completed the five years' service, the Court held that he was not entitled to be examined. *Ex-parte Smith*, 28 L. J. Q. B. 263; 23 Jur. 515; 7 W. R. 451; 32 L. T. 135. *Ex-parte Llewellyn*, 12 L. J. Q. B. 138.

In the following cases the Court has allowed the clerk to be admitted, athough there was no continuous service under the articles. Where the clerk whilst under articles, by medical advice and with the consent of his master, went to sea, and after a lapse of five months entered as a student at Harvard University, in the United States, and there pursued the study of the law for seven months, after which time he returned to England and completed his articles. *Ex-parte Cross*, 2 Dowl. N. S. 692. So, where the clerk was articled on the 18th of April, 1822, and served under the articles till the beginning of July 1825, when he was seized with severe illness, which prevented him giving any regular application to business during the residue of the term, but the affidavit showed that he had attended as his health permitted, and that such attendances amounted in the whole to a very considerable portion of the remainder of the term, the Court allowed the clerk to be admitted on the ground that his service had been prevented by the act of God, and that the applicant had done all in his power to qualify himself. *Ex-parte Matthews*, 1 B. & Adol. 160. *Ex-parte Hodge*, 2 Jur. 989. And in general if a clerk has, from illness or other circumstance, been unavoidably absent during part of his service, if he have subsequently completed the full term he will be admitted. *Ex-parte Peel*, 7 Jur. 724. *Ex-parte Frost*, 3 Dowl. 322. *Ex-parte Tomkins*, 6 id. 3. *Ex-parte Hubbard*, 1 id. 438. *Re Smith*, 1 D. & R. 14. *Ex-parte Johnson*, 2 Jur. 966. *Ex-parte Earle*, 1 Bail. C. C. 180. *Ex-parte Cross*, 12 L. J. Q. B. 138. *Ex-parte Smith*, 28 L. J. Q. B. 263.

Even before this statute it was necessary that a barrister should be disbarred before entering upon his articles, the office of a barrister and articled clerk being incompatible. *Ex-parte Bateman*, 6 Q. B. 853. *Ex-parte Warner*, 6 Jur. 1016. *Ex-parte Parkes*, Q. B. in T. 1859.

clerks to be examined during their articles, in order to ascertain their progress in acquiring professional knowledge.

Queen's Bench and Common Pleas, and the Lord Chief Baron of the Court of Exchequer, jointly with the Master of the Rolls, may from time to time, if they see fit, make regulations for the examination of persons hereafter becoming bound under articles of clerkship as aforesaid, at such times or periods of their service, under such articles as the said judges may think fit and direct, in order to ascertain the progress made by such persons in acquiring the knowledge necessary for rendering them fit and capable to act as attornies or solicitors, and such examination shall be conducted by the examiners appointed under the first herein-mentioned act, or such other examiners as the said judges may from time to time appoint on their behalf; and the said judges may by such regulations, in the case of persons who fail to pass such examination to the satisfaction of the examiners, postpone, either for a definite time or such time as the examiners may in such case think proper, and either conditionally or otherwise, the examination required to be passed at the expiration of the term of service under articles and before admission."

(H) *The Service is not vitiated by the Neglect of the Master to take out his Annual Certificate.*

Service not vitiated by master not taking out certificate.

7 & 8 Vic. c. 86, s. 4, reciting that "many attornies, solicitors, notaries public, and others, may have omitted, or may hereafter omit to take out annual certificates, or to enter or register the same in the proper office; and persons who may have served as clerks to such attornies, solicitors, notaries public, and others, by reason of such omission may have incurred, or may hereafter incur, certain disabilities;" for preventing thereof it is enacted, "that no person who now has, or hereafter shall have regularly served any attorney or attornies, notary public or notaries public, for the term of years required by law, shall be prevented or disqualified from being admitted an attorney, solicitor, or notary public, by reason of any omission of the person or persons whom he served for the same term or any part thereof having neglected or omitted to take out his annual certificate, or to enter or register the same, provided such person so having served is otherwise entitled to be so admitted as aforesaid by the laws for the time being in force relating thereto."

(I) *Nor by his being struck off the Rolls for Misconduct after the Termination of the Service.*

Nor by his being struck off roll.

6 & 7 Vic. c. 73, s. 28. "No person who shall have duly served his clerkship under articles in writing, pursuant to the provisions of this act, shall be prevented or disqualified from being admitted and enrolled as an attorney or solicitor, or liable to be struck off the roll, if admitted, by reason or in consequence of the attorney or solicitor to whom he may have been bound by such articles having been after such service struck off the roll, provided that such clerk or person be otherwise entitled to be admitted and enrolled according to the provisions of the said act."

(K) *Discharge from and Assignment of Articles.*[1]

[1] See *Ex-parte Ellis*, 7 W. R. 61. In addition to the cases specifically provided for by statute, there are others in which the courts will exercise the discretionary power vested in them for the purpose of enabling a clerk to complete his prescribed term of service, either by discharging him from the articles and permitting him to enter into fresh articles for the residue of the term, or by directing an assignment of the articles to some other practising attorney. Thus, when the attorney with whom a clerk was serving his articles became, by reason of mental alienation, incapable of continuing to practise, the Court directed the articles to be discharged, and allowed the applicant to be articled to another attorney. *Ex-parte Allen*, 8 Jur. 1169. So it did when the attorney was convicted of forgery, and sentenced to transportation. *Ex-parte* ——, id.

(*a*) *In Case of Bankruptcy or Insolvency.*

6 & 7 Vic. c. 73, s. 5, enacts, "in case any attorney or solicitor to whom any clerk is articled, shall before the expiration of the term become bankrupt, or take the benefit of any act for the relief of insolvent debtors, or be imprisoned for debt, and remain in prison for the space of twenty-one days, it shall be lawful for the Court in which such attorney is admitted, upon the application of such clerk, to order and direct the articles to be discharged or assigned to such person, upon such terms and in such manner, as the said Court shall think fit." If master become bankrupt or insolvent, court may direct his discharge or assignment.

(L) *Return of Premium.*[1]

III. The Examination, and Preliminaries thereto.

(A) *Preliminary Notices, &c.*

848. So where he had absconded. *Ex-parte Cartmel*, 6 id. 950. *Ex-parte Cartley*, 12 L. J. Q. B. 98. *Ex-parte Wilkinson*, 9 Dowl. 320. And where it appeared that the attorney had died intestate, that his widow was a minor, and that no letters of administration were likely to be taken out, the Court granted a rule calling on the widow to show cause why the applicant, who was of age, should not be at liberty to re-article himself for the remainder of the term which he had to serve. *Ex-parte Lewis*, 2 D. & L. 130. *Ex-parte Darbell*, 6 Dowl. 505.

It is not necessary that there should be an assignment of the original articles. *Ex-parte Hancock*, 2 Dowl. N. S. 54; 6 Jur. 949. In the case already referred to, where the master had absconded, the rule was drawn up in the following terms :—

"Why J. W. should not be discharged from certain articles, bearing date and made between A., B., and C., and why the said J. W. should not be at liberty to enter into further articles for the residue of his service of clerk to D. E.; and why such further articles should not be enrolled without assignment of the original articles."

This rule was directed to be served at the last place of abode of the master, and stuck up in the Queen's Bench office. 6 Jur. 950; 12 L. J. Q. B. 98.

Where articles of clerkship are discharged by reason of the master's absence, or on any other sufficient ground, and fresh articles are subsequently entered into, the circumstance of an interval elapsing between the first and second service is immaterial, provided the first term be eventually completed. *Ex-parte Tomkins*, 6 Dowl. 3. *Re Smith*, 1 D. & R. 14. But the period which may elapse between the discharge of the original and the execution of the fresh articles, although it will not, under the circumstances supposed, vitiate the service, cannot be included in the five years, or other period forming the regular period of service. *Ex-parte Brown*, 9 Dowl. 526. *Ex-parte Johnson*, 2 Jur. 966. Further, the assignment of articles can only take place during the continuance of the term. *Ex-parte Unthank*, 2 M. & P. 453.

The stamp duty on an assignment of the articles, or fresh articles for the residue of the term, is 35*s.* (55 Geo. 3, c. 184, sched. "Articles.") But fresh articles for a fresh term, after an interval of non-service, require the same stamp duty as original articles, the first stamp being allowed for as a spoilt stamp. Id.

[1] The Court will, in some cases, order that a portion of the premium paid on entering into articles be returned, where from unforeseen circumstances the clerk is defrauded of the benefit of the attorney's professional superintendence, or of those advantages to which he is reasonably entitled during his clerkship. This the Court does in the exercise of its peculiar jurisdiction over attornies. When it so interferes, the practice is to refer it to the master to examine into the facts of the case, and to report as to the amount which ought, in his judgment, to be refunded; such report, when made, being of course subject to the review of the Court. *Anon.* 2 Barnard, 227. *Anon.* 1 id. 331. Where an attorney, on the ground of the misconduct of his clerk, refused to receive him back after he had run away from his service, the master to whom the matter was referred having reported that one half of the premium should be returned, the Court refused to interfere with the report. *Ex-parte Prankerd*, 3 B. & A. 257. *Ex-parte Haydn*, W. W. & H. 321. *Ex-parte Bennett*, W. W. & D. 210. Where an attorney received 200 guineas as a premium with the clerk, and died within two months after the articles had been entered into, the Court of Exchequer refused to order any portion of the premium thus paid to be refunded. *Re Thompson*, 1 Ex. 864. But see *Hirst v. Tolson*, 19 L. J. Ch. 441, where part of premium was decreed to be paid out of assets. And where an attorney had absconded, and had assigned all his property to one individual, the Court refused, on the application of his clerk, to call on the latter to refund any portion of the premium paid on his articles. *Ex-parte Carnley*, 2 Dowl. N. S. 945.

It was held, that an articled clerk to an attorney was not an apprentice within the Bankrupt Act, 6 Geo. 4, c. 16, s. 49, so as to be entitled to a return of any part of the premium in case of the master's bankruptcy. *Ex-parte Prideaux*, 3 Mylne & C. 327.

(*a*) *He must deliver a Notice at the Master's Office, stating his Name and Place of Abode, &c.*[1]

(*b*) *And deposit his Articles of Clerkship and Answer to Questions with the Secretary of the Incorporated Law Society.*

Deposit articles with secretary of Law Society.

Regulation 1. "Every person applying to be admitted an attorney of any of the said courts pursuant to the said rules shall, within the first seven days of the term in which he is desirous of being admitted, leave, or cause to be left, with the secretary of the said Incorporated Law Society, his articles of clerkship, duly stamped, and also any assignment which may have been made thereof, together with answers to the several questions hereunto annexed,[2] signed by the applicant, and also by the attorney or attornies, London agent, barrister, or special pleader, with whom he shall have served his clerkship."[3]

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[1] By rule 5 of Reg. Gen. H. T. 1853, "three days at the least before the commencement of the term next preceding that in which any person not before admitted shall propose to be admitted an attorney of either of the courts, he shall cause to be delivered at the master's office a written notice, which shall state his place or places of abode or service for the last preceding twelve months, and the name and place of abode of the attorney or attornies to whom he was articled and assigned (if any such assignment has been made), and the master shall reduce all such names as in this rule first mentioned to an alphabetical table or tables, under convenient heads, and affix the same on the first day of term in some conspicuous place within or near to and on the outside of each court; and such person shall also, for the space of one full term previous to the term in which he shall apply to be admitted, enter, or cause to be entered, in two books kept for that purpose, one at the chambers of the Lord Chief Justice, or Chief Baron of the court in which he applies to be admitted, and the other at the chambers of the other judges or barons of such court, his name and place or places of abode, and also the name and names, and place or places of abode of the attorney or attornies to whom he shall have been articled and assigned (if any such assignment has been made)."

Notice to Examiners of Intention to apply for Examination.

Notice is hereby given, that D. C. of whose place of abode [*or* service] for the last preceding twelve months has been at and who was lately [*or* is now] under articles of clerkship to A. A. of attorney-at-law [and also under articles of assignment from the said A. A. to E. F. attorney-at-law] intends to apply next Term for examination, in order to be admitted an attorney of her Majesty's Court of Queen's Bench [C. P. *or* Exch. of P.] at Westminster.

Dated this day of 18 D. C.

[2] The following are the questions as to the due service of articles of clerkship to be answered by the clerk:—

1. What was your age at the date of your articles?

2. Have you served the whole term of your articles at the office where the attorney or attornies, to whom you were articled or assigned, carried on his or their business? and if not, state the reason.

3. Have you, at any time during the term of your articles, been absent without the permission of the attorney or attornies to whom you were articled or assigned? and if so, state the length and occasions of such absence.

4. Have you, during the period of your articles, been engaged or concerned in any profession, business, or employment, other than your professional employment, as clerk to the attorney or attornies to whom you were articled or assigned?

5. Have you, since the expiration of your articles, been engaged or concerned, and for how long time, in any and what profession, trade, business, or employment, other than the profession of an attorney or solicitor?

[3] Questions to be answered by the attorney, agent, barrister, or special pleader, with whom the clerk may have served any part of the time under his articles:—

1. Has A. B. served the whole time of his articles at the office where you carry on your business? and if not, state the reason.

2. Has A. B., at any time during the term, been absent without your permission? and if so, state the length and occasion of such absence.

3. Has A. B., during the period of his articles, been engaged or concerned in any profession, business or employment, other than his professional employment as your articled clerk?

4. Has the said A. B., during the whole term of his clerkship, with the exceptions above mentioned, been faithfully and diligently employed in your professional business as an attorney or solicitor?

5. Has the said A. B., since the expiration of his articles, been engaged or concerned, and for how long time, in any and what profession, trade, business, or employment, other than the profession of an attorney or solicitor?

And I do hereby certify that the said A. B. has duly and faithfully served under his articles of clerkship (*or* assignment, *as the case may be*) bearing date, &c., for the term

(c) *If he does not Pass, he may Renew the Notices within a Week after the End of the Term.*[1]

(B) *Where Period of Clerkship expires in Vacation, the Clerk may pass his Examination in the Term preceding.*[2]

Pass examination in preceding term, when articles expire in vacation.

23 & 24 Vict. c. 127, s. 12. "Whenever any of the periods of three years, four years, and five years mentioned in this act, or the 6 & 7 Vict. c. 73 (whether the same period shall have commenced before or after the passing of this act), shall expire in any vacation, then and in such case any person whose period of clerkship shall so expire shall be at liberty to pass his examination in the term immediately preceding the said vacation; and at any time in or after such vacation, and after the said period of clerkship shall have expired, the Master of the Rolls as to the Courts of Chancery, and any one of the judges as to the courts of common law at Westminster, on being satisfied, by affidavit or otherwise, that the period of clerkship of such person has expired, may proceed to administer to him the oath mentioned in the 6 & 7 Vict. c. 73, and the oath of allegiance, and may do all other acts necessary for or towards the admission and enrolment of such person as an attorney and solicitor in the said last-mentioned act."

(C) *The Examination and Certificate.*

(a) *Where and before whom held.*

Examination to be at Hall of Law Society.

By the 4th regulation of H. T. 1853, every person applying for admission shall also attend the said examiners[3] at the Hall of the Incorporated Law

therein expressed, and that he is a fit and proper person to be admitted an attorney.

By regulation 2, "in case the applicant shall show sufficient cause to the satisfaction of the examiners why the first regulation cannot be fully complied with, it shall be in the power of the said examiners, upon sufficient proof being given of the same, to dispense with any part of the first regulation that they may think fit and reasonable."

And by the third regulation, "every person applying for admission shall also, if required, sign and leave, or cause to be left, with the secretary of the said society, answers in writing to such other written or printed questions as shall be proposed by the said examiners touching his said service and conduct; and shall also, if required, attend the said examiners personally, for the purpose of giving further explanations touching the same; and shall also, if required, procure the attorney or attornies with whom he shall have served his clerkship as aforesaid to answer, either personally or in writing, any questions touching such service or conduct, or shall make proof to the satisfaction of the examiners of his inability to procure the same."

[1] By Reg. Gen. H. T. 1853, r. 6, "every person so proposing to be admitted an attorney of either of the said courts, who shall have given such notices of his intention to apply for examination and admission as aforesaid, or as authorised by this rule, and who shall not have attended to be examined, or not have passed the examination, or not have been admitted, may, within one week after the end of the term for which such notices were given, renew the notices for examination or admission for the then next ensuing term, and so from time to time, as often as he shall think proper; and that all such renewed notices shall be added to the lists of notices of admission and re-admission, and placed up on the first day of the term in the said courts, chambers, and offices; and the applicant named in such renewed notices may be examined in the ordinary way in pursuance of such last-mentioned notices, but shall not be admitted until the last day of the term, unless otherwise ordered by one of the said courts or a judge thereof."

[2] The Law Society have, since the 6 & 7 Vict. c. 73, been in the habit of examining articled clerks in the term in which their articles expire, even although they expire on a day subsequent to that on which the examination is held. See *Ex-parte Thomas*, 8 W. R. 522; 36 L. T. 352.

In general, a clerk cannot go up for examination until he has attained the age of twenty-one years. *Ex-parte Cragg*, 6 Dowl. 256. *Ex-parte Evans*, 2 Jur. 47. But where any delay might have lost the clerk the benefit of a valuable partnership of which he had received an offer, the Court allowed him to be examined while he was yet a few months under age. *Ex-parte Tebbs*, 9 Dowl. 151. *Ex-parte Bousfield*, id. 616.

There is no definite time within which he must offer himself for examination after having completed the term of his service. A clerk has been examined, although fourteen years had elapsed since he had served his time. *Ex-parte Waring*, 12 L. J. Q. B. 280. Where it was doubtful whether the service was good, the Court has allowed the examination *de bene esse*. *Ex parte Llewellyn*, 2 Dowl. N. S. 701.

[3] By Reg. Gen. H. T. 1853, r. 1, the se-

Society[1] at such times as shall be appointed for that purpose, pursuant to the said rule, as the said examiners shall appoint, and shall answer such questions as the said examiners shall then and there put to him by written or printed papers, touching his fitness and capacity to act as an attorney and in the usual business transacted by an attorney."

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veral masters of the Queen's Bench, Common Pleas, and Exchequer respectively, together with sixteen attornies or solicitors, to be appointed by a rule of court in every year, to be examiners for one year, any five of whom (one whereof to be one of the said masters) shall be competent to conduct the examination; and that, subject to such appeal as hereinafter mentioned, no person who shall not previously have been admitted a solicitor of the High Court of Chancery shall be admitted to be sworn an attorney of any of the courts except on production of a certificate, signed by the major part of such examiners actually present at and conducting his examination, testifying his fitness and capacity to act as an attorney, and in the usual business transacted by an attorney; such certificate to be in force only to the end of the term next but one following the date thereof, unless such time shall be specially extended by the order of a judge. By r. 2, the examiners so to be appointed shall conduct the examinations under regulations to be first submitted to and approved by the judges.

By the 5th of the same regulations: "Upon compliance with the aforesaid regulations, and if the major part of the said examiners actually present at and conducting the said examination (one of them being one of the said masters), shall be satisfied as to the fitness and capacity of the person so applying to act as an attorney, the said examiners so present, or the major part of them, shall certify the same under their hands in the following form, namely:—"In pursuance of the rules made in Hilary Term, 1853, of the Court of Queen's Bench, Common Pleas, and Exchequer, we, being the major part of the examiners actually present at and conducting the examination of A. B., of, &c., do hereby certify that we have examined the said A. B., as required by the said rules, and we do testify that the said A. B. is fit and capable to act as an attorney of the said courts, and in the usual business transacted by attornies."

By the 23 and 24 Vict. c. 127, sect. 11, the examination "shall be deemed to include such examination touching his fitness and capacity to act in matters of business usually transacted or performed by attornies or solicitors, as the examiners for the time being deem proper, subject nevertheless to any rules, orders, or regulations to be from time to time made in manner provided by the 6 & 7 Vict. c. 73."

Articled clerks not having degrees, or passed a university examination, may be examined in branches of general knowledge, if the judges so appoint.

It is by the 23 & 24 Vic. c. 127, s. 8, enacted, "the Lord Chief Justice of the Court of Queen's Bench, and the Lord Chief Baron of the Court of Exchequer, jointly with the Master of the Rolls, may from time to time make regulations for the examination in such branches of general knowledge as they may deem proper of all persons not having taken degrees, or successfully passed such university examinations as aforesaid, hereafter becoming bound under articles of clerkship to attornies or solicitors; and the said judges by such regulations may require such examination to be passed, either before persons so become bound, or at any time before their admission as attornies or solicitors, as to the said judges may seem fit; and the said judges may from time to time revoke or alter any such regulations as they think fit, and may from time to time appoint examiners for conducting such examination as aforesaid; and no person required to pass such examination shall be capable of being bound as aforesaid, where such examination is required to be passed before being bound, or of being admitted as an attorney or solicitor, where such examination is permitted to be passed at any time before admission, unless before being bound, or before being admitted, as the case may require, he obtain from the examiners a certificate of having satisfactorily passed such examination: Provided always, that the said judges, or any one or more of them, may, where under special circumstances they or he see fit so to do, dispense with compliance with such regulations entirely, or subject to any such conditions as to them or him may seem fit."

[1] By Reg. Gen. H. T. 1853, r. 4. "Whereas the Hall or building of the Incorporated Law Society, in Chancery Lane, is a fit and convenient place for holding the said examinations, and the said society have allowed the same to be used for that purpose: It is ordered that, until further orders, such examination shall be there held on such days as the said examiners, or any five of them, shall appoint; and that any person not previously an attorney of any of the three courts, and desirous of being admitted, shall give notice to the said examiners, before the commencement of the term next preceding that in which he shall propose to be examined, of his intention to apply for examination, by leaving the same with the secretary of the said society at their said Hall; which notice shall also state his place or places of residence or service for the last preceding twelve months: and in case of application to be admitted, on a refusal of the certificate shall give ten days' notice, to be served in like manner, of the day appointed for hearing the same."

(*b*) *Appeal from Refusal of Certificate by Examiners.*[1]

Reg. Gen. H. T. 1853, r. 3. "In case any person shall be dissatisfied with the refusal of the examiners to grant such certificate, he shall be at liberty within one month to apply for admission, by petition in writing, to the judges, to be delivered to the clerk of the Lord Chief Justice of the Court of Queen's Bench, upon which no fee or gratuity shall be received, which application shall be heard in Serjeants' Inn Hall, by not less than three of the judges." Appeal to judges, if examiners refuse certificate.

IV. The Admission.[2]

(A) *Affidavit of Service.*[3]

6 & 7 Vic. c. 73, s. 14. "Every person who shall have been or who shall be bound as a clerk as aforesaid, shall, before he be admitted an attorney or solicitor according to this act, prove by an affidavit of himself, or of the attorney or solicitor to whom he was bound as aforesaid, or such agent, barrister, or special pleader as aforesaid, to be duly made and filed with the proper officer, hereinbefore mentioned, that he hath actually and really served and been employed by such practising attorney, solicitor, agent, or barrister, during the whole time, and in the manner required by the provisions of this act, and in the form to be approved by the judges of the court wherein such person shall apply to be admitted." Before admission, affidavit of same must be made and filed.

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[1] Where the examiners, after inquiring into alleged immoralities on the part of a clerk, declined to examine him for admission at the ordinary examination, the Court, on the ground that the examiners had in effect examined and found he was unfit, refused a rule calling on them to show cause why they should not examine, saying at the same time that the proper redress was by appeal under the above rule. *Ex-parte Duke*, 6 W. R. 72.

[2] By 6 & 7 Vict. c. 73, s. 19, "every person who shall, pursuant to this act, apply to be admitted an attorney or solicitor, shall, before he be admitted and enrolled as aforesaid, take and subscribe the oath, or, if he be one of the people called Quakers, the affirmation following:—

I, A. B., do swear [*or* solemnly affirm, *as the case may be*] that I will duly and honestly demean myself in the practice of an attorney [*or* solicitor, *as the case may be*], according to the best of my knowledge and ability. So help me God.

He must also take the oath of allegiance prescribed by stat. 21 & 22 Vic. c. 48. *See ante*, Allegiance, p. 305. As to the oath to be taken by a Mahomedan admitted an attorney, see *In re Conroodan Tyabjee*, 4 Jur. N. S. 1108; 28 L. J. Q. B. 22.

If the master oppose the swearing in of his articled clerk, on the ground that he disclosed his professional secrets, the affidavit should be explicit. *In re* ——, 7 W. R. 62.

The admission should be taken to the master's office, when the name of the clerk will be entered in the roll of the attornies of the court. 6 & 7 Vict. c. 73, s. 20.

"A printed copy of the list of admissions and readmissions shall be stuck up in the Queen's Bench, Common Pleas, and Exchequer Offices, and at the Judges' Hall or Chambers of each court in Rolls' Garden." Reg. Gen. H. T. 1853, r. 8.

[3] *Affidavit of Service under Articles, and of Service of Notices of Application for Admission.*

In th Q. B. [*or* C. P. *or* Exch. of P.]

I, D. C., of gentleman, make oath and say as follows:—

1. Under and in pursuance of the articles of clerkship hereunto annexed, bearing date, &c., I actually and really served and was employed by A. A. of in the county of gentleman, one of the attornies of her Majesty's Court of Q. B. at Westminster, as his clerk in the practice of an attorney and solicitor, from the day of the date of the said articles inclusive, to the day of 18 inclusive, being the full term of five years specified in the said articles.

2. I did, before the commencement of Term now last past, enter a notice in writing, in the two judges' books, kept for that purpose at their chambers, containing my name and then place of abode, and the name and then place of abode of the said A. A. my master, purporting that I intended to apply in the then next term to be admitted an attorney of her Majesty's Court of [*Q. B.*] at Westminster.

3. I did then also, three days at least previous to the said term, leave a like notice, containing in addition my place or places of abode or service for the last preceding twelve months, with clerk to the masters of this Honourable Court, at the said Master's Office in the Temple.

4. If the said notices, or any or either of them, were or was afterwards cancelled or defaced, it was done without my privity or consent.

Sworn, &c.

The affidavit of the execution or enrolment of the articles [*see ante*, p. 552] must also be

(B) *Affidavit of Payment of Stamp Duty.*

And affidavit of payment of stamp duty.

34 Geo. 3, c. 14, s. 3. "Every person shall, before admission as an attorney, make an affidavit of the due payment of the stamp duty on his articles of clerkship, "and shall insert in such affidavit the sum paid in respect thereof, and also shall specify the name and place of abode with whom such contract of service was entered into, the time of the execution thereof, and the time of enrolling or registering the same; and in case such person shall have been previously admitted a solicitor or attorney in some other court, shall also specify in such affidavit the court in which he has been so admitted, and the time of his admission therein, and shall cause the same to be duly filed in the court in which he proposes to be so admitted a solicitor or attorney, with the proper officer."

(C) *Fees on Admission.*[1]

(*a*) *Upon Admission in one Court, he may Practise in any other on signing the Roll thereof.*[2]

produced to the court or judge to whom such person shall apply for admission, unless such court or judge shall be satisfied that the same cannot be produced, and shall think fit to dispense with the production thereof. See *Ex-parte Nicholls*, 1 Dowl. N. S. 263.

An inadvertent omission to make the entry of the name, &c. in the books at the Judge's Chambers may be excused. *Ex-parte Waller*, 8 W. R. 563.

[1] 6 & 7 Vict. c. 73, sched. 2, contains the following Table of Fees, which, however, the judges have power to diminish or increase, so that by such diminution they be not reduced to less than one-half, or by such increase be not made to exceed by more than one-half the amount mentioned in the said schedule:—

Persons entitled to receive the Fees.	Duties to be Performed.	Amount of Fees in each case. £	s.	d.
The persons appointed for that purpose under ss. 8, 11, 20	On filing every affidavit of execution of articles of clerkship, and making the indorsement required by the act	0	5	0
The Incorporated Law Society	On leaving articles and assignments for inspection and inquiry as to due service previous to examination for admission in the Courts at Westminster	0	10	0
The Incorporated Law Society	For the examination and certificate of fitness and capacity for admission in the courts at Westminster	2	2	0
The officer appointed for that purpose under ss. 8, 11, 20	Search for and delivery of affidavit of execution of articles to be produced on applying for admission	0	2	6
The clerk of the judge granting the *fiat*	For *fiat* at common law	1	1	0
The crier	For the oath	0	1	0
The usher	On signing of the roll	0	5	0
The master's clerk	For certificate of inrolment in any of the courts at Westminster	0	10	0
The officer appointed by the Master of the Rolls	For admission at the Rolls, including the fees of the clerk of the Petty Bag Office, usher, and porter	1	17	0
The officer appointed by the Court of Bankruptcy	For admission in the Court of Bankruptcy	0	6	0
The Registrar of Attornies and Solicitors	Preparing and keeping an alphabetical roll of all the attornies of the courts of law and solicitors in equity, and for issuing each certificate	0	1	6

[2] No motion is necessary for that purpose. *Ex-parte Roberts*, 1 D. & L. 829. And an attorney duly admitted and enrolled in one of the superior courts, according to the regulation of 6 & 7 Vict. c. 73, may practise in any other court in the name of an attorney of such latter court, and is not disabled by sect. 2 or sect. 35 of that act from recovering

6 & 7 Vict. c. 37, s. 27. "Every person who shall have been duly admitted an attorney of any one of the superior courts of law at Westminster shall be entitled, on production of his admission therein, or an official certificate thereof, and that the same still continues in force, to be admitted as an attorney in any other of the said courts, or in any inferior court of law in England or Wales, upon signing the roll of such other court, but not otherwise; and shall thereupon be entitled to practise as an attorney therein, in like manner as if he had been sworn in and admitted an attorney of such court: Provided always, that no additional fee besides those payable by virtue of this act shall be demanded or paid." Any person admitted as attorney in a superior court may be admitted in other or inferior court.

(D) *Admission of Clerks articled to Attornies of Palatine Courts.*[1]

V. The Enrolment.[2]

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his costs for work so done. *Hulls v. Lee*, 11 Jur. 891.

In order to be admitted in such other court, the applicant should take his admission in the court to which he has been admitted to the master's office of the court in which he wishes to be admitted, and sign the roll; the clerk will thereupon enroll his name as an attorney of the court. He should make an affidavit as follows:—

In the Exch. of P.

I, A. B., of gentleman, make oath and say that I was duly admitted an attorney of her Majesty's Court of Q. B. [*or* C. P.] at Westminster, on the day of 18 and that my said admission still continues in full force.

Judge's Fiat *thereon.*

Let A. B. of gentleman, duly admitted an attorney of her Majesty's Court of Q. B. [*or* C. P.] at Westminster, be admitted, sworn, and enrolled an attorney of her Majesty's Court of Exchequer at Westminster.

Dated this day of 18

He is entitled, on the like production of his admission, to be admitted into any inferior courts of law. 6 & 7 Vict. c. 73, s. 27, *supra*. As to admissions in Lord Mayor's Court, see *R. v. Lord Mayor of London*, 13 Q. B. 1; in County Court, *Clutterbuck v. Bulls*, 4 D. & L. 801.

On being admitted in the common-law courts, the attorney is, as a matter of course, admitted in the Court of Chancery, on leaving his admission with the secretary of the Master of the Rolls the day before the day appointed for swearing in solicitors, and attending to be sworn, and paying the fee, which is 37*s*. In general, solicitors are neither admitted nor restored to the roll in Chancery until they have been admitted or restored in a common-law court. *Re Barber*, 19 Beav. 378.

[1] Attornies or solicitors admitted before 1843, in any of the courts of common law, or Chancery, or Palatine Courts of Lancaster or Durham, are admissible in all the other courts without examination, on payment of such duty as by law required: and until they are admitted into the other courts, attornies in such courts may act for them as agents. 5 & 6 Vic. c. 73, s. 45. See *Ex-parte Blackhurst*, 6 Mee. & W. 693; 8 Dowl. 770. *Ex-parte Patrick*, 1 D. & L. 696. *Re Myers*, 8 Q. B. 515. *Re Lucas*, 2 Jur. N. S. 65.

By 23 & 24 Vic. c. 127, s. 13, "no person hereafter bound by articles of clerkship to any attorney of the Court of Common Pleas of the county palatine of Lancaster, or of the court of the Court of Pleas of the county palatine of Durham, shall be capable of being admitted and enrolled as an attorney of such respective court unless, after the expiration of his term of service, he shall have been examined touching his articles and service, and his fitness and capacity to act as an attorney of her Majesty's superior courts at Westminster, or a solicitor of the High Court of Chancery, in like manner as is required before admission as an attorney of the said courts of law, or one of them, or a solicitor of the Court of Chancery, and the judge or judges of such respective court of the county palatine of Lancaster or Durham be satisfied by such examination, or the certificate of the examiners, of his being qualified to act as an attorney or solicitor: Provided always, that the enactments contained in the 12th section of this act shall extend and apply *mutatis mutandis* to persons hereafter bound by articles of clerkship to attornies of the Court of Common Pleas of the county palatine of Lancaster, and the Court of Pleas of the county palatine of Durham respectively, and to the judges of those courts respectively."

But by the 14th section, "all persons who, previously to the passing of this act, shall have been duly admitted and enrolled attornies or solicitors of the courts of counties palatine of Lancaster or Durham, or either of them, shall and may be admitted and enrolled attornies of the High Court of Chancery, and in her Majesty's superior courts of law at Westminster, in pursuance of the provisions of this act, without further examination, upon payment of such fees and duty as by law required: Provided always, that such admission and enrolment be perfected on or before the first day of Trinity Term, 1861."

[2] The attorney is not qualified to act as such until he has not only been admitted but enrolled. 6 & 7 Vic. c. 73, s. 2. The chiefs of the common-law courts and the Master of the Rolls each appoint an officer, whose duty it is to enroll the name of every person who has been admitted an attorney

VI. The Certificate.[1]

ARTICLES of the Peace. *See* Sureties to keep the Peace.

ARTICLES of War, how proved.[2]

ARTIFICERS. *See* Master and Servant; Strikes; Truck Act; Wages.

ARTIFICIAL Watercourses. *See* Easements; Watercourses.

ASPORTAVIT. *See* Larceny; Trespass; Turvet.

As Soon as. Construction of in Wills.[3]

ASSAULT and Battery.

I. Of the Action for an Assault, p. 563.

(A) *What Constitutes an Assault and Battery*, p. 563.

(B) *Form of Declaration*, p. 564.

(C) *Effect of General Issue*, p. 564.

(D) *Pleas of Justification*, p. 565.

(*a*) *Son Assault Demesne*, p. 565.

(*b*) *In Defence of Lands or Goods*, p. 565.

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or solicitor, and the time when admitted, in alphabetical order, in rolls or books, to be kept in their respective courts, to which all persons may have free access without fee or reward. 6 & 7 Vic. c. 73, s. 20. The enrolment may be permitted to be made *nunc pro tunc*. *Ex-parte Swift*, 1 Bing. N. S. 734; 3 Dowl. 636. *Ex-parte Fry*, id. 338. It is no objection to a rule being granted on payment of costs that the opposite attorney is not on the roll. *Punter v. Grantley*, 3 Man. & G. 295. If the attorney change his name, the Court will amend the roll by substituting the new name, on being satisfied by affidavit of the *bonâ fides* (*Ex-parte Benthall*, 6 id. 722. *Ex-parte James*, 9 C. B. 221; 1 L., M. & P. 15 Ex. 310; 15 Jur. 153); or will order the master to make a memorandum, stating the new name. *Re Deardon*, 5 Ex. 740; 1 L., M. & P. 666.

Any solicitor desiring to be appointed a London commissioner to administer oaths in Chancery is required to lodge with the Lord Chancellor's secretary a petition fairly written on foolscap paper, praying to be so appointed. Every such petition must state the following particulars: *i. e.*—

1st. That the applicant has practised as a solicitor for ten years, and that his place of business is within ten miles of Lincoln's Inn Hall.

2d. The street and number of the house in which he has carried on his business for the last three years.

3d. The names of partners (if any), or (if such be the case) that he has no partner.

4th. Every such petition must be accompanied by a certificate, signed by two solicitors (whose names, additions, and addresses must be given), who shall state that they are themselves solicitors of ten years' practice, and that the applicant is well known to them.

The certificate, signed by two barristers, will be, in addition, required.

Twenty-one days' notice of every such application shall be given to the registrar of solicitors, to be submitted to the council of the Incorporated Law Society.

[1] Before he can practise the attorney must take out a stamped certificate. As to the certificate, *see post*, Attorney.

[2] By the annual statute called the Mutiny Act, the Sovereign is empowered to make articles of war, which shall be judicially taken notice of in all courts and by all judges whatsoever. 2 Steph. Com. 596.

In order to instruct the Court, a copy purporting to be printed by the Queen's printer, or, in the case of the marine service, a copy certified under the hand of the Lord High Admiral, or under the hands of any two or more of the commissioners for executing his office, should be produced. *R. v. Withers*, cited by *Buller, J.*, in *R. v. Holt*, 5 T. R. 446. *See* Mutiny Act.

[3] When a devise or bequest is made to a person "when," or "as soon as" he shall attain a given age, or "when," or "as soon as" an event shall happen which may never occur at all, whether the words of contingency precede or follow the words of gift, the gift is contingent unless there are indications of immediate vesting. But the gift is vested if the testator does not annex the time to the devise or bequest itself, but merely to the payment, possession, or enjoyment; as, where he gives A. a legacy, to be paid when he shall attain the age of twenty-one years. This distinction does not, however, apply to charges on real estate, or where the period may never arrive, unless it is the attainment of a given age. Smith, *R. P. & Pr.* 290; 1 Jarm. *Wills*, 712, 2d ed.

(*c*) *In Preservation of the Public Peace*, p. 566.
(*d*) *Costs in Action of. See* Costs.

II. Of Indictment or Information for an Assault, p. 567.
(A) *What is such an Assault*, p. 567.
(*a*) *Indictment for a Common Assault*, p. 567.
(B) *Defences to Indictment*, p. 567.
(*a*) *Misadventure*, p. 567.
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(*f*) *That Complaint disposed of by Justices*, p. 568.
(C) *Punishment*, p. 569.
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(*a*) *If Prosecutor bound by Recognizance, the Court may allow him Costs*, p. 570.

III. Assaults against particular Persons, or with particular Intent, p. 570.
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(D) *On the Trial of an Indictment for Robbery, the Jury may convict of an Assault with intent to Rob*, p. 572.
(E) *And on the Trial of any Indictment for Felony, except Murder or Manslaughter, where a Wounding is alleged, the Defendant may be acquitted of the Felony and convicted of the Misdemeanour of Wounding*, p. 572.

I. Of the Action for an Assault.

(A) *What Constitutes an Assault and Battery.*

Coward v. Baddeley, 4 H. & N. 478; 28 L. J. Ex. 260.

Action for giving the plaintiff into custody.

Plea, justifying under the Metropolitan Police Act, that the plaintiff assaulted the defendant, &c.

A mere touching another without hostile intent, or any circumstance of violence or insult, is not an assault.[1]

It appeared that the plaintiff, while the defendant, who was the inspector of a fire brigade, was directing the hose against a fire, pulled him by the arm to

[1] Every attempt or offer, with force and violence, to do hurt to another constitutes an assault: such as, striking at a person with or without a weapon; holding up a fist in a threatening attitude sufficiently near to be able to strike; presenting a gun or pistol, whether loaded or unloaded, in a hostile and threatening manner, within gunshot or pistol-shot range, and near enough to create terror and alarm; riding after a man with a whip threatening to beat him, or shaking a whip in a man's face; advancing with hand uplifted in a threatening manner with intent to strike, although the party is stopped before he gets near enough to carry the intention into effect (Bac. Abr. Assault. *Martin v. Shoppee*, 3 C. & P. 373. *Stephens v. Myers*, 4 id. 349. *Rex v. St.*

direct his attention to the spreading of the flames. The defendant thereupon gave the plaintiff into the custody of a constable who was present. The plaintiff having obtained a verdict, a rule to enter a nonsuit was obtained.

Pollock, C. B. "I am of opinion that this rule ought to be discharged. It has been found by the jury that what the plaintiff did in touching or pulling the arm of the plaintiff was done merely for the purpose of calling his attention to something he was going to ask him. It must be taken that it was not done with that degree of violence which would justify the jury in putting another construction on the act. The defendant treated it as an assault, and gave the plaintiff into the custody of a police constable. The jury have found a verdict for the plaintiff in the action for false imprisonment, and we are asked to set aside that verdict on the ground that a mere touching of another is a battery in point of law, and such a battery as justifies the giving of the person into custody. I think that is not so; that the finding of the jury has disposed of the question, and that the verdict ought to stand."

(B) *Form of Declaration.*[1]

(C) *Effect of General Issue.*[2]

George, 9 id. 493); hitting at one man, and unintentionally striking another (*James v. Campbell*, 5 id. 372); cutting off the hair of a pauper in a poor-house (*Ford v. Skinner*, 4 id. 239); throwing water upon the person of another (*Pursell v. Horne*, 3 Nev. & P. 564); and any gesture or threat of violence exhibiting an intention to assault, with the means of carrying that threat into effect. *Reade v. Coker*, 13 C. B. 860. But an assault must be an act done against the will of a person. It cannot be said that a party has been assaulted with his own permission. If the act has been done in the course of sport, and pursuant to mutual consent, there is no assault. *Christopherson v. Bare*, 11 Q. B. 477. *Reg. v. Martin*, 9 C. & P. 214. But on the other hand, an assault may be committed without any design or intention to commit an assault; for if the person of one man is violently struck, through the carelessness and negligence of another, this is an assault, and it is no answer to say that it was done unintentionally. Thus, if a man drives against and violently upsets the plaintiff in his carriage, and knocks him down or overturns the chair in which he was seated, the party thus striking the plaintiff or knocking him down is guilty of an assault, although he had no intention to commit an assault. *Hopper v. Reeve*, 7 Taunt. 698. *See post*, 567 n.

It is not, however, an assault to push gently against the person of another in endeavouring to make a way through a crowd; but if it is done in a rude and violent manner, or there is any struggling or pushing calculated to do harm, there will be both an assault and a battery. *Cole v. Turner*, 6 Mod. 149. *See* Add. on *Torts*, 394; 1 Hill, id. 187.

A battery, as distinguished from an assault, is where the person of a man is actually struck or touched in a violent, angry, rude, or insolent manner. *Rawlings v. Till*, 3 Mee. & W. 28. If a man is violently jostled out of the way or spat upon (*Reg. v. Cotesworth*, 6 Mod. 172), or has water, stones, or dirt rudely thrown upon him (*Pursell v. Horne*, 8 Ad. & E. 604; 4 Nev. & P. 564); or has his hat insolently knocked off, or his hair forcibly cut (*Ford v. Skinner*, 4 C. & P. 239); or his horse has been struck, so that it ran away and threw him to the ground. *Dodwell v. Burford*, 1 Mod. 24; Sid. 433. And if a constable orders an unconvicted prisoner to be handcuffed when there is no attempt to escape, nor any reasonable ground to fear a rescue, the constable will be responsible in damages for an assault. *Griffin v. Coleman*, 4 H. & N. 265; 28 L. J. Ex. 134.

But every laying on of hands is not a battery. The party's intention must be considered, for people will sometimes, by way of joke or in friendship, clap a man on the back, and it would be ridiculous to say that every such case constitutes a battery. *Williams v. Jones*, Hardw. 301: *per Ld. Hardwicke.* A touch given by a constable's staff, in order to engage the attention of a party, is not a battery. *Wiffin v. Kineard*, 2 N. R. 472. See *Coward v. Baddeley*, *supra.*

The old word "mayhem," from the French word *mayhemer*, or *mehaigner*, was used to signify any hurt done to a man's body, whereby he was rendered less able in fighting either to defend himself or annoy his adversary, such as the cutting off, disabling, or weakening a hand or finger, striking out an eye or foretooth, breaking a bone or injuring the head, or wounding a sinew, &c. Bac. Abr. Maihem; Bract. lib. 3, t. 2.

[1] *Declaration for Assault and Battery.*

For that the defendant assaulted and beat the plaintiff, and with a stick struck the plaintiff on the head with great violence, so that his life was despaired of; and the plaintiff claims pounds.

See Steph. Pl. 37, 6th ed.

[2] Under the issue raised by not guilty, the defendant may prove that the act com-

(D) *Pleas of Justification.*

(*a*) *Son Assault Demesne.*[1]

(*b*) *In Defence of Lands or Goods.*

POLKINGHORN v. WRIGHT, 8 Q. B. 19.

In case of a forcible entry a trespasser may be turned out without previous request; but a prior request

Action for assault and battery. The defendant pleaded a justification in resisting a forcible entry of the defendant on his land;[2] and also in resisting the endeavour of the plaintiff to drive away a cow of the defendant, then in the defendant's close. On demurrer, it was objected to the pleas that they did not allege a previous request to desist.

Lord Denman, C. J. "There is a manifest distinction between endeavouring to turn a man out of a house or close, into which he has previously entered

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plained of was involuntary, as being the result of accident, or of some agency over which he had no control, so as not to be his act (*Hall v. Fearnley*, 3 Q. B. 919. *Wakeman v. Robinson*, 1 Bing. 213, *ante*, p. 83; or that the act was done with the leave and license of the plaintiff. *Christopherson v. Bare*, 11 Q. B. 473. But any defence which admits that the act was a trespass, and that it was the act of the defendant, must be pleaded specially. Thus, the defence that the plaintiff himself, by negligence or otherwise, contributed to or caused the injury, must be specially pleaded. *Knapp v. Salsbury*, 2 Camp. 500. And it is not competent to the defendant to show, in mitigation of damages, circumstances which would afford a justification, unless specially pleaded; but extenuating circumstances, not amounting to a justification, may be proved, in order to reduce the damages, without a plea. *Linford v. Lake*, 3 H. & N. 276; 27 L. J. Ex. 334.

[1] If one man strike another, and the party struck, in the heat of anger and on the impulse of the moment, return the blow with a stick or bludgeon, the battery is excusable. *Oakes v. Wood*, 3 Mee. & W. 150. But if a man strike another, who does not immediately after resent it, but takes his opportunity, and then some time after falls upon him and beats him, in this case the second assault cannot be justified. *Cockroft v. Smith*, 11 Mod. 43. *Reg. v. Driscoll*, 1 C. & M. 214.

Proof, however, of a plaintiff's first assault, in support of a plea of *son assault demesne*, is not any excuse if the retaliation by the defendant were excessive, and bore no proportion to the necessity or to the provocation received. 1 East, P. C. 406.

But when a person has been assaulted in such a way as to endanger his life, he is justified in maiming and wounding the attacking party, and if he has been violently assaulted, or assaulted in such a way as to put him into bodily fear, the mayhem or wounding, if inflicted in self-defence, is held excusable. But a man cannot justify a mayhem for every assault; as, if A. strike B., B. cannot justify the drawing his sword and cutting off his hand. *Cook v. Beale*, Ld. Raym. 177; 3 Salk. 115: *per Cur.* If A. strike B., and B. strike again, and they close immediately, and in the scuffle B. mayhems A., this mayhem is excusable; but if, upon a little blow given by A. to B., B. gives him a blow that mayhems him, this maihem is not excusable. *Cockroft v. Smith*, 11 Mod. 43; 2 Salk. 641.

In order to admit this defence it is necessary to plead *son assault demesne*. Reg. Gen. H. T. 1853, r. 17; 1 Inst. 282 b; but see *Syers v. Chapman*, 2 C. B. (N. S.) 438, as to admissibility of evidence in mitigation of damages.

The following is the form of such a plea, prescribed by the 15 & 16 Vic. c. 76, sched. B. 45:—

"That the plaintiff first assaulted the defendant, who thereupon necessarily committed the alleged assault in his own defence."

Under a replication taking issue on this form of plea, the plaintiff may give evidence of excess. *Dean v. Taylor*, 11 Ex. 68.

The same statute, sched. B. 53, prescribes the following form of

Replication to Plea of Son Assault Demesne, that the Plaintiff first assaulted the Defendant in Defence of his Land.

That the plaintiff was possessed of land, whereon the defendant was trespassing and doing damage, whereupon the plaintiff requested the defendant to leave the said land, which the defendant then refused to do, and thereupon the plaintiff gently laid his hands on the defendant, in order to remove him, doing no more than was necessary for that purpose, which is the alleged first assault by the plaintiff.

[2] See *Tullay v. Reed*, 1 C. & P. 6. Even where such right of entry is given by law, a forcible one is expressly prohibited by the stat. 5 R. 2, c. 7. And it has been laid down that if a man enters peaceably into a house, but turns the party out of possession by force, or by threats frightens him out of possession, this is a forcible entry. *Newton v. Harland*, 1 Man. & G. 660; 1 Scott, N. R. 474. If a tenant who holds over (*see* 27 L. J. C. P. 316; id. Ex. 183) after the expiration of his lease is *de facto* in possession of the house, if he is sitting in his drawing-room or sleeping in his bed, and the landlord walks in at

to leave is necessary where the entry was peaceable.[1]

quietly, and resisting a forcible attempt to enter. In the first case a request is necessary, in the latter not. This distinction is expressly taken in the case of *Green v. Goddard*, 2 Salk. 641; and *Weaver v. Bush*, 8 T. R. 78. In the present case the pleas justify the trespass, on the ground of resisting a forcible attempt, in the one case to enter the defendant's close, and in the other to dispossess him of his cow; in neither of which cases was a request to desist necessary."

(c) *In Preservation of the Public Peace.*[2]

the front door, the latter cannot be said to be in possession of the house any more than the visitor who comes to make a morning call; and if he lay hands on the tenant and turn him out, he cannot truly say that this was done in defence of his (the landlord's) possession of the house, such possession not having been gained until after the exercise of the act of force constituting the assault: but if the tenant or any other party who has originally lawfully come into possession voluntarily leaves the premises vacant, the landlord, or lawful owner, may at once enter and take and keep possession. The previous possessor is then lawfully dispossessed, and if he re-enter he commits a trespass, and may be turned out of the house or off the land. *Brown v. Dawson*, 12 Ad. & E. 629. *Taylor v. Cole*, 3 T. R. 295. *Taunton v. Costar*, 7 id. 431. *Butcher v. Butcher*, 7 B. & C. 402. *See* also 1 Bing. 158; 6 id. N. C. 57; 8 B. & C. 4; id. 409.

[1] An assault and battery may be justified in defence of a house, or a close, or a vestry-room, or in defence of the possession of goods and chattels by the person entitled to the possession and use of them. If one man enters the house of another with force and violence, the owner of the house may justify turning him out without a previous request to depart; but if he enters quietly, he must be requested to retire before hands can be lawfully laid upon him to turn him out. If he will not depart after having been requested so to do, the owner may use as much force as is necessary; and if the intruder resists the attempts of the owner of the house to turn him out, he is guilty of an assault upon the latter, and if a policeman standing by sees the resistance and witnesses the assault, he is justified in taking the intruder into custody. Add. on Wrongs, 397. The landlord of a public-house is justified, after request, in forcibly expelling a person conducting himself therein in a disorderly manner, though the disturbance does not amount to a breach of the peace. *Howell v. Jackson*, 6 C. & P. 725. *Webster v. Watts*, 11 Q. B. 311; 17 L. J. Q. B. 73. And where a person went into a shop and insisted on having an article at the price at which it is ticketed in the window, and refused to leave without it, the shopkeeper was held justified in turning him out. *Timothy v. Simpson*, 6 C. & P. 725.

Persons resorting to this remedy must exercise great caution, for before a person turns out or excludes another from entering a particular house or room, he must be well assured that himself has a *better* right to the possession than the party to be excluded, and that the latter has no right to be present; and therefore, if the exclusion be from a vestry meeting, it must be certain that the meeting was duly holden. *Dobson v. Fussey*, 7 Bing. 301. There must also be much caution in the modes of resisting the intruder or in turning him out, for if there be any excess, the party guilty of it may be liable to an action; and in answer to a plea justifying a battery in defence of possession, the plaintiff may reply, and prove that the battery was excessive. *Gregory v. Hill*, 8 T. R. 299.

Plea justifying by Defendant and his Servants in Defence of the Defendant's Land.

That at the time of the alleged trespass the defendant, C. D., was possessed of land, whereon the plaintiff was trespassing and doing damage, whereupon the defendant, C. D., requested the plaintiff to leave the said land; which the plaintiff refused to do, and thereupon the defendant, C. D., in his own right, and the defendant, E. T., as the servant of the defendant, C. D., and by his command, gently laid their hands on the plaintiff, in order to remove him, doing no more than was necessary for that purpose, which is the alleged trespass.

See, for forms of like pleas, *Holmes v. Bagge*, 1 E. & B. 782; 22 L. J. Q. B. 301. *Bush v. Parker*, 1 Bing. N. C. 72. *Piggott v. Kemp*, 1 C. & M. 197. *Hayling v. Okey*, 8 Ex. 531. For pleas justifying in defence of dwelling-house, see *Webster v. Watts*, 11 Q. B. 311. *Timothy v. Simpson*, 1 C., M. & R. 757. Expulsion of plaintiff guilty of disorderly conduct in defendant's public-house (*Ingle v. Bell*, 1 Mee. & W. 517. *Webster v. Watts*, 11 Q. B. 311; 17 L. J. Q. B. 73. *Howell v. Jackson*, 6 C. & P. 725); that the alleged assault was done in preventing the plaintiff breaking into defendant's house (*Grant v. Moser*, 5 Man. & G. 123. *Weaver v. Bush*, 8 T. R. 78), or his close. *Polkinghorn v. Wright*, 8 Q. B. 197. *Looker v. Halcomb*, 4 Bing. 183.

[2] Any person who witnesses an affray may, during the continuance and for the purpose of putting a stop to it, lay hands on the affrayers. *Noden v. Shores*, 16 Q. B. 218. If he comes up in the midst of the affray and forcibly interferes as a peacemaker for the purpose of separating the combatants and preventing further violence, he is not guilty of a trespass, unless he uses more violence than was necessary for the purpose. *Timothy v. Simpson*, 6 C. & P. 500. And if a constable see an assault committed, he

II. Of Indictment or Information for an Assault.

(A) *What is such an Assault.*[1]

(*a*) *Indictment for a Common Assault.*[2]

(B) *Defences to Indictment.*[3]

(*a*) *Misadventure.*[4]

may recently after that assault, and before all danger of further violence has ceased, apprehend the offender; and if in so doing he is resisted and assaulted, the person assaulting is liable to be convicted of assaulting a constable in the execution of his duty. *Reg. v. Light*, 7 Cox. *Cr. Ca.* 389.

[1] An assault, the subject of indictment, is an attempt to commit a forcible crime against the person; such as an attempt to commit a battery, murder, robbery, rape, &c. Striking at another with a cane, stick, or fist, although the party striking misses his aim (2 Roll. Arb. p. 554, pl. 65); drawing a sword or bayonet, or throwing a bottle or glass with intent to wound or strike, presenting a loaded gun at a man who is within the distance of which the gun will carry (see *Reg. v. St. George*, 9 C. & P. 483. *Reg. v. Baker*, 1 C. & Kir. 254); pointing a pitchfork at him when within reach of it, or any act indicating an intention to use violence against the person of another, is an assault. 1 Hawk. c. 62, s. 1. If a master take indecent liberties with a female scholar without her consent, though she does not resist, it is an assault. *R. v. Nichol*, B. & N. 130. *Reg. v. Day*, 9 C. & P. 722. But an attempt to commit the misdemeanour of having carnal knowledge of a girl between ten and twelve years old is not an assault, by reason of the consent of the girl. *Reg. v. Meredith*, 8 id. 509. *Reg. v. Martin*, 2 Mood. C. C. 123; 9 C. & P. 213, 215. If a medical man unnecessarily strip a female patient naked, under the pretence that he cannot otherwise judge of her illness, it is an assault if he himself take off her clothes. *R. v. Rosinski*, 1 Mood. C. C. 12. So if parish officers cut off the hair of a pauper in the poor-house by force and against her will, it is an assault. *Forde v. Skinner*, 4 C. & P. 239. An unlawful imprisonment is also an assault. Where the defendant took a new-born child from the mother, under the pretence of taking it to an institution to be nursed, and put it into a bag, and hung the bag with the child in it on some palings by the wayside, this was held to be an assault. *Reg. v. Marsh*, 1 id. 496. The causing a deleterious drug to be taken by another has been holden to be an assault. *Reg. v. Button*, 8 id. 660; but see *Reg. v. Dilworth*, 2 M. & Rob. 531, *contra*. *See* further as to what is an assault and battery, *ante*, p. 563. A wounding is where the violence is so great as to draw blood by striking or stabbing with a sword, knife, or other instrument, or by shooting, or by striking with a cudgel, a fist, or the like.

By 8 & 9 Vic. c. 100, s. 56, the abusing, ill-treating, or wilful neglect of any patient in a lunatic asylum, is a misdemeanour. See *Reg. v. Pelham*, 8 Q. B. 959.

[2] *Indictment for a Common Assault.*

Central Criminal Court, } The jurors for
to wit. } our Lady the Queen, upon their oath, present that J. S., late of the parish of B., in the county of M., labourer, on the first day of June, in the twenty-fourth year of the reign of our Sovereign Lady Victoria, with force of arms, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, in and upon one J. N., in the peace of God and our Lady the Queen then and there being, did make an assault; and him, the said J. N., then and there did beat, wound, and ill-treat, and other wrongs to the said J. N. then and there did, to the great damage of the said J. N., and against the peace of our Lady the Queen, her crown and dignity. [*If the assault were committed under circumstances of aggravation, you may state them.*]

[3] The defendant must, by way of defence, prove either that he is not guilty at all, or that the facts of the case do not amount to an assault or battery, or that he was justified or excused in law in what he did, or that the complaint has been already disposed of upon summary application before two justices (9 Geo. 4, c. 31, s. 27); or upon summary conviction under the 10 & 11 Vic. c. 82; Hob. 134; and see *R. v. Gill*, 1 Str. 143. And there are many cases of accidents which cannot be set up as a defence in an action for a battery that would certainly be a good defence upon an indictment. In civil cases the accident must have been inevitable, in order to operate as an excuse (2 Roll. Arb. 548 G.; Hob. 134; Mod. 864; and *see* Str. 526); but in criminal cases it may be deemed a general rule, that the same facts which would make a killing homicide by misadventure, will be a good defence upon an indictment for battery.

[4] It is a good defence to prove that the alleged battery happened by misadventure. If a horse run away with his rider and run against a man it is no battery. *Gibbins v. Pepper*, 2 Salk. 637. If a soldier in his ranks discharge his gun, and a man unexpectedly pass before him at the time and be hurt by him, it is no battery. Moore, 864.

It is a good defence to prove that the alleged battery was merely an amicable contest; as, that he wrestled with the prosecutor for a wager. Com. Dig. Plead. 3 M. 18. So, that it happened by accident whilst the defendant was engaged in some sport or game, which was neither unlawful nor dangerous. Arch. *Cr. L.* 461.

(*b*) *In Self-Defence.*[1]

(*c*) *Defence of Possession.*[2]

(*d*) *Under Warrant, &c. or in Apprehending an Offender without Warrant.*[3]

(*e*) *For Correction.*[4]

(*f*) *That Complaint disposed of by Justices.*[5]

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[1] It is a good defence in justification, even of a wounding or mayhem, to prove that the prosecutor assaulted or beat the defendant first, and that the defendant committed the alleged battery merely in his own defence. 1 Sid. 246; 1 Rob. Rep. 19; 2 Salk. 642; 3 id. 46. If he prove an assault merely, as, for instance, that the prosecutor lifted up his staff and offered to strike him, it is sufficient to justify the defendant's striking him, for he need not in such a case stay till the other has actually struck him. Bull. N. P. 18; 2 Roll. Abr. 547, 637. So a husband may justify a battery in defence of his wife, a wife in defence of her husband, a parent in defence of his child, a child in defence of his parent, a master in defence of his servant, and a servant in defence of his master. 2 Roll. Abr. 546, D.; 1 Hawk. c. 61, ss. 23, 24. But in all these cases the battery must be such only as was necessary in the defence of the party or his relation, for if it were excessive, if it were greater than was necessary for mere defence, or if it were, after all danger from the assailment was past, and by way of revenge, the prior assault will be no justification. Bull. N. P. 18; *Reg. v. Driscoll*, Car. & M. 314. Also it will be a sufficient answer to this defence to prove that the first assault was justifiable. Com. Dig. Plead. 3 M. 15; 1 Salk. 407; Carth. 280.

[2] The defendant may justify a battery by proving that he committed it in defence of his possession; as, for instance, to remove the prosecutor out of the defendant's close or house (Lutw. 1455; Hard. 358); or to prevent him from entering it (2 Roll. Abr. 548, l. 25); to restrain him from taking or destroying his goods, &c. (id. 549, l. 7); from taking or rescuing cattle, &c., in his custody upon a distress (id. l. 16; 2 Bro. E. 253)); or the like. *See ante*, p. 565.

[3] It is a good defence to prove that the defendant, as an officer of justice, arrested the prosecutor by virtue of a certain writ of process, which is the alleged battery complained of. 2 Roll. Abr. 547, A. And the same as to officers of justice and persons acting in their aid, arresting on suspicion of felony without warrant, and as to private persons arresting men committing felonies in their presence. *See ante*, Arrest. So a man can justify laying his hand upon another to prevent him from fighting or committing a breach of the peace. Com. Dig. Plead. 3 M. 16. In a recent case it was held, that where a policeman saw a man who was drunk assault his wife, and about twenty minutes after took him into custody, the policeman was justified in so doing, notwithstanding the man had left the spot where his wife was, saying he should "leave her altogether." *Reg. v. Light*, 27 L. J. M. C. 1; 1 Dear. & B. C. C. 332; 7 Cox, C. C. 389. So if it be to prevent him from rescuing goods taken in execution (3 Lev. 113), or the like. *See* 1 Mod. 168; 2 Roll. Abr. 546, l. 40. A coroner (*Garnett v. Ferrand*, 6 B. & C. 618), and a magistrate, upon a preliminary inquiry (*Cox v. Coleridge*, 4 B. & C. 16), may justify a forcible exclusion of a party from the justice-room, even though he be the attorney of the party accused; but if the inquiry be final and of a judicial nature, all persons have a right to be present. *Daubney v. Cooper*, 10 B. & C. 237. *See* 6 & 7 Wm. 4, c. 114, s. 2; 11 & 12 Vic. c. 42, s. 19. Yet, even in these cases, he must use no more force than is requisite to restrain the other party, otherwise he cannot avail himself of the threatened breach of the peace, &c. as a justification.

[4] It is a good defence to prove that the alleged battery was merely the correcting of a child by its parent, the correcting of a servant or scholar by his master, or the punishment of the criminal by a proper officer. (Com. Dig. Plead. 3 M. 19; 1 Hawk. c. 60, s. 23; c. 62, s. 2; and *see* 2 B. & P. 224.) provided the correction be moderate in the manner, the instrument, and the quantity of it; or that the criminal be punished in the manner appointed by the law. It has been holden that the defendant may justify even a mayhem, if done by him as a military officer for disobedience of orders. *Lane v. Degberg*, Bull. N. P. 12.

[5] It is a good defence to show that the complaint has been disposed of by two justices, either by conviction or dismissal of the case, provided in the former case the defendant has paid the penalty and suffered the imprisonment awarded, and in the latter, the magistrates have dismissed the case because it was justified, or so trifling as not to merit punishment, and this be forthwith certified under their hands. 9 Geo. 4, c. 31, ss. 27, 28; 10 & 11 Vic. c. 82.

It appears that the application for the certificate may be made at any time after the complaint has been dismissed. The word "forthwith," in the 27th section of the 9th Geo. 4, c. 31, means forthwith upon the application of the party entitled to the certificate, and not forthwith upon the dismissal of the complaint. *Costar v. Hetherington*, 27 L. J. M. C. 198; 8 Cox, C. C. 175. The granting of the certificate is a ministerial and not a judicial act. If the magistrate has dismissed the charge on either of the grounds stated in the section, he is bound to grant a certificate stating the fact of such

(C) *Punishment.*[1]

(D) *Aggravated Assault.*[2]

(*a*) *Indictment.*[3]

(*b*) *Punishment.*

Persons guilty of aggravated assault are liable to three years' imprisonment.

14 & 15 Vic. c. 19, s. 4, after reciting "that it is expedient to make further provision for the punishment of aggravated assaults," enacts, "that if any person shall unlawfully and maliciously inflict upon any other person, either

dismissal. *Hancock v. Somes*, 27 L. J. M. C. 196. The magistrates have no power to hear and determine any assault involving a question of title of lands, &c., or any interest therein, or relating to any bankruptcy or insolvency, or any execution under the process of any court of justice; and if the assault be accompanied by any attempt to commit felony, or in their opinion be a fit subject for a prosecution by indictment, they may abstain from any adjudication, and leave the case to be prosecuted by indictment. 9 Geo. 4, c. 31, s. 29. See *Anon.* 1 B. & Adol. 382.

A conviction by justices for a common assault and battery under 9 Geo. 4, c. 31, s. 27, has been held to be a bar to an indictment for feloniously stabbing with intent to maim, where it appeared that both charges related to one and the same transaction. *R. v. Walker*, 2 M. & Rob. 446. See *Ex-parte Thompson*, 30 L. J. Ex. 90.

Justices have also jurisdiction to dispose of cases of aggravated assaults; and a conviction by them will be an answer to any subsequent indictment or other proceedings for the same assault. Even, it seems, although the act, which the justices have treated as an aggravated assault, was in fact a rape. See *Ex-parte Thompson*, 30 L. J. Ex. 19.

[1] A common assault is punishable as a misdemeanour with fine or imprisonment, or both.

[2] By the 16 & 17 Vic. c. 30, s. 1, it is enacted, "where any person shall be charged before two justices of the peace, sitting at a place where the petty sessions are usually held, or before any magistrate of the police courts of the metropolis, sitting at any such police court, or before any stipendiary magistrate elsewhere, with an assault upon any female whatever, or upon any male child, whose age shall not, in the opinion of such justices, or police or stipendiary magistrate, exceed fourteen years, either upon the complaint of the party aggrieved or otherwise, it shall be lawful for the said justices, or police or stipendiary magistrate, if the assault is of such an aggravated nature that it cannot in their or his opinion be sufficiently punished under the provisions of statute 9 Geo. 4, c. 31, to proceed to hear and determine in a summary way; and if they shall find the same to be proved, to convict the person accused; and every offender so convicted shall be liable to be imprisoned in the common gaol or house of correction, with or without hard labour, for a period not exceeding six calendar months, or to pay a fine not exceeding (together with costs) the sum of 20*l.*, and in default of payment to be imprisoned as aforesaid, with or without hard labour, for a period not exceeding six calendar months, unless such fine and costs be sooner paid; and, if the magistrate or magistrates shall so think fit, shall be bound to keep the peace and be of good behaviour for any period not exceeding six calendar months from the expiration of such sentence; and such conviction shall be a bar to all future proceedings civil or criminal for or in respect of the same assault; and no person convicted under this act shall be entitled to appeal against such conviction to the general quarter sessions, anything to the contrary in any statute notwithstanding."

Where the information laid before the magistrates was that the defendant "unlawfully assaulted and abused" the complainant, and, notwithstanding the complainant's statement before the magistrate, went to show, if she were believed, that he had committed a rape, the magistrates, with the assent of the defendant's attorney, convicted the defendant of an aggravated assault, it was held by two of the judges of the Court of Exchequer that the charge amounted to a charge of rape, and that the magistrates had no jurisdiction; but the other two barons were of opinion that the charge was one of an assault only, and that the magistrates had jurisdiction, and their decision could not be reviewed. *Ex-parte Thompson*, 30 L. J. Ex. 19.

[3] *Indictment for an Aggravated Assault.*

[Commencement as *ante*, 567.]—— in and upon one J. N., in the peace of God and our Lady the Queen then and there being, did make an assault, and him the said J. N. then and there did beat, wound, and ill-treat; and the said J. S., with both his hands, then and there violently cast, flung, and threw the said J. N. to, upon, and against a certain brick-floor there, and him the said J. N., in and upon his head, neck, breasts, sides, back, and other parts of his body, with both the feet of him the said J. S., then and there violently and grievously did kick, strike, and beat, giving to the said J. N., as also by such kicking, striking, and beating of the said J. N. as aforesaid, in and upon the head, neck, breasts, sides, back, and other parts of the body of him the said J. N., divers bruises, hurts, and wounds, so that his life was greatly despaired of, and other wrongs, &c. [*Add a count for a common assault, as ante*, p. 567.]

with or without any weapon or instrument, any grievous bodily harm, or unlawfully or maliciously cut, stab, or wound any other person; every such offender shall be guilty of a misdemeanour, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned, with or without hard labour, for any term not exceeding three years: Provided, however, that nothing herein contained shall be deemed or taken to repeal the provisions of the 29th section of 10 Geo. 4, c. 34."

(E) *Costs of Indictment for Assault and Battery.*

(*a*) *If Prosecutor bound by Recognizance, the Court may allow him Costs.*

If prosecutor bound by recognizance, court may allow costs.

14 & 15 Vic. c. 55, s. 3, reciting that by the 9 Geo. 4, c. 31, it is enacted, that "where any person shall unlawfully assault or beat any other person, it shall be lawful for two justices of the peace, upon complaint of the party aggrieved, to hear and determine such offence; and that it is by the said act provided, that in case the justices shall find the assault or battery complained of to have been accompanied by any attempt to commit felony, or shall be of opinion that the same is from any other circumstance a fit subject for a prosecution by indictment, they shall abstain from any adjudication thereupon, and shall deal with the case in all respects in the same manner as they would have done before the passing of the said act;" and after reciting that it is expedient that courts before whom such indictments shall be tried shall have power to order payment of costs to parties so bound by recognizance to prosecute or give evidence, enacts, "that in every case of assault so brought before justices for summary decision, in which the justices shall be of opinion that the same is a fit subject for prosecution by indictment, and shall thereupon bind the prosecutor and witnesses in recognizance to prosecute and give evidence at the assizes or sessions of the peace, every such Court is hereby authorised and empowered, at its discretion, to order payment of the expenses of the prosecutor and witnesses so appearing before such court under such recognizance, together with compensation for their trouble and loss of time, in the same manner as courts are authorised and empowered to order the same in cases of felony."

III. Assaults against particular Persons, or with particular Intent.

(A) *With Intent to commit Felony; in Obstruction of Arrest; on Officer in Execution of Duty.*[1]

9 Geo. 4, c. 31, s. 25. "Where any person shall be charged with, or convicted of any of the following offences, as misdemeanours; that is to say, of any assault with intent to commit felony, of any assault upon any peace-officer or revenue-officer in the due execution of his duty, or upon any person acting in aid of such officer; of any assault upon any person with intent to resist or prevent the lawful apprehension and detainer of the party so assaulting, or of any other person for any offence for which he or they may be liable by law to be apprehended or detained; or of any assault committed in pursuance of any conspiracy to raise the rate of wages; in any such case the Court may sentence the offender to be imprisoned, with or without hard labour, in the common gaol or house of

[1] See *Reg v. Light*, 7 Cox, *Cr. Ca.* 389. By the 9 Geo. 4, c. 31, s. 24, "if any person shall assault and strike, or wound any magistrate, officer, or other person whatsoever lawfully authorised, on account of the exercise of his duty, in or concerning the preservation of any vessel in distress, or of any vessel, goods, or effects wrecked, stranded, or cast on shore, or lying under water, every such offender being convicted thereof shall be liable to be transported beyond the seas for the term of seven years, or to be imprisoned, with or without hard labour, in the common gaol or house of correction, for such term as the Court shall award." *See* 7 Wm. 4, and 1 Vic. c. 89, s. 7, making it felony to impede any person endeavouring to save his life in case of shipwreck.

correction, for any term not exceeding two years, and may also, if it shall so think fit, fine the offender, and require him to find sureties for keeping the peace."

(B) *Assaulting Gamekeepers.*[1]

9 Geo. 4, c. 69, s. 2. "Where any person shall be found upon any land committing any such offence as is hereinbefore mentioned [*i. e.* destroying game on land, or entering upon lands to destroy game at night; *see* sect. 1, and 7 & 8 Vic. c. 29, s. 1], it shall be lawful for the owner or occupier of such land, or for any person having a right or reputed right of free warren or free chase therein, or for the lord of the manor or reputed manor wherein such land may be situate, and also for any gamekeeper or servant, of any of the persons herein mentioned, or any person assisting such gamekeeper or servant, to seize and apprehend such offender upon such land, or, in case of pursuit being made, in any other place to which he may have escaped therefrom, and to deliver him as soon as may be into the custody of a peace-officer, in order to his being conveyed before two justices of the peace; and in case such offender shall assault or offer any violence with any gun, cross-bow, fire-arms, bludgeon, stick, club, or any other offensive weapon whatsoever, towards any person hereby authorised to apprehend him, he shall, whether it be his first, second, or any other offence, be guilty of a misdemeanour, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for seven years, or to be imprisoned and kept to hard labour in the common gaol or house of correction, for any term not exceeding two years; and in Scotland, whenever any person shall so offend he shall be liable to be punished in like manner."[2]

(C) *Forcing Seamen on Shore.*

17 & 18 Vic. c. 104, s. 206. "If the master, or any other person belonging to any British ship, wrongfully forces on shore, or otherwise wilfully and

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[1] A gamekeeper, or other person lawfully authorised, may apprehend poachers without giving notice of his purpose (*R. v. Payne*, 1 Mood. C. C. 378), and without a written authority so to do (*R. v. Price*, 7 C. & P. 178): provided they are upon the land or manor of his master, or other place mentioned in 8 Vic. c. 29; but without authority he may not apprehend them upon the lands of others. *R. v. Davis*, 7 id. 785. And though sect. 2 is confined to offences mentioned in sect. 1, still an offender under sect. 9 may be apprehended; for, though a greater punishment is inflicted where several are out armed together, it is still an offence within sect. 1. *Reg. v. Ball*, 1 Mood. C. C. 330.

To be within the statute, the gamekeeper at the time of the assault committed upon him must be acting in the apprehension, or intent to apprehend the defendant; and where several are charged with the offence, a common intent to poach will not sustain an indictment for assaulting and wounding the gamekeeper, unless there is some evidence also of an aiding by the others in an assault committed by one of them. *Reg. v. Doddridge*, 8 Cox, *Cr. Ca.* 334.

[2] In the case of deerkeepers, it is by the 7 & 8 Geo. 4, c. 29, s. 29, enacted, that "if any person shall enter into any forest, chase, or purlieu, whether inclosed or not, or into any inclosed land, where deer shall be usually kept, with intent unlawfully to hunt, wound, kill, snare, or carry away any deer, it shall be lawful for every person intrusted with the care of such deer, and for any of his assistants, whether in his presence or not, to demand from such offender any gun, fire-arms, snare, or engine in his possession, and every dog there brought for hunting, coursing, or killing deer; and in case such offender shall not immediately deliver up the same, to seize and take the same from him, in any of those respective places, or, upon pursuit made, in any other place to which he may have escaped therefrom, for the use of the owner of the deer; and if any such offender shall unlawfully beat or wound any person intrusted with the care of the deer, or any of his assistants, in execution of any of the powers given by this act, every such offender shall be guilty of felony, and being convicted thereof shall be liable to be punished, in the same manner as in the case of simple larceny."

The act done by the deerkeeper, upon which the beating ensued, must be in the exercise of the powers given to him by the act. *R. v. Amery*, R. & R. 500. There must be a wounding or a beating, in the popular sense of the word; a mere battery by pulling the keeper to the ground, and holding him there while a confederate escapes, is not sufficient. *Reg. v. Hale*, 2 C. & Kir. 326.

wrongfully leaves behind, in any place on shore or at sea, in or out of her Majesty's dominions, any seamen or apprentice belonging to such ship, before the completion of the voyage for which such person was engaged, or the return of the ship to the United Kingdom, he shall for every such offence be deemed guilty of a misdemeanour." *See* ss. 207, 518, 520.

(D) *On the Trial of an Indictment for Robbery, the Jury may convict of an Assault with intent to Rob.*

On the trial of an indictment for robbery, the jury may convict of an assault with intent to rob.[1]

14 & 15 Vic. c. 100, s. 11. "If, upon the trial of any person upon any indictment for robbery, it shall appear to the jury upon the evidence that the defendant did not commit the crime of robbery, but that he did commit an assault with intent to rob, the defendant shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that the defendant is guilty of an assault with intent to rob, and thereupon such defendant shall be liable to be punished in the same manner as if he had been convicted upon an indictment for feloniously assaulting with intent to rob; and no person so tried as is herein lastly mentioned shall be liable to be afterwards prosecuted for an assault with intent to commit the robbery for which he was so tried."

(E) *And on the Trial of any Indictment for Felony, except Murder or Manslaughter, where a Wounding is alleged, the Defendant may be acquitted of the Felony and convicted of the Misdemeanour of Wounding.*

14 & 15 Vic. c. 19, s. 5. "If, upon the trial of any indictment for any felony, except murder or manslaughter, where the indictment shall allege that the defendant did cut, stab, or wound any person, the jury shall be satisfied that the defendant is guilty of the cutting, stabbing, or wounding charged in such indictment, but are not satisfied that the defendant is guilty of the felony charged in such indictment, then, and in every such case, the jury may acquit the defendant of such felony, and find him guilty of unlawfully cutting, stabbing, or wounding, and thereupon such defendant shall be liable to be punished, in the same manner as if he had been convicted upon an indictment for the misdemeanour of cutting, stabbing, or wounding."

ASSAULT and False Imprisonment. *See* False Imprisonment; Malicious Arrest; Malicious Prosecution.

ASSAY Mark, forging.[2]

ASSEMBLY, Unlawful. *See* Unlawful Assembly.

ASSETS. *See* Administration, p. 162; Bankruptcy; Executor; Will.

ASSIGN, Covenant not to. *See* Covenant; Landlord and Tenant.

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[1] By the 10th section, the 1 Vic. c. 85, is repealed. That statute enacted, "that on the trial of any person for any of the offences thereinbefore mentioned, or for any felony whatever, where the crime charged shall include an assault against the person, it should be lawful for the jury to acquit of the felony, and to find a verdict of guilty of assault against the person indicted if the evidence should warrant such finding."

Numerous questions of great nicety arose upon this enactment; but since the above statute of 14 & 15 Vic. reference to the cases under the previous statute is unnecessary, the difficulties under the earlier being removed by the restricted provisions of the later act.

[2] By the 7 & 8 Vic. c. 22, s. 2, the forging or counterfeiting any die for marking gold or silver wares, or marking such wares with a forged die, or forging the mark of any such die, or transposing or removing the marks, or cutting or reversing the marks, with intent to affix them on other wares, or affixing any mark cut from other wares, or fraudulently using genuine dies, shall be felony, and be punishable by transportation for not more than fourteen, nor less than seven years, or imprisonment, with or without hard labour, not exceeding three years.

ASSIGNEES. *See* Bankrupt; Chose in Action; Contract; Debtor and Creditor; Insolvent; Lease; Mortgage.

ASSIGNATUS utitur jure Auctoris. Broom's *Max.* p. 14. *An Assignee is clothed with the rights of his principal.*[1]

ASSIGNMENT defined.[2]

ASSIGNMENT for Benefit of Creditors. *See* Bankruptcy; Composition Deed.

ASSIGNMENT of Breaches in Action on Bond. *See* Bond.

ASSIGNMENT of Perjury. *See* Perjury.

ASSIGNMENT of Terms. *See* Lease; Terms, Assignment of.

ASSIZES. *See* Circuit.

ASSOCIATE.[3]

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[1] It is a well-known rule, imported into our own from the civil law, that no man can transfer a greater right or interest than he himself possesses (*Nemo plus juris in alterum transferre potest quam ipse habet*). Wing. *Max.* p. 56. The owner, for example, of a lease or determinable fee, can do no more than transfer to another his own estate, or some interest of inferior degree created out of it; and if there be two joint-tenants of land, a grant or a lease by one of them will operate only on his own moiety. 3 Prest. *Abs.* 25, 222. In like manner, where the grantor originally possessed only a temporary or revocable right in the thing granted, and this right becomes extinguished by efflux of time or by revocation, the title of the assignee must of course cease to be valid, according to the rule *Resoluto jure concedentis resolvitur jus concessum.* Mackeld, *Civ. Law*, 179. It must, however, be observed, that the maxim above mentioned, which is one of the leading rules as to titles, or the equivalent maxim, *Non dat qui non habet*, is said not to apply to wrongful conveyances or tortious acts. 3 Prest. *Abs.* 25. *See* Co. Litt. 330 b. *Machell v. Clarke*, 2 Ld. Raym. 778; 1 Cruise, Dig. 80, 4th ed. And as between the parties themselves an interest may be transferred, although greater than that which the assignor himself possessed: for instance, a jury found that the lessor had nothing in the land when he made the lease to the plaintiff, and afterwards the lessor entered and ejected him, and it was held that this lease was good as between the parties. *Rawlyn's case*, 4 Rep. 52. *See* 15 L. J. Ex. 214. So where a termor, having previously assigned the term by way of mortgage, makes a subdemise, such lease will be good by way of estoppel as between the mortgagor or tenant; and if in this case the mortgagor should subsequently re-acquire the legal estate, the lease by estoppel would become a lease in interest, and the relation of landlord and tenant would thereupon exist; as perfectly as if the lessor had been actually seised of the land at the time the lease was made. *Sturgeon v. Wingfield*, 15 Mee. & W. 224. *Pargeter v. Harris*, 7 Q. B. 708. *Webb v. Austin*, 8 Scott, N. R. 419. *See* Broom's *Max.* 350.

[2] An assignment is that kind of total alienation by deed or writing, other than testamentary, of a chattel interest in real property, which is not essentially destructive of such interest, or an alienation by deed or writing, other than testamentary, of chattels personal, or of an equitable interest in real estate. Some assignments are called gifts, others bills of sale. A gratuitous transfer of personal chattels is specifically called a gift. And a transfer of personal chattels for valuable consideration is termed a bill of sale, whether the transaction be a purchase or a mortgage. The technical operative words of an assignment are, "assign, transfer, and set over." But the words "give, grant, bargain, and sell," or any other words which show the intent of the parties to make a complete transfer, will amount to an assignment. Smith, R. & P. P. 653; Watk. *Conv.* by Preston, 22, 3d ed.; 4 Bl. Com. 440.

[3] There is an associate in each of the superior common-law courts, appointed by the Chief Justice and Chief Baron respectively. *See* 15 & 16 Vic. c. 73, s. 1. Each associate appoints two clerks for the discharge of his duties, subject to the approval of the Chief Justice or Chief Baron. He is paid by salary (Id. s. 12); and is prohibited from acting as a barrister, attorney, solicitor, or agent. Id. s. 11.

ASSOCIATES; Fees at Offices of.[1]

ASSOILZIE. A term in the Scottish Law; meaning, to give judgment for the defendant.

ASSUMPSIT. *See* Action, *ante*, p. 132; Contract; Promises, Action on.

ASSURANCE. *See* Insurance.

ASSYTHMENT. In the Scottish Law, damages awarded to the relatives of a person killed by another, to be paid by the person who caused the death.

AT, Construction of in Will;[2] **in a Lease.**[3]

AT LEAST. Where used in statute as a limit of time.[4]

ATHEIST. Not admissible as witnesses.[5]

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[1] The following is a Table of the Fees which may be taken at the Offices of the Associates, published Nov. 24th, 1852:—

	£		
Every record of Nisi Prius delivered to the associate to be entered for trial .	1	5	0
Every trial of a cause from plaintiff	1	0	0
„ defendant	0	15	0
„ if the trial continue more than one day, then for every other day from plaintiff and defendant	0	10	0
Returning the *postea*	0	5	0
Every cause made remanet at the instance of the parties to be paid by plaintiff or defendant, as the case may be	0	10	0
Every case withdrawn to be paid by the party at whose instance it is withdrawn .	0	5	0
Re-entering every record at Nisi Prius made remanet, &c.	0	2	0
Every reference from plaintiff and defendant, each	0	5	0
Every amendment of any proceedings whatever	0	2	0
Every order or certificate	0	5	0
Every special case or special verdict, in addition to the charge for engrossing and copying, at the rate of 4*d.* per folio from plaintiff and defendant, each . .	0	10	0
Attending any court or otherwise with any record, or other proceeding, under writ of subpœna or special order of court, per day	1	0	0

All other fees than those before mentioned are abolished, and are not to be taken by any person in the Associates' Office, under any pretence whatever.

[2] Where an uncertain event forms part of the original description of a devisee or legatee, and not merely of a superadded description, the interest is necessarily contingent on account of the person; as, where a gift is made to the children who shall be living *at* a particular time, and not "to the children or the survivors," or "to the children or such of them as shall be living." Smith's *R. & P. Pro.* 290; 1 Jarm. *Wills*, 2d ed. 726.

[3] A lease to begin *at* the feast of, &c., is the same as if it had been *from* the feast, &c. (Cro. Car. 502); "at the time of." *See* 15 Mee. & W. 391.

[4] Where an act is required by statute to be done so many days "at least" before a given event, the time must be reckoned excluding both the day of the act and that of the event. *R. v. Justices of Shropshire*, 8 Ad. & E. 173; 3 Nev. & P. 286. *Mitchell v. Foster*, 9 Dowl. 527; 4 Per. & D. 150. *R. v. Aberdare Canal Co.* 19 L. J. Q. B. 251.

[5] Persons insensible to the obligations of an oath from defect of religious sentiment and belief are incompetent to testify as witnesses, because the very nature of an oath presupposes a belief in the existence of an omniscient Supreme Being, who is the rewarder of truth and avenger of falsehood. *Per Lord Hardwicke*, 1 Atk. 48. Without this belief, the person cannot be subject to that sanction which the law deems an indispensable test of truth. It is not sufficient that a witness feels himself bound to speak the truth from a regard to character, or to the common interests of society, or from fear of the punishment which the law inflicts upon persons guilty of perjury. Our law requires the additional security afforded by the religious sanction implied in an oath, and, as a necessary consequence, rejects all witnesses who are incapable of giving this security. 1 Phil. *Ev.* 7. Atheists, therefore, and all persons professing no religion that can bind the conscience to speak truth, are rejected, as incompetent to testify as witnesses. Bull. N. P. 292; 1 Atk. 48, 45; 1 Phil. *Ev.* 18; 1 Tayl. *Ev.* s. 1018; Roscoe, 136.

The rule of law, which fixes the nature and degree of religious faith required in a witness, seems as at present understood to be this: that the person is competent to testify if he believes in the existence of God, and that Divine punishment will be the certain consequence of falsehood. It may be considered as now generally settled in this country, as well as in America, that it is not material whether the witness believes that the punishment will be inflicted in this

ATTACHMENT. *See* Attorney; Discovery; Execution; Matrimonial Causes; Probate; Rules and Orders; Sheriff; Witness.

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I. Against Whom, and in what Cases, it may Issue.[1]

world, or in the next. It is enough if he has the religious sense of accountability to the omniscient Being, who is invoked by an oath. See *Omichund v. Barker*, Willes, 545; 1 Atk. 21; Tayl. *Ev.* s. 1019.

[1] Attachment is a taking or seizing of the person or property by virtue of legal process. It is a summary mode of punishing the officers and *quasi* officers of the court, and the parties in an action who disobey or treat the orders of the court with contempt; and it may be used also against third parties, who show such contempt and obstruct the course of justice. Thus, an attachment lies against a third party, who interferes to prevent a material witness being subpœnaed (*Schesinger v. Kersheine*, 2 D. & L. 737); against a witness, who wilfully or contemptuously refuses to attend on his subpœna (*Miller v. Knox*, 4 Bing. N. C. 574. *Mungean v. Wheatley*, 6 Ex. 88. See *Netherwood v. Wilkinson*, 17 C. B. 226. *Marshall v. York, &c. Railway Co.* 11 id. 405); against a person who sends threatening or deceptive letters to the jurors (*R. v. Lucas*, 3 Burr. 1564); against a person who threatens a prosecutor for proceeding (*R. v. Carroll*, 1 Wils. 75); against any one aiding in a rescue from the sheriff. But it does not lie against an officer of an inferior court seizing goods already seized by an officer of the superior court (see *White v. Chapple*, 4 C. B. 628. *Day v. Carr*, 7 Ex. 883). It may be obtained against any person who, on being sued with process, speaks contemptuously of the court and its process (2 Hawk. c. 22, s. 36. *R. v. Jones*, 1 Str. 105. *Anon.* 1 Salk. 64); against a governor of a prison, though not an officer of the court, for refusing to allow a prisoner to be served with process (*Danson v. Le Capelain*, 7 Ex. 667); against a party wilfully instructing his attorney to give a false statement of his place of abode (*Smith v. Bond*, 2 D. & L. 460), or collusively defeating the process of the court (*Macgregor v. Barrett*, 6 C. B. 262); or not paying the fees of court; and, generally, against any person who uses force or fraud to prevent the course of justice. *Smith v. Bond*, 13 Mee. & W. 596; 2 D. & L. 460.

Where a party wilfully disobeys any rule of court or order of a judge which contains some express directions (*Doe d. Earl of Cardigan v. Bywater*, 7 C. B. 794), an attachment lies against him (*Ex-parte Laurence*, 2 Dowl. 231. *Cook v. Sanswell*, 8 Taunt. 131. *North v. Evans*, 2 H. Black. 25. *Ex-parte Welland*, 11 C. B. 544), provided a personal demand has been previously made upon him to comply with the rule or order (*Doddington v. Hudson*, 8 Moore, 510; 1 Bing. 410. *Swinfen v. Swinfen*, 18 C. B. 485), and a copy served on him, and the original shown. *R. v. Smithies*, 3 T. R. 351. *Baker v. Rue*, 1 Dowl. 689. *Greenwood v. Dyer*, 5 id. 255.

So where a submission has been made a rule of court, and the award expressly directs certain things to be done which the party wilfully refuses to do, an attachment lies (*Doddington v. Hudson*, 8 Moore, 510; 1 Bing. 410. *Doddington v. Bailward*, 7 Dowl. 640. *Doe d. Earl of Cardigan v. Bywater*, 7 C. B. 794; see *ante*, 503), provided the other party has no condition precedent to discharge (*Bouker v. Tabbrett*, 2 D. & L. 707), and the thing ordered has not been done to the best of the party's means. *Clare v. Blakesley*, 1 Man. & G. 567; 1 Scott, N. R. 397. See *Hobetell v. Miller*, 3 id. 163. An attachment lies also against the sheriff, or a coroner acting in his stead, for not returning a writ or bringing in the body, or for executing writs oppressively or ineffectually; also against attornies, for any misconduct in the course of their profession; also against judges of inferior courts or justices of the peace, for disobeying writs. Peers and members of parliament are privileged

II. Of the Rule.

(A) *Is* Nisi, *unless for Non-payment of Costs on* Allocatur, *or against Sheriff for not obeying Rule to return Writ.*

The rule is *nisi*, except for non-payment

Reg. Gen. (Pr.) H. T. 1853, r. 168. "Rules for attachment shall be absolute in the first instance in the two following cases only: viz. first, for non-payment

from an attachment for not paying money, or not performing an award, &c. (*Walker v. Earl Grosvenor*, 7 T. R. 171. *Catmore v. Knatchbull*, id. 448); but not from attachment for any gross or wilful contempt of process. 2 Hawk. c. 22, s. 33. *R. v. Earl Ferrers*, 1 Burr. 634. An attachment cannot issue against a corporation (*Mackenzie v. Sligo, &c. Railway Co.* 9 C. B. 250), nor can it issue against two partners, unless each has been served with the judge's order. *Ex-parte Welland*, 11 C. B. 544.

An attachment also lies against parties who have been ordered by a rule of court absolutely to pay a sum of money or costs (*R. v. Stokes*, Cowp. 136. *R. v. Ireland*, 3 T. R. 512. *Doe d. Fry v. Barker*, 2 Dowl. 217), there is, however, another remedy by execution on the rule, under 1 & 2 Vic. c. 110, s. 18. To ground an attachment the party so ordered must be first served with a correct copy of the rule, with the master's *allocatur* thereon, if any (*Dalton v. Tucker*, 5 Dowl. 550. *R. v. Calvert*, 2 id. 276; 2 Car. & M. 189. *Doe v. Robinson*, 2 Dowl. 503. *Parker v. Burgess*, 2 Nev. & M. 36), personally (*Birkett v. Holme*, 4 Dowl. 556. *Rollen v. Hodgson*, 3 id. 178. *Doe d. Steer v. Bradley*, 1 id. N. S. 259), or by what is equivalent to personal service. *Phillips v. Hutchinson*, 3 Dowl. 503. *R. v. Hoops*, 3 id. 566. *Wenhen v. Downes*, 3 id. 573. In general, service on a wife, &c. without showing that the copy came to the hands of the husband, is not sufficient (see *Mason v. Muggeridge*, 18 C. B. 642. *R. v. Guard*, 6 Jur. 916), unless the husband keeps out of the way. *Potter v. Williams*, 6 id. 508. The original rule should at the same time be shown to the party, so that he can read the contents (*Rogers v. Twisdel*, 3 Dowl. 572. *Davies v. Sherlock*, 7 id. 592. *Doe d. Sturges v. Bond*, 2 id. N. S. 706. *Calvert v. Redfearn*, 2 Dowl. 537); or the original may be served, though in practice it is not usual to do so. *Leaf v. Jones*, 3 id. 315. So an original award must be shown. *Lloyd v. Harris*, 8 C. B. 63. The money or costs should be demanded by the person to whom they are payable. The amount of costs need not be named. *Doe d. Tew v. Billingham*, 15 L. J. Q. B. 220. See *Earl of Clarendon v. Henderson*, 22 id. 83. *Dusino v. Oliphant*, 15 Mee. & W. 152. If not demanded by the person to whom they are due, the person demanding should produce and show a letter of attorney, authorising him to demand and receive the debt and costs, and a copy of such letter of attorney should be served thereupon. *Doe d. Sturges v. Ward*, 2 Dowl. N. S. 707. *Doe d. Hickman v. Hickman*, 1 Scott, N. R. 398. *Price v. Duggan*, 4 Man. & G. 225; 1 Dowl. N. S. 707. *Doe d. Cape v. Johnson*, 7 id. 550. If the money is payable to several parties, one of them may make the demand. *Bailey v. Curling*, 2 L., M. & P. 161. *Drew v. Woolcock*, 24 L. J. Q. B. 24. See *R. v. Dobson*, 9 Q. B. 302. If it be the party's attorney who demands the costs, it seems he need not show any letter of attorney (*Inman v. Hill*, 4 Mee. & W. 7. *Doe d. Sturges v. Ward*, 2 Dowl. N. S. 707. *R. v. Pembridge*, 3 Q. B. 901. See *Mason v. Whitehouse*, 6 Dowl. 602; 6 Scott, 246; 4 Bing. N. C. 692); and if the costs are payable to the party or his attorney, the country agent has implied power to demand them (*Dennett v. Pass*, 1 Bing. N. C. 638; 1 Scott, 586; 3 Dowl. 632); but not the attorney's clerk. *Ex-parte Fortescue*, 2 Dowl. 440. *Clark v. Dignum*, 3 Mee. & W. 319. See *Browne v. Jenks*, 4 Dowl. 581. If the party pay part of the sum before the attachment is moved for, a fresh demand for the reduced amount must be made. *Spiry v. Webster*, 1 id. 696.

If costs are payable to the sheriff, the under-sheriff may, after the sheriff has left office, execute the letter of attorney. *R. v. Molty*, 6 Dowl. 515. If the costs are payable to a married woman, the husband has no power to demand them, and payment to him will be no answer to an attachment. *Wynne v. Wynne*, 1 Dowl. N. S. 723.

The Court may, on consent, make the rule to pay the money by instalments absolute, with a proviso that in default as to part, an attachment may issue without further application to the Court. *Black v. Gray*, 6 Jur. 587. If several parties are ordered to pay the costs, an attachment against one is not irregular. *R. v. Dobson*, 9 Q. B. 302.

Where the rule allows something to be done on payment of costs, no attachment lies for non-payment, even though the step permitted has been taken without payment; as, a rule to discontinue (*Stokes v. Woodeson*, 7 T. R. 6. *Rex v. Fearn*, 2 Dowl. 182. *Turner v. Gill*, 3 id. 31), to amend (*Handy v. Collett*, 7 id. 599. *Field v. Sawyer*, 6 C. B. 71), to stay proceedings (*Fricker v. Eastman*, 11 East, 319. *Hind v. Pinely*, 2 Str. 1220); to strike out a plea (*Rex v. Fearn*, 2 Dowl. 182), to change the venue *Pugh v. Kerr*, 5 Mee. & W. 164; 6 id. 17; 8 Dowl. 218). Where, however, the rule is that the party shall do some act, "or in default thereof an attachment shall issue against him," an attachment lies, and no demand to do the act is necessary. *Woolison v. Hodgson*, 3 Dowl.

of costs on a master's *allocatur;* secondly, against a sheriff for not obeying a rule to return a writ, or to bring in the body."

of costs on *allocatur*, or against sheriff for not obeying rule to make return.[1]

(B) *Affidavit on Motion.*[2]

(C) *Service of Rule* Nisi.[3]

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178. Non-payment of costs under the master's *allocatur* does not, without a rule of court to pay them, authorise an attachment. *Harrison v. Ward*, 3 Dowl. 541. *Ryales v. Emerson*, 2 id. 357. *Price v. Philcox*, 7 id. 559.

It is doubtful whether the justices at sessions, &c. have authority to issue an attachment against a witness who has been summoned and has failed to attend; the only mode of proceeding against the witness in such a case seems to be by indictment. Arch. *Cr. Pl.* by Welsby, 243.

[1] The rule of court applies, though the party be a married woman (*R. v. Johnson*, 5 Q. B. 335), or a *prochein amy*. *Newton v. London and Brighton Railway Co.* 7 D. & L. 328. It is no objection to the motion that the party had only been served with the original rule and *allocatur* immediately before the application. *Steel v. Compton*, 9 Jur. 181. If the rule directs more than the payment of costs, the rule for an attachment is only *nisi* (*Ex-parte v. Towneley*, 3 Dowl. 39. *Hatfield v. Hatherfield*, 1 D. & L. 809), as where the costs are payable under an award (*Daniel v. Beadle*, 2 Scott, N. R. 155. *Daniel v. Wealds*, 9 Dowl. 44. *Thompson v Billingsly*, 2 Chit. R. 57); or the *allocatur* is between attorney and client, and is in substance an award (*Spragg v. Willis*, 2 Dowl. 511. *See* id. 533, 578), or where the rule is a side-bar rule by a clerk of assize. *Anon.* 3 Jur. 364. *Ashmore v. Rypley*, 2 Scott, N. R. 213.

The motion for an attachment is made to the Court by counsel only (*Ex-parte Fenn*, 2 Dowl. 527. *Ex-parte Pitt*, id. 439. See *R. v. Lord John Russell*, 7 id. 693); and should be made promptly (*R. v. Stretch*, 4 id. 30; 3 Ad. & E. 503; 5 Nev. & M. 178); any delay should be fully explained in the affidavit. *Storey v. Garrey*, 8 Dowl. 299. *R. v. Rogers*, 3 id. 605. It cannot be moved for on the last day of term, unless the rule is absolute in the first instance. *Anon.* 3 Smith, 118. *Ashmore v. Rypley*, 2 Scott, N. R. 203. In one case the Court made the rule for an attachment absolute in the first instance, but ordered it to lie in the office till a defect in the affidavit was supplied (*Davies v. Sherlock*, 7 Dowl. 592. *King v. Smithies*, 3 T. R. 351); and in another case a second application was allowed to be made. *Dixon v. Oliphant*, 15 Mee. & W. 427.

[2] On the motion an affidavit must be produced, setting forth the fact of the service of the rule and demand, &c. as stated in preceding note, so as clearly to show the contempt. *Gardner v. Creswell*, 2 Mee. & W. 319. In cases of rescue, however, the sheriff's return dispenses with an affidavit. *Gobbey v Dewes*, 3 M. & Scott, 556; 10 Bing. 112. The affidavit is entitled in the action where there is an action pending. *See ante*, Affidavit. It should in general be made or joined in by the party himself (*Potter v. Back*, 8 Dowl. 872); and where there are several parties to whom the money is payable, all should concur denying payment. *Mansell v. Thompson*, 6 D. & L. 91. See *Bailey v. Curling*, 2 L., M. & P. 161.

Form of Affidavit of Demand and Refusal of Costs.

[Title of Court and Cause.]

I, R. A., of attorney in this cause for the above-named plaintiff; and I, A. B., of severally make oath and say,—

And, first, I, R. A., for myself say,—

1. That I did on the day of last, personally serve the above-named C. D. with a true copy of the rule and the master's *allocatur* [*and the letter of attorney*] thereon, hereunto annexed, such rule and *allocatur* being served as aforesaid at the same time.

2. That at the time of the said service I showed the said C. D. the said original rule and *allocatur* [*and letter of attorney*], and at the same time demanded of him the costs allowed by the master on the said rule, such costs amounting to the sum of £ being the said sum mentioned in the said *allocatur*, and the costs referred to in the said rule; but that the said C. D. did not then, or at any other time, pay the same or any part thereof to me, the said R. A.

And I, A. B., for myself say, that I have not received the said costs, or any part thereof, but the same now remain due and unpaid to me. [*If there were a letter of attorney, the attesting witness should be a party to the affidavit, and should say*],—That I was present, and did see the said plaintiff, A. B., duly execute the letter of attorney above-mentioned, to be hereunto annexed, and that the name A. B. appearing to be the party executing the same and subscribed thereto is of the proper handwriting of the said A. B., and that the name subscribed as a witness to the due execution of the said letter of attorney is of the proper handwriting of me, the said .

Sworn, &c. R. A.
A. B.

[3] When the rule *nisi* is granted, it must be drawn up, and a copy thereof served personally on the party proceeded against, and the original must at the same time be shown, though not demanded. Rule (Pr.) 163, H. T. 1853. The service must be a reasonable time before the day for showing cause. *R. v. Giles*, 4 Dowl. 569. Personal service is in general essential (*Birkett v. Holmes*, 4 id. 556. *Stunnel v. Tower*, 1 C., M. & R. 88. *Anon.* 1 D. & R. 520), unless in peculiar circum-

(D) *Showing Cause against Rule.*[1]

III. Of the Attachment.[2]

(A) *Execution of.*

stances (*Re Fennell*, 3 Dowl. 703. *Wenlan v. Downe*, 3 id. 573. *Re Whalley*, 14 M. & W. 731. *Green v Prosser*, 2 Dowl. 99); or unless it can be shown that the rule has reached the hands of the party (*Re Morris*, 1 Bro. C. C. 190. *Re Pyne*, 1 D. & L. 703. *R. v. Coops*, 3 Dowl. 566. *Phillips v. Hutchinson*, id. 583); and it makes no difference that the party is an attorney (*Re Pyne*, 1 D. & L. 703. *Wilkinson v. Pennington*, 6 Dowl. 183; 5 Scott, 401. *Albin v. Toomer*, 3 Dowl. 63). The rule *nisi* cannot be served on a Sunday. *M'Mehan v. Smith*, 8 T. R. 86. On an affidavit of service, counsel should be instructed to move to make the rule absolute.

[1] Cause is shown in court, as this will not be allowed to be done at chambers. *Ashmore v. Rypley*, 2 Scott, N. R. 203. *Fate v. Fate*, 2 Dowl. 88. Before showing cause the party must have taken office copies of the affidavits. *R. v. Carttar*, 1 L., M. & P. 274. *Walker v. Needham*, 1 Dowl. N. S. 220.

It is good cause that it was not in the party's power to comply with the rule. *Cook v. Tunswell*, 8 Taunt. 131. *Clare v. Blakesly*, 1 Man. & G. 567; 1 Scott, N. R. 397. *Doddington v. Bailward*, 7 Dowl. 640; 7 Scott, 733); or that he was advised and believed the rule bore another construction (*Camden v. Edir*, 1 H. Pl. 21. *Fuller v. Prentice*, id. 49); or if it be that he consented, that he never consented (*Bodington v. Harris*, 1 Bing. 187); but it is no cause that the money had been demanded by and paid to the husband if the rule made it payable to the wife. *Wynne v. Wynne*, 1 Dowl. N. S. 723. The Court will not, however, listen to anything very improbable in the affidavit. *Re Crossley*, 6 T. R. 731. Showing cause waives the objection that the rule was not personally served (*Levy v. Duncombe*, 3 Dowl. 447); but not that the affidavits are defective. *Clothier v. Ess*, 2 id. 731. On showing cause, fresh affidavits by the party in support are not admissible. *Re Butler*, 13 Q. B. 341. If the rule is discharged, it will sometimes be discharged without costs, where, though the excuse is sustained, yet the party was justified in applying for the attachment. See *Netherwood v. Wilkinson*, 17 C. B. 226.

[2] Where the rule is made absolute and drawn up, the writ of attachment may be issued. The writ is stamped at the office of the court; and in the Queen's Bench it is issued from the Crown side, tested on the day on which the rule was made absolute, returnable on a day certain in term, and indorsed with the name and address of the attorney, or party suing it out, and an entry of these particulars is made in a book in the Crown Office. *See* Rules, Q. B. H. 1844; Corner's *Crown Prac.* The attachment is directed to the sheriff, or, if against himself, to the coroner, or if against the coroner, to elisors. The attachment is taken to the under-sheriff's office, and a warrant is issued to one of the officers.

1. *Form of Attachment in Queen's Bench and Common Pleas.*

Victoria, &c., to the sheriff of greeting. Attach C. D., so that you have his body before us [*or in C. P. before our justices*] at Westminster, on to answer us of and concerning such things as on our own behalf shall be then and there objected against him; and have there then this writ.

Witness, &c. at Westminster, the day of in the year of our Lord

Indorsement.—A. B. against C. D. for non-payment of £ costs, taxed by master pursuant to a rule of court, dated the day of 18

2. *Form of Attachment in Exchequer.*

Victoria, &c., to the sheriff of greeting. We command you that you omit not, by reason of any liberty of your county, but that you enter the same, and attach C. D. by his body wheresoever he shall be found in your bailiwick, and him safely and securely keep, so that you may have him before the barons of our Exchequer, at Westminster, on next ensuing, to answer us of divers trespasses, contempts, and offences by him lately done and committed; and further to receive what our said barons shall then and there think fit to order concerning him in this behalf; and have there then this writ.

Witness, &c. R. A. Solicitor.

By order of the Court, at instance of A. B., for non-payment of £ costs.

[3] Several writs may issue into different counties. After a year, if the writ is unexecuted, it must be revived, which is done in an affidavit setting forth that the contempt is unsatisfied. The sheriff cannot arrest the party on a Sunday. *R. v. Myers*, 1 T. R. 265. See *Anon.* Willes, 459. *Ex-parte Whitchurch*, 1 Atk. 55. A prisoner, it seems, may be brought up on a *habeas* and charged in execution. See *Boucher v. Sims*, 2 C., M. & R. 392; 4 Dowl. 173. *Briant v. Clutten*, 5 Dowl. 66. The money should not be paid by the party to the sheriff. *R. v. Palmer*, 2 East, 411. *R. v. Sheriff of Devon*, 3 Dowl. 10. If the sheriff do not return the writ he may be ruled to do so, as in other cases. In the Queen's Bench this is a side-bar. *See* Corner's *Crown Prac.*

If the sheriff return *Non est inventus*, alias and pluries writs may issue from time to time; but if four terms intervene, an application to revive the attachment must first be made. If the sheriff return *Cepi corpus*,

ATTACHMENT of Debts.[1]

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III. Order attaching Debts, p. 581.

(A) *May be made on* ex-parte *Application to Judge, supported by Affidavit*, p. 581.

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V. Proceedings where Garnishee disputes the Debt, p. 584.

(A) *Judge may give Judgment-Creditor leave to proceed against Garnishee*, p. 584.

(*a*) *Form of Writ against Garnishee*, p. 584 n.

a *habeas corpus* to bring in the body is moved for and issued. When the body is brought in, another motion is made that the party be sworn to answer certain interrogatories. He is sworn accordingly, and then may be discharged on bail being found to appear and answer the interrogatories when called on. Interrogatories are subsequently drawn up which contain the charge against the party, and are engrossed on parchment and signed by counsel, and filed, after which an appointment is made, under which the master examines the party on the interrogatories. It is the duty of the prosecutor to rule the defendant to appear before the examiners, otherwise the defendant may be discharged on bail. *Doe d. Clark v. Stillwell*, 2 Dowl. N. S. 18. A motion is next made that the examination be referred to the Queen's coroner or master on the Crown side, and an appointment obtained and served. Afterwards, a motion is made that the master make his report. If the party has cleared himself of his contempt, which he can only do by *bonâ fide* obeying the rule (*R. v. Weston*, 8 Jur. 1122) he is discharged forthwith; if he is reported in contempt, the Court, after hearing affidavits in mitigation of sentence, and next the affidavits in aggravation, and the counsel or parties respectively, the prosecutor having the reply, sentence is pronounced. The party may be sentenced to imprisonment, which, however, is no exoneration. *R. v. Hemsworth*, 3 C. B. 745.

If the party pay the money, or comply with the rule, he is in general allowed to set aside the attachment on payment of costs; *i. e.* all costs fairly incidental to the suing out of the attachment. *Tyler v. Campbell*, 5 Bing. N. C. 192. On setting aside an attachment against the sheriff for an execution made under a *ca. sa.*, the Court is governed by the principle laid down in an action for damages under 5 & 6 Vic. c. 98, s. 31, and, if necessary, an action will be directed to ascertain the amount of such damages. *Arden v. Goodacre*, 11 C. B. 367. All affidavits after the attachment issued must be entitled "The Queen *v.* A. B." *Brown v. Edwards*, 2 D. & L. 520. The party may also set it aside for irregularity. *R. v. Burgess*, 2 Jur. 856. An attachment has been set aside on the ground that it was obtained by a person describing herself as a widow, whereas she was a married woman. *R. v. Carlton*, 1 L., M. & P. 302. Bankruptcy of itself discharges the party (*R. v. Edwards*, 9 B. & C. 652); but the Court will not grant a *habeas corpus* to bring him up to enable him to move in person to set it aside. *Ford v. Nassue*, 1 Dowl. N. S. 631. The application must be made in reasonable time. *R. v. Burgess*, 8 Ad. & E. 275; 3 Nev. & P. 366.

[1] Where a creditor has recovered judgment, which he is unable to realise out of the property of the debtor, he may proceed under 17 & 18 Vic. c. 125, s. 60 (*see post*, 580), and attach debts due to the latter.

(B) *The Proceedings in the Suit are the same as upon a Writ of Revivor*, p. 584.
(*a*) *Forms of Pleadings*, p. 584 n.
(*b*) „ *Writs of Execution*, p. 585 n.
VI. Proceedings where Third Party claims Debt of Garnishee, p. 585.
(A) *Such Third Party may be ordered to appear before Judge*, p. 585.
(B) *And the Judge makes such Order thereupon as he thinks Reasonable*, p. 586.
VII. Costs, p. 586.
(A) *Are in Discretion of the Court or Judge*, p. 586.
VIII. Discharge of Garnishee, p. 586.
(A) *By Payment or Execution levied*, p. 586.
IX. Debt-Attachment Book, p. 586.
(A) *Copies of Entries in may be taken*, p. 586.

I. Examination of Judgment-Debtor.

(A) *Order for, as to Debts due to him.*

Judgment-creditor may apply for order to examine judgment-debtor as to debts due to him before a master.

17 & 18 Vic. c. 125, s. 60. "It shall be lawful for any creditor who has obtained a judgment in any of the superior courts to apply to the court or a judge for a rule or order that the judgment-debtor shall be orally examined as to any and what debts are owing to him, before a master of the court, or such other person as the court or judge shall appoint; and the court or judge may make such rule or order for the examination of such judgment-debtor, and for the production of any books or documents, and the examination shall be conducted in the same manner as in the case of an oral examination of an opposite party before a master under this act."

(*a*) *Form of Summons.*[1]

II. What Debts may be Attached.

(A) *There must be an actual existing Debt.*

Jones v. Thompson, 27 L. J. Q. B. 234; 22 Jur. 338.

Money awarded by verdict in an action for unliquidated damages is not attachable before judgment.

Application for a rule to attach money awarded by verdict in an action for unliquidated damages. At the time the rule was moved for judgment had not been signed.

Crompton, J. "In *Ex-parte Charles* (11 East, 197), it was decided that a verdict in an action for unliquidated damages did not constitute a debt so as to be the foundation of a commission of bankruptcy. It was argued that the Common-Law Procedure Act makes a distinction, by using the word "accruing;" but in my opinion there must still be a debt, which, though not due in point of payment, is still an absolute debt. There is a large class of cases which come under this head, such as the case between the drawer and drawee of a promissory note still running, in which I have always held at chambers, and I understand other judges also, that there is a debt. On the other hand, I have always held that it is not sufficient that in all probability there will be a debt,

[1] The following is the material part of the summons, the formal part being the same as in ordinary cases:—

A. } To show cause why he should not at-
v. } tend before the master [*or other person*]
B. } at and submit to be examined *vivâ voce*, on oath as to the debts due and accruing to him, and why on such examination he should not produce to the master [*or other person*] all books of account, papers, and writings in any way relating to such debts.

Dated, &c. [*Judge's signature.*]

as in the cases of rent or annuities not yet due. The mere fact that it is most probable there will be a debt is not sufficient; there must be an actual debt."[1]

III. Order attaching Debts.

(A) *May be made on* ex-parte *Application to Judge, supported by Affidavit.*

17 & 18 Vic. c. 125, s. 61. "It shall be lawful for a judge, upon the *ex-parte* application of such judgment-creditor, either before or after such oral examination, and upon affidavit by himself or his attorney, stating that judgment has been recovered and that it is still unsatisfied, and to what amount, and that any other person is indebted to the said judgment-debtor, and is within the jurisdiction, to order that all debts owing or accruing from such third person (hereinafter called the garnishee) to the judgment-debtor, shall be

Judge may, on *ex-parte* application of judgment-creditor, order that debts shall be attached in hands of garnishee,[2] and

[1] The same point was so decided also in *Dresser v. Johns*, 28 L. J. C. P. 281; 6 C. B. (N. S.) 429.

A legacy, even though admitted by the executor, cannot be attached in his hands (*M'Donald v. Hollister*, 3 W. R. 522; 25 L. T. 185); and where the effect of attaching a debt on a bond granted by commissioners under an act of parliament would have been to give a priority to the bondholder over the others, and they had agreed to be paid *pari passu*, it was held that the debt ought not to be attached. *Kennett v. The Westminster Improvement Commissioners*, 11 Ex. 349. A mere contract to indemnify does not create a debt, and money that may have become due under it cannot be attached. This was held to be the case in *Johnson v. Diamond*, 24 L. J. Ex. 217; *Dresser v. Jones*, 28 L. J. C. P. 281, where a party had given the nominal plaintiff in an action brought on his behalf a bond, conditioned to pay the defendant in such action all the costs the plaintiff might become liable to pay: costs having been taxed against the plaintiff, the Court held that the amount of such costs did not constitute a debt in the hands of the obligor of the bond, and could not be attached by the defendant, the judgment-creditor. A superannuation allowance granted by the East India Company to a servant of the Company under the 53 Geo. 3, c. 155, s. 93, is a gratuity, and not a debt, and cannot therefore be attached. *Innes v. The East India Company*, 25 L. J. C. P. 154. Where the action is against an executor, a debt due to the executor in his representative capacity is subject to attachment. *Burton v. Roberts*, 29 L. J. Ex. 484. A debt due to the wife of the judgment-debtor under a specialty given to her *dum sola*, cannot be attached. *Dingley v. Robinson*, 26 id. 55. As to attaching money in the hands of the judgment-debtor's bankers, see *Seymour v. The Corporation of Brecon*, 29 id. 243. If debt be due, it need not be payable till a future day. *Sparkes v. Young*, 8 Ir. C. L. R. 25. If *bonâ fide* assigned before order, it cannot be attached. 18 C. B. 757; S. C. 25 L. J. C. P. 315.

The above cases have been decided on the construction of the Common-Law Procedure Act. A power to attach debts by process of foreign attachment previously existed, and still exists, in the Lord Mayor's Court of London. A brief reference to a few of the decisions upon this subject upon proceedings in that court may be useful. It has been held that money obtained by the garnishee, through the fraud of the debtor, cannot be attached (*see* Locke on Foreign Attachment, 33), nor a debt which can only be recovered in a court of equity (Com. Dig. Attachment, B. *Wood v. Smith*, Noy. 115); nor debts in which the debtor is not beneficially interested. *Westoby v. Day*, 22 L. J. Q. B. 418. *Hirsch v. Coates*, 25 L. J. C. P. 115. It would seem that money in the hands of the sheriff, the produce of an execution at the suit of the debtor, cannot be attached (1 Leon. 264); nor money ordered to be paid by a rule of court (*Grant v. Harding*, 4 T. R. 313 n. *Coppel v. Smith*, 4 id. 312); nor money in the hands of the government or its agents, unless where the latter have made themselves personally responsible. *Gidley v. Lord Palmerston*, 3 B. & B. 286. The property of a foreign ambassador or foreign potentate cannot be so attached. 7 Anne, c. 12, s. 3. *Wadsworth v. Queen of Spain*, 20 L. J. Q. B. 488. When an executor sells his testator's goods, the money arising from the sale cannot be attached in the hands of the executor. Com. Dig. Attachment, D. *Horsam v. Turget*, 1 Vent. 111. The plaintiff cannot take monies out of the hands of a garnishee who has a lien thereon without discharging his lien. *Giles v. Nathan*, 5 Taunt. 558; 1 Marsh. 226. *Caila v. Elgood*, 2 D. & R. 193. Where there are mutual debts between the debtor and garnishee, the plaintiff can only recover the balance against the garnishee. *Nathan v. Giles*, 5 Taunt. 558. See *post*, Foreign Attachment; Locke on Foreign Attachment; Ashley's *Practice in the Lord Mayor's Court;* Com. Dig. Attachment. As to how far a foreign attachment is a bar to an action, *see* 3 East, 366; 14 L. J. C. P. 234.

[2] The executor of a judgment-creditor is not entitled to this remedy unless he make himself a party to the record by suggestion or revivor. *Baynard v. Simmons*, 24 L. J. Q. B. 253. And a judgment-cre-

by the same or a subsequent order he may be required to show cause why he should not pay such debts to the judgment-creditor.

attached to answer the judgment-debt; and by the same or any subsequent order it may be ordered that the garnishee shall appear before the judge, or a master of the court, as such judge shall appoint, to show cause why he should not pay the judgment-creditor the debt due from him to the judgment-debtor, or so much thereof as may be sufficient to satisfy the judgment-debt."

(*a*) *Form of Affidavit.*[2]

(B) *And Debts are Bound on Service of Order or giving of Notice.*

And debts are bound in the hands of the garnishee from time of service of order or notice, as directed.[2]

17 & 18 Vic. c. 125, s. 62. "Service of an order that debts due or accruing to the judgment-debtor shall be attached, or notice thereof to the garnishee, in such manner as the judge shall direct, shall bind such debts in his hands."

(*a*) *Form of Order and Summons.*[3]

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ditor is not entitled to this remedy after he has arrested his debtor under a *ca. sa. Jauralde v. Parker*, 3 L. T. (N. S.) 751.

Where a plaintiff had sued in a county court on a judgment in a superior court, and had obtained an order for payment by instalments, some of which had been paid, it was held that he could not attach a debt (*Jones v. Jenner*, 25 L. J. Ex. 319); but an action is not now maintainable in the county court on a judgment of a superior court. *See* 19 & 20 Vic. c. 108, s. 27.

It would appear that the jurisdiction of the judge to grant or refuse the order is discretionary. *Kennett v. The Westminster Improvement Commissioners*, 11 Ex. 349. The Court will not set aside the order of attachment, unless it is perfectly clear that the debt is not subject to attachment. *Seymour v. The Corporation of Brecon*, 29 L. J. Ex. 243. The order should be served without delay. *Mason v. Muggeridge*, 18 C. B. 642.

[1] The following may be the form of the affidavit:—

In the Q. B. [C. P. *or* Exch. of P.]
Between A. B., plaintiff, and C. D., defendant.

I, A. B., of, &c. make oath and say,—

1. That on the day of last, I recovered a judgment of this honourable court in this action against the above-named defendant for the sum of £

2. That the said judgment is still unsatisfied to the amount of the said sum so recovered [*or of £ parcel of the said sum thereby recovered*].

3. That J. K. of in the county of gentleman, is indebted to the said C. D. in £

[*Orders have frequently been made upon affidavits which did not state the amount.*]

4. That the said J. K. is within the jurisdiction of this honourable court.

Sworn, &c. A. B.

[2] The debt is bound in the hands of the garnishee, so that he cannot pay to his original creditor, or to any one claiming under him; but such binding is subject to the provisions of the Bankrupt Act, and the debt will pass to the assignees of the garnishee, should he become a bankrupt after the service of the order and notice given pursuant to the act, and the judgment-creditor will be in the position of a creditor having a security within 12 & 13 Vic. c. 106, s. 184. *Homes v. Tutton*, 24 L. J. Q. B. 346; 5 E. & B. 65. *Tilbury v. Brown*, 30 L. J. Q. B. 46.

[3] The following form contains both the order for attachment and summons:—

Order for Attachment of Debt, and Summons for Garnishee to pay the same.

A. B. Judgment-Creditor,
against
C. D. Judgment-Debtor.
E. F. Garnishee.

Upon hearing the attornies or agents for the judgment-creditor, and upon reading the affidavit of X. Y., I do order that all debts due and owing, or accruing due from the above-named garnishee to the above-named judgment-debtor, be attached, to answer a judgment recovered against the above-named judgment-debtor on the day of 18 by the above-named judgment-creditor, in the Court of Queen's Bench [*or* Common Pleas, *or* Exchequer of Pleas.] I further order that the above-named garnishee, his attorney or agent, attend me at my chambers in Rolls Gardens, Chancery Lane, on the day of next, at of the clock in the noon, to show cause why he should not pay the judgment-creditor the debt due from him to the judgment-debtor, or as much thereof as may be sufficient to satisfy the said judgment-debt.

Dated, &c. [*Judge's signature.*]

*** See memorandum on back hereof.

There is always indorsed on the back of the summons the following

Memorandum.

17 & 18 Vic. c. 125, ss. 62, 63.

62. "Service of an order that debts due or accruing to the judgment-debtor shall be attached, or notice thereof to the garnishee, in such manner as the judge shall direct, shall bind such debts in his hand."

63. "If the garnishee does not forthwith pay into court the amount due from him to the judgment-debtor, or an amount equal to the judgment-debt, and does not dispute the debt due, or claimed to be due from him

IV. Proceedings where Garnishee admits Debt or makes Default.

(A) *The Judge may order Execution to issue.*

17 & 18 Vic. c. 125, s. 63. "If the garnishee does not forthwith" [*that is, after service of the order for an attachment, and the summons*] "pay into court the amount due from him to the judgment-debtor, or an amount equal to the judgment-debt, and does not dispute the debt due, or claimed to be due, from him to the judgment-debtor; or, if he does not appear upon summons, then the judge may order execution to issue, and it may be sued forth accordingly, without any previous writ or process, to levy the amount due from such garnishee towards satisfaction of the judgment-debt."

If the garnishee does not pay debt into court, and does not dispute the debt, the judge may order execution to issue.[1]

(*a*) *Form of Order for Payment by Garnishee.*[2]
(*b*) *Forms of Writs of Execution.*[3]

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to the judgment-debtor, or if he does not appear upon summons, then the judge may order execution to issue, and it may be sued forth accordingly without any previous writ or process to levy the amount due from such garnishee towards satisfaction of the judgment-debt."

[1] Where an order is made upon a garnishee to pay an accruing debt, execution cannot be issued against him until the debt is due. See *Robbins v. Standard*, 1 Sid. 327.

[2] In the matter of attachment of debt.
A. B. Judgment-Creditor,
against
C. D. Judgment-Debtor.
E. F. Garnishee.

Upon hearing the attorney or agent for the judgment-creditor and for the garnishee, and upon reading the affidavit of X. Y., and order made herein on the day of 18 whereby it was ordered, [*&c. as in order for attachment*], I do order that the said garnishee do forthwith pay the said judgment-creditor the debt due from him to the said judgment-debtor, or so much thereof as may be sufficient to satisfy the judgment-debt, and that in default thereof execution may issue for the same.

Dated, &c. [*Judge's signature.*]

[3] *Forms of Execution.*

The *fi. fa.* in such case must be in the following form, or as nearly as may be, such form being prescribed by the Reg. Gen. M. V. 1854, sched. 22.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith. To the sheriff of greeting.

We command you that you omit not, by reason of any liberty of your county, but that you enter the same, and of the goods and chattels of E. F., in your bailiwick, you cause to be levied £ being the amount of [*or* part of the amount of, *if the debt be more than the judgment-debt*], a debt due from the said E. F. to C. D., heretofore attached in the hands of the said E. F. by an order of Sir Knight, one of our justices of our court of Queen's Bench [*or* one of our justices of our court of Common Pleas, *or* one of the barons of our Exchequer], dated [*date of order*], pursuant to the statute in such case made, to satisfy [*or if the debt be less than the judgment-debt say*, towards satisfying] £ which A. B. lately, in our court of Queen's Bench [*or* Common Pleas, *or* Exchequer of Pleas], recovered against the said C. D., whereof the said C. D. is convicted, and that you have that sum of £ before us [*or* in C. P., before our justices; *or* in Exchequer, before the barons of our Exchequer] at Westminster, immediately after the execution hereof, to be rendered to the said A. B. in satisfaction as aforesaid; and that you do all such things as by the statute passed in the second year of our reign you are authorised and required to do in this behalf. And in what manner you have executed this our writ make and appear to us [*or* in the C. P., to our justices; *or* in the Exchequer, to the barons of our Exchequer], immediately after the execution hereof; and have you then there this writ.

Witness at Westminster, the day of A. D.

The form of *ca. sa.* in the like case is prescribed by Reg. Gen. M. V. 1854, sched. 23, and is as follows:—

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith. To the sheriff of greeting.

We command you that you omit not, by reason of any liberty in your county, but that you enter the same and take E. F., if he be found in your bailiwick, and him safely keep, so that you may have his body before us [*or* in Common Pleas, before our justices; *or* in Exchequer, before the barons of our Exchequer] at Westminster, immediately after the execution hereof, to satisfy A. B., £ being the amount [*or* part of the amount, *if the debt be more than the judgment debt*], of a debt due from the said E. F. to C. D., heretofore attached, in the hands of the said E. F., by an order of Sir Knight, one of our justices of our court of Queen's Bench [*or* one of our justices of our court of Common Pleas, *or* one of our barons of the Exchequer] dated [*date of order*] pursuant to the statute in such case made and provided, to satisfy [*or* towards satisfying, *if the*

V. Proceedings where Garnishee disputes the Debt.[1]

(A) *Judge may give Judgment-Creditor leave to proceed against Garnishee.*

Judge may give judgment-creditor leave to proceed against garnishee.[2]

17 & 18 Vic. c. 125, s. 64. "If the garnishee disputes his liability, the judge, instead of making an order that execution shall issue, may order that the judgment-creditor shall be at liberty to proceed against the garnishee by writ, calling upon him to show cause why there should not be execution against him for the alleged debt and for costs of suit."

(*a*) *Form of Writ against Garnishee.*[3]

(B) *Proceedings in Suit.*

The proceedings in the suit are the same as upon a writ of revivor.[4]

17 & 18 Vic. c. 125, s. 64. "The proceedings upon such suit shall be the same, as nearly as may be, as upon a writ of revivor, issued under the C. L. P. Act, 1852," 15 & 16 Vic. c. 76.

(*a*) *Forms of Pleadings.*[5]

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debt be less than the judgment-debt] £ which the said A. B. lately in our said court of Queen's Bench [*or* Common Pleas, *or* Exchequer of Pleas, *as the case may be*] recovered against the said C. D., whereof the said C. D. is convicted; and have you there then this writ.

Witness at Westminster, the day of A. D.

[1] The garnishee must show some real ground for disputing his liability. *Newman v. Rook, the Vestry of St. Matthew, Bethnal Green, Garnishee*, 5 C. B. (N. S.) 434.

[2] If the garnishee alleges a valid ground of refusal to pay over the money, the judge will not order the writ to issue, if satisfied of its truth. *Wise v. Birkenshaw*, 29 L. J. Ex. 240. And in any case "the judge may, in his discretion, refuse to interfere where, from the smallness of the amount to be recovered, or of the debt sought to be attached, or otherwise, the remedy sought would be worthless or vexatious." Com. Law P. Act, 1860; 23 & 24 Vic. c. 126, s. 28.

[3] *Form of Writ.*

The writ must be in the following form, prescribed by the Reg. Gen. M. V. 1854, sched. 24:—

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith. To E. F, greeting.

We command you, that within eight days after the service of this writ upon you, inclusive of the day of such service, you appear in our court of Queen's Bench [*or* Common Pleas, *or* Exchequer of Pleas], to show cause why A. B. should not have execution against you for £ being the amount [*or* part of the amount, *if the debt exceed the judgment-debt*] of a debt due from you to C. D. to satisfy [*or* towards satisfying, *if the debt be less than the judgment-debt*], £ which on the day of 18 [*date of judgment*], the said A. B. by a judgment of our court of Queen's Bench [*or* Common Pleas, *or* Exchequer of Pleas], recovered against the said C. D., and for costs of suit in this behalf; and take notice, that in default of your so doing the said A. B. may proceed to execution.

Witness at Westminster, the day of in the year of our Lord

Indorsements.

The following indorsements must be made on the writ:—

This writ was issued by P. A. [*plaintiff's attorney's name in full; also, if sued out as agent for an attorney in the country, here say* as agent for A. B.] of attorney for the said A. B. [*or if issued out by the plaintiff in person*, this writ was issued in person by the plaintiff within named], who resides at, [*mentioning the city, town, or parish, and also the name of the hamlet, street, and number of the house of the plaintiff's residence, if any such there be*]. The plaintiff claims £ [*the amount of the debt claimed from the garnishee*], and £ for costs; if the amount thereof be paid to the plaintiff or his attorney, within four days from the service hereof, further proceedings will be stayed.

Within three days after the service, fill up the following indorsement:—

This writ was served by me, X. Y., on C. D., on the day of 18

X. Y.

[4] By the 15 & 16 Vic. c. 76, s. 131, a writ of revivor may be served in any county, and otherwise proceeded on, whether in term or vacation, in the same manner as a writ of summons; and the venue in a declaration upon such writ may be laid in any county, and the pleadings and proceedings thereupon, and the rights of the parties respectively to costs, shall be the same as in an ordinary action.

[5] *Declaration.*

The following is the form of declaration in a writ against a garnishee, given in schedule 25 to the Reg. Gen. M. V. 1854:—

In the Q. B. [*or* C. P., *or* Exch. of Pleas.]

The day of A. D.

Venue. A. B. by his attorney [*or*

(*b*) *Forms of Writs of Execution.*[1]

VI. Proceedings where Third Party claims Debt of Garnishee.

(A) *Such Third Party may be ordered to appear before Judge.*

Com. Law P. Act, 1860; 23 & 24 Vic. c. 126, s. 29.

"Whenever, in any proceedings to obtain an attachment of debts under the act above mentioned, it is suggested by the garnishee that the debt sought to

On suggestion that third party entitled

in person], sues E. F. by a writ issued out of this court, in these words:—

Victoria, &c. [*copy of the writ*], and the said E. F. has appeared to the said writ, and the said A. B. by his attorney aforesaid says that the said debt due from the said E. F. to the said C. D., is for, &c. [*here state as in a declaration in ordinary cases*], and the said A. B. prays that execution may be adjudged to him accordingly for the said £ and for costs of suit in this behalf.

Plea.

The following plea thereto is prescribed by Reg. Gen. M. V. 1854, sched. 26:—

In the Q. B. [C. P. *or* Exch. of P.]
E. F. *als.* A. B. } The said E. F. by his attorney of says that he never was indebted to the said C. D. as alleged [*or plead such other defence or several defences as in other cases*].

Issue.

The following is the form of issue prescribed by Reg. Gen. M. V. 1854, sched. 27.

[*Copy the declaration and pleadings, and conclude thus*], Therefore let a jury come, &c.

Postea.

The *postea* is the same as in ordinary cases, omitting the assessment of damages. Reg. Gen. M. V. 1854, sched. 28.

[1] *Execution.*

The following forms of writs of execution upon judgment obtained by a judgment-creditor against a garnishee are given by the Reg. Gen. M. V. 1854, scheds. 30 and 31 respectively.

Fieri Facias *against Garnishee.*

Victoria, by the grace of God of the United Kingdom of Great Britian and Ireland, Queen, Defender of the Faith. To the sheriff of greeting.

We command you omit not, by reason of any liberty of your county, but that you enter the same, and of the goods and chattels of E. F. in your bailiwick you cause to be made £ the amount [*or* part of the amount, *if the debt be more than the judgment-debt*], £ which A. B. on the day of 18 [*date of judgment against judgment-debtor*] by the judgment of our court of Queen's Bench [*or* Common Pleas, *or* Exchequer of Pleas], recovered against the said C. D., and whereupon it has been adjudged by our said Court that the said A. B. should have execution against the said E. F. for the said £ and also £ which in our same court were adjudged to the said A. B. for his costs of suit, which he had been put to on occasion of our writ sued out against the said E. F. at the suit of the said A. B. in that behalf, whereof the said E. F. is convicted, and have the said money before us [*or in the Common Pleas*, before our justices; *or in the Exchequer of Pleas*, before the barons of our Exchequer at Westminster], immediately after the execution hereof, to be rendered to the said A. B.; and that you do all such things as by the statute passed in the second year of our reign you are authorised and required to do in his behalf. And in what manner you shall have executed this our writ make appear to us [*or in the Common Pleas*, to our justices; *or in the Exchequer*, to the barons of our Exchequer, *as the case may be*], at Westminster, immediately after the execution hereof; and have you there then this writ.

Witness at Westminster, on the day of in the year of our Lord

Capias ad Satisfaciendum *against Garnishee.*

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith. To the sheriff of greeting.

We command you that you omit not, by reason of any liberty of your county, but that you enter the same, and take E. F. if he shall be found in your bailiwick, and him safely keep, so that you may have his body before us [*or in the Common Pleas*, before our justices; *or in the Exchequer*, before the barons of our Exchequer, *as the case may be*], at Westminster, immediately after the execution hereof, to satisfy A. B. £ the amount [*or* part of the amount, *if the debt be more than the judgment-debt*] of a debt due from the said E. F. to C. D. and for the levying of which it has been adjudged by our court of Queen's Bench [*or* Common Pleas, *or* Exchequer of Pleas], that the said A. B. should have the execution against the said E. F. to satisfy [*or* towards satisfying, *if the debt be less than the judgment-debt*] £ which the said A. B. on [*the date of the judgment against the judgment-debtor*] by the judgment of the said court, recovered against the said C. D., and further to satisfy the said A. B. for his costs of suit, which he has been put to on occasion of our writ sued out against the said E. F. at the suit of the said A. B. in that behalf, whereof the said E. F. is convicted; and have you there then this writ.

Witness at Westminster, the day of in the year of our Lord

to debt of garnishee, he may be ordered to appear before judge;

be attached belongs to some third person, who has a lien or charge upon it, the judge may order such third person to appear before him, and state the nature and particulars of his claim upon such debt."

(B) *And the Judge makes such Order thereupon as he thinks Reasonable.*

who makes such order thereupon as he thinks reasonable.[1]

23 & 24 Vic. c. 126, s. 30. "After hearing the allegations of such third person under such order, and of any other person whom by the same or any subsequent order the judge may think fit to call before him, or, in case of such third person not appearing before him upon such summons, the judge may order execution to issue to levy the amount due from such garnishee, or the judgment-creditor to proceed against the garnishee according to the provisions of the Common-Law Procedure Act, 1854, and he may bar the claim of such third person, or make such other order as he shall think fit, upon such terms in all cases, with respect to the lien or charge (if any) of such third person, and to costs, as he shall think just and reasonable."

VII. Costs.

(A) *Are in Discretion of the Court or Judge.*

The costs are in the discretion of the court or judge.[2]

17 & 18 Vic. c. 125, s. 67. "The costs of any application for an attachment of debt under this act, and of any proceedings arising from or incidental to such application, shall be in the discretion of the court or a judge."

VIII. Discharge of Garnishee.

(A) *By Payment or Execution levied.*

Payment or execution levied discharges garnishee.[3]

17 & 18 Vic. c. 125, s. 65. "Payment made by or execution levied upon the garnishee under any such proceeding as aforesaid, shall be a valid discharge to him as against the judgment-debtor, to the amount paid or levied, although such proceedings may be set aside or the judgment reversed."

IX. Debt-Attachment Book.

(A) *Copies of Entries in may be taken.*

A debt-attachment book is to be kept in the master's office of each of the superior courts.

17 & 18 Vic. c. 125, s. 66. "In each of the superior courts there shall be kept at the master's office a debt-attachment book, and in such book entries shall be made of the attachment and proceedings thereon, with names, dates, and statements of the amount recovered and otherwise, and the mode of keeping such book shall be the same in all the courts; and copies of any entries made therein may be taken by any person upon application to any master."

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[1] By the 31st sect. of 23 & 24 Vic. c. 126, the provisions of the Common-Law Procedure Act, 1854 (17 & 18 Vic. c. 125), "so far as they are applicable, shall apply to any order, and the proceedings thereon made and taken in pursuance of the powers given by this act."

[2] If no order be made, the successful party is entitled to his costs, as in ordinary cases. *Johnson v. Diamond*, 25 L. J. Ex. 40.

[3] In *Westoby v. Day*, 22 L. J. Q. B. 418, it was held that the garnishee in a foreign attachment in the Lord Mayor's Court was discharged after execution executed, although the debt sued for in that court did not arise within its jurisdiction. As to a transfer in account amounting to payment, see *Wetter v. Rucker*, 1 B. & B. 494; 4 Moore, 172.

END OF VOL. I.

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